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THE UNITED NATION'S CONVENTION ON THE LAW OF THE SEA (TREATY DOC. 103-39)

HEARINGS

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (TREATY DOC. 103–39)

THURSDAY, SEPTEMBER 27, 2007

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m., in room SD–419, Dirksen Senate Office Building, Hon. Jim Webb, presiding.

Present: Senators Webb, Lugar, Corker, Murkowski, DeMint, Isakson, and Vitter.

OPENING STATEMENT OF HON. JIM WEBB, U.S. SENATOR FROM VIRGINIA

Senator WEBB. The hearing will come to order. Today the Committee on Foreign Relations meets to consider the Law of the Sea Convention. I am presiding at the request of Senator Biden, who had a schedule change and had to be out of Washington this afternoon. Chairman Biden supports the Convention and is committed to moving it forward. Recognizing the difficulty of scheduling, the senior officials from the executive branch, who are sitting before us, he decided that the hearing should proceed in his absence. I ask consent and will include a statement by Senator Biden for the record.

As a former Secretary of the Navy, I have had a continuing interest in the Convention on the Law of the Sea, and I thank Senator Biden and the distinguished ranking member for beginning the process of moving it forward with this hearing today.

The Convention on the Law of the Sea is a product of several decades of bipartisan effort. Negotiations begun in the 1970s, under President Nixon, were continued under Presidents Carter and Reagan. In 1982, President Reagan refused to sign the Convention because of its objectionable provisions of deep seabed mining. The following year, President Reagan proclaimed that the United States would accept an act in accordance with the other aspects of the Convention, relating to traditional uses of the oceans. In 1990, under President Bush, a new effort was initiated to address the problems identified by President Reagan with the deep seabed mining provisions. Four years later, during President Clinton's term, a new agreement was included that modifies the seabed mining provisions. The Convention is now endorsed by President Bush, who in May, urged the Senate to approve it during this session of Congress.

Three years ago, this committee approved the Convention by a unanimous vote of 19 to 0. At that time no Senator on the committee voiced any objections to it. The Convention balances the interests of coastal states with longstanding rights of freedom of navigation. As the world's premier maritime power and a country with long coast lines, we have a strong interest in both. I believe the Convention strikes the right balance and effectively protects our security, economic, and environmental interests.

Our security is advanced by the Convention because the United States Navy will benefit from navigational rules of passage through territorial waters, international straits, and archipelagic sealanes. Many strategic sealanes run through straits, such as the Strait of Gibraltar, or in archipelagos, such as in Indonesia. These rights of passage through straits or archipelagos are not contained in the 1958 treaties on the Law of the Sea, to which we are currently a party.

In my judgment, our naval commanders are better off with clearer legal parameters that are treaty-based, rather than relying on the uncertainties inherent in customary international law. Our economic interests are advanced in numerous ways, including by codifying our right to an exclusive economic zone, out to 200 nautical miles, in which the United States has sovereign control over the resources, whether living or nonliving, by providing a means for international recognition of our sizable Continental Shelf, particularly off the coast of Alaska, where we can export mineral resources, by setting clear rules for laying of undersea cables, which are an essential component of the telecommunications infrastructure, by establishing an international framework for deep seabed mining in areas outside of national jurisdictions, which we have long expected would be subject to international regulation.

Our environmental interests are advanced by the rules permitting coastal states to control the exploitation of the resources in the zone and to address pollution from various sources in the territorial sea.

The case against the Convention is rooted in the opposition to it by President Reagan, who objected only to the deep seabed mining regime in the 1982 treaty. The 1994 agreement that modifies these mining provisions, an agreement that is also before the committee, should be seen as a triumph of American diplomacy. After rejecting the Convention, President Reagan asked our key allies to join us staying outside of it, most of them did. The large majority of our NATO partners, as well as Australia and Japan, did not ratify the Convention until after the conclusion of the 1994 agreement.

A concerted diplomatic effort by the United States and other major powers, produced an agreement that will protect American technology, provide for market-based approaches to production, and give the United States a permanent seat on the decisionmaking body of the Seabed Mining Authority.

This week, the committee has received letters from more than 100 public figures urging the Senate to approve the treaty. Among these letters are those from two Secretaries of State under President Reagan, Al Haig and George Shultz; two of Reagan's National Security Advisors, Bud McFarland and Colin Powell. They understand, like the President and our military leaders, that the Conven-

tion, as modified by the 1994 agreement, is a good deal for America.

Today the committee will hear from the Deputy Secretary of State, who in earlier phases of his career, worked on the Convention and who also served as Deputy National Security Advisor to President Reagan. We also welcome the Deputy Secretary of Defense and Vice Chief of Naval Operations.

The Chief of Naval Operations, Admiral Mullen, is preparing to assume the duties of Chairman of the Joint Chiefs of Staff in a few days and has told us that he would not be able to appear today.

Next week, on October 4, the committee will hear from witnesses from outside the government, both proponents and opponents, as well as representatives of affective industries.

I now would like recognize Senator Lugar, who put this Convention on the agenda of the committee 4 years ago and has done so much to bring us to this point today.

STATEMENT OF HON. RICHARD G. LUGAR, U.S. SENATOR FROM INDIANA

Senator LUGAR. I thank the chairman for holding this important hearing on the United Nations Convention on the Law of the Sea. And I welcome our distinguished panel and appreciate the strong position taken by President Bush and his administration in favor of this treaty.

Four years ago, as the chairman has mentioned, the Foreign Relations Committee began consideration of the Law of the Sea Convention after it was designated by the Bush administration as one of five urgent treaties, deserving of ratification. The Foreign Relations Committee took up all five of these treaties, as requested by the President, during the 108th Congress and all but the Law of the Sea eventually gained the advise and consent of the Senate.

Our committee held two public hearings and four briefings to examine the Law of the Sea Convention. 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 testified in support of the Convention at various congressional hearings. 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 and 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 supported U.S. accession to the Law of the Sea and lobbied in favor of it. The National Foreign Trade Council, representing hundreds of exporting companies, also supported ratification. Moreover, a long list of environmental and ocean groups endorse the treaty because it protects and preserves the marine environment and establishes a framework for further international action to combat pollution.

On February 25, 2004, after more than 4 months of consideration, the committee approved the Resolution of Advice and Con-

sent by unanimous 19 to 0 vote. This vote came almost 10 years after the Convention was first submitted to the Senate.

Today, as we return to this treaty, the coalition in favor of it has grown and the urgency of completing Senate consideration has intensified. 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 with respect to the oceans. This treaty is important to an expansive array of American economic, environmental, and security interests.

But I want to underscore, for my colleagues, a fundamental starting point for our hearings. The Commander in Chief, the Joint Chiefs of Staff, and the U.S. Navy in time of war are asking the Senate to give its advise and consent to this treaty. Our uniformed commanders and civilian national security leadership are telling us unanimously and without qualification, the U.S. accession to this treaty would help them do their job.

We have charged the U.S. Navy with maintaining sealanes and defending our Nation's interest on the high seas. They do this every day. And even in peacetime, these operations carry considerable risk. The Navy is telling us that U.S. membership in the Law of the Sea Convention is a tool that they need to maximize their ability to protect the U.S. national security with the least risk to the men and women charged with this task.

This request is not the result of the Chief of Naval Operations or recent assessment by naval authorities. The support of the military and the Navy for this treaty has been consistent, sustained, and unequivocal. All the members of the Joint Chiefs have written us a letter supporting advise and consent. Their predecessors, likewise, supported this Convention.

As seven CNOs wrote in a joint letter, "Back in 1998, there are no downsides to this treaty. It contains expansive terms, which we use to maintain forward presence and preserve U.S. maritime superiority. It also has vitally important provisions, which guard against the dilution of our navigational freedoms and prevent the growth of new forms of excessive maritime claims."

Mr. Chairman, the military is not always right, but the overwhelming presumption in the U.S. Senate, has been that if our Armed Forces and our entire national security apparatus asks us for something to help them achieve a military mission, we do our best to provide them with just that tool, within the restraints of law and responsible budgeting.

In recent weeks we have heard a great deal of advocacy about the necessity of heeding the advice of our military leaders as they seek to carry out the missions we have given them. Senators rose to declare that General Petraeus, an acknowledged counterinsurgency expert, was better positioned and trained to assess our progress in Iraq than critics in Congress.

In the coming debate on Law of the Sea, we should be similarly respectful of the expertise of military commanders. Articles and statements opposing the Convention, often avoid mentioning the fact that the military's longstanding and vocal support for Law of the Sea is certainly there. And this is because to oppose the Con-

vention on national security grounds, requires one to say that military leaders, who have commanded fleets in times of war and peace and who have devoted their lives to naval and military studies, have illegitimate opinions.

Those critics, who do mention the military support, struggle to spin conspiracy theories as to why the military would back this treaty. One explanation that has been offered, is that sometimes military commanders have been misled by their service lawyers. As a former Navy officer, who served as a briefer to ADM Arleigh Burke, I can say with confidence that CNOs are not easy to deceive. [Laughter.]

These, in fact, are some of the most talented, learned, and politically adept individuals ever to serve our Nation. The suggestion that CNOs, service chiefs, and other military leaders are blithely allowing themselves to be led astray by the Defense Department lawyers, is nonsense.

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 supporting an outcome that will disadvantageous of their own interests.

The ongoing delay in ratifying the Convention would be just an interesting political science case study, if the United States were not facing serious consequences because of our nonparticipation. As a nonparty, we do not have a seat at the table to prevent proposed amendments that would roll back Convention rights we fought hard to achieve.

In addition, as a nonparty, our ability to influence the decisions of the Commission on the limits of the Continental Shelf is severely constrained. Russia is already making excessive claims in the Arctic. Until we become a party to the Convention, we will be in a weakened position to protect our national interests in these discussions.

Opponents seem to think that if the United States declines to ratify the Law of the Sea, the United States can avoid any multilateral responsibilities or entanglements related to the oceans. But unlike some treaties, such as the Kyoto Agreement and Comprehensive Test Ban Treaty, where U.S. nonparticipation renders the treaty virtually irrelevant or inoperable, the Law of the Sea will continue to form the basis of maritime law regardless of whether the United States 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 can not insulate itself from the Convention merely by declining to ratify. The Convention is the accepted standard in international maritime law. American's 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 the Law of the Sea to defend their interests and to make sure that other nations respect our rights and our claims.

Given the United States has been abiding by all but one provision of the treaty since President Reagan's 1983 statement of oceans policy, and that we have been a party to a less advantageous international convention on ocean law since 1958, dire predictions about the hazards to sovereignty, of joining the Law of the Sea ring particularly hollow.

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, U.S. economy, and the American people.

I thank the Chair.

Senator WEBB. I thank the distinguished ranking member for all of the work that he has done on this over many, many years.

I would now like to recognize our distinguished panel of witnesses. Secretary Negroponte, you're welcome to begin your remarks.

STATEMENT OF HON. JOHN D. NEGROPONTE, DEPUTY SECRETARY, DEPARTMENT OF STATE, WASHINGTON, DC

Mr. NEGROPONTE. Thank you very much, Mr. Chairman, Senator Lugar. Thank you for the invitation to testify on the 1982 Law of the Sea Convention.

Accession to the Convention is a serious piece of unfinished business for the United States that we should now bring to closure. Joining would strengthen our national security interests, our sovereignty, our economic rights, and our leadership on oceans and beyond—on oceans issues and beyond.

Senator Webb was mentioning my prior experience dealing with the Law of the Sea and I was listing to myself the variety of positions I'd held where Law of the Sea had come up during the course of the exercise of my duties. I was on the National Security Council under Dr. Henry Kissinger, when I was responsible for helping bring together the instructions for our delegations to the Seabeds Committee of the United Nations, which was the conference the group that prepared the Law of the Sea, that took place starting in 1974 in Caracas.

Subsequent to my time on the National Security Council I was a political officer in Quito, Ecuador, where the question of fisheries and tuna boat captures and the extension of fisheries jurisdiction was a very live issue in our bilateral relationship with that country, and it was also a time during which I was able to participate, however briefly, at the first meeting of the third Law of the Sea Convention parties at Caracas, Venezuela.

I was a Deputy Assistant Secretary for Oceans and Fisheries, later in that same decade, from 1977 to 1980 when I participated in the negotiations of many agreements related to fishing rights of the United States and other countries and the effort to sort out overlapping claims of jurisdiction and such issues.

And later, in the mid-1980s, I was the Assistant Secretary for Oceans Environment and Science, where I dealt with these issues

on an almost daily basis. And finally of course, in this administration, from 2001 to 2004, I was Ambassador to the United Nations, where I was able to observe the keen interest on the part of other nations that we finally become a party to this Convention.

President Bush set forth, for the clear benefits of accession, in his May 15 statement, seeking urgent Senate approval of the Convention. As he stated, "Joining will serve the national security interests of the United States, it will secure U.S. sovereign rights over extensive maritime areas, promote U.S. interests in the environmental health of the oceans, and give the United States a seat at the table, when the rights vital to our interests are debated and interpreted."

Mr. Chairman, as the foremost maritime power and a country with an extensive coastline, the United States has basic and enduring interests in the oceans. We have long sought a stable international legal regime, and in terms of its content, an appropriate balance between the interests of countries in controlling activities off their coasts and the interests of all countries in protecting freedom of navigation. And we have consistently taken the view that our various interests in the oceans, including military and economic ones, are best advanced through a comprehensive, widely accepted treaty.

The United States joined and remains a party to a set of Law of the Sea treaties from 1958. However, these do not satisfactorily address several key issues. So we continue to pursue a single treaty that would promote our interests and attract near universal acceptance. In the 1970s, beginning under President Nixon, the United States and other maritime powers pushed hard to secure navigational freedoms, including the right of transit passage, to limit the size of the territorial sea, to gain sovereign rights over offshore natural resources, and to establish mechanisms for enforcing the rights and freedoms gained during the negotiations.

The Convention completed in 1982, was a victory for the U.S. negotiators on almost every front. The only exception was deep seabed mining. Due to flaws in that chapter, President Reagan decided not to sign it. However, he considered the Convention's other aspects so favorable, that in 1983 he directed that the United States Government abide by these provisions and to encourage other countries to do likewise.

Under the first President Bush, the world had changed enough to embark upon a fundamental overhaul of the Convention's deep seabed mining chapter. The resulting agreement, also before the Senate, fixed all the flaws identified by President Reagan. These revisions achieve our longstanding objective of ensuring access by companies to deep seabed minerals on reasonable terms and conditions. George Shultz, the Secretary of State under President Reagan, recently wrote to Senator Lugar, "The treaty has been changed in such a way, with respect to the deep seabeds, that it is now acceptable in my judgment. Under these circumstances, and given the many desirable aspects of the treaty on other grounds, I believe it is time to proceed with ratification."

I would also emphasize that the role of the International Seabed Authority is limited to administering deep seabed mining areas, in areas beyond national jurisdiction. It has no other authority over

uses of the oceans, such as navigation, or over other resources in the oceans, such as fisheries, or, for that matter, over national 200-mile exclusive economic zones. With these changes in hand, we should join the Convention without delay to take full advantage of the many benefits it offers, and to avoid the increasing costs of being a nonparty. The benefits of accession to the Law of the Sea Convention relate to sovereignty, security, and sustainability.

Let me first address sovereignty, which includes the expansion of U.S. sovereign rights over maritime areas. The Convention provides for maximum sovereignty over a territorial sea of 12 nautical miles from the coastline, and sovereign rights over natural resources out to 200 miles, within the so-called exclusive economic zone. It also recognizes sovereign rights over resources found in and on the Continental Shelf, including oil, gas, and other resources. The shelf extends automatically out to 200 miles, but may extend beyond that point if it meets certain geological criteria.

The United States stands to secure resource rights over one of the largest Continental Shelves in the world, including up to 600 miles off Alaska. Our extended shelf is likely to be the size of an area equal to two Californias. United States interests are well served, not only by the Convention's substantive definition of the Continental Shelf, but also by the procedure it sets forth for parties to gain international recognition and legal certainty concerning the outer limits of the shelf.

Recent Russian activities in the Arctic, all the way to the North Pole, have focused attention on this aspect of the Convention. Continuing data collection by Russia and other parties to the Convention, reflect a commitment to maximizing their sovereign rights over natural resources in that region.

The United States is at a distinct disadvantage in relation to such parties. As a nonparty, we are not currently in a position to maximize U.S. sovereign rights over the shelf in the Arctic or elsewhere. We have no access to the Convention procedure that would assure the full exercise of our sovereign rights. In the absence of such international recognition and legal certainty, U.S. companies are unlikely to secure the necessary financing and insurance to exploit energy resources on the extended shelf.

Turning to national security aspects of the Convention, on which my colleagues from the Defense Department will elaborate, our security interests are intrinsically linked to freedom of navigation. The U.S. military relies on the navigational rights set forth in the Convention for worldwide access, without permission from countries along the way. As we ask our military to fight a global war on terrorism, worldwide maritime mobility takes on ever greater importance. The United States has been fairly successful in promoting these provisions as reflective of customary international law, as well as in challenging them militarily. However, these tools alone are not adequate to ensure the continued vitality of these rights. Customary law is not universally accepted and changes over time, in this case potentially to the detriment of our interests.

U.S. accession would put these vital navigational rights on the firmest legal footing. We would have treaty rights, rather than have to rely solely on force on customary law. Moreover, joining the Convention would promote international cooperation on initiatives

of great security importance, such as facilitating the interdiction of weapons of mass destruction through the Proliferation Security Initiative or PSI. The PSI specifically requires participating countries to act consistent with international law, which includes the law reflected in the Convention. Almost all PSI partners are parties to the Convention. Further, joining the Convention is likely to strengthen PSI by attracting new cooperative partners.

Turning to the third benefit of accession, sustainability, the Convention supports U.S. interests in the health of the world's oceans and the living resources that they contain. In addressing marine pollution, it appropriately balances the interests of coastal states with the navigational rights and freedoms of all the states. This framework supports vital economic activities off our coasts. The Convention also promotes the conservation of various marine resources.

What do we have to do in exchange for securing these benefits? We will not have to change U.S. law and practices or give up rights, largely because we have already followed the Convention, per the mandate from President Reagan. In other words, we have been living with the Convention for years and it has stood the test of time. The first several years of the Convention's life was fairly quiet, but now its provisions are being actively applied, interpreted, and developed, and we are on the sidelines.

One example, is the technical body reviewing the Continental Shelf beyond 200 miles. Its recommendations, which are being made without participation of a U.S. expert, will affect our rights with respect to other countries shelves, in addition to creating precedence that could affect the future outer limit of our own shelf. In both inside and outside the Convention, our position as a nonparty puts us in a far weaker position to advance U.S. interests than should be the case for our country.

Given the benefits of joining and the downsides of not joining, there is no persuasive reason why we should remain a nonparty. My written statement addresses a number of what we call myths about the Convention, and I'd be pleased to answer any questions in this regard.

Mr. Chairman, no alternative to joining the Convention stands up to scrutiny. We can not rely on the 1958 Law of the Sea Treaties. They are less favorable in many respects, such as navigational rights, the Continental Shelf, and ability to conduct boardings on the high seas. And as noted, we can not rely on customary law.

Finally, my Department of Defense colleagues will explain why it is implausible and undesirable for the United States to preserve and enforce its navigational and economic rights, based solely on military power.

In closing, the administration urges the committee to give its swift approval for accession to the Convention and ratification of the 1994 agreement. And we urge the Senate to give its advice and consent before the end of this session of Congress.

I thank you very much for you attention.

[The prepared statement of Hon. Negroponte follows:]

PREPARED STATEMENT OF HON. JOHN D. NEGROPONTE, DEPUTY SECRETARY, DEPARTMENT OF STATE, WASHINGTON, DC

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") and 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").

At my confirmation hearing earlier this year, I reminded the committee that the Senate confirmed me 20 years ago as Assistant Secretary for Oceans and International Environmental and Scientific Affairs. Shortly thereafter, under the first President Bush, we began to work on revising the deep seabed mining section of the Convention to address the flaws President Reagan had correctly identified, so that we could join the Convention. That effort succeeded, resulting in the 1994 Agreement overhauling the deep seabed mining regime, as I will explain in greater detail.

Since my first involvement with the Law of the Sea Convention, I have had the privilege to serve the United States in other assignments that have only strengthened my support for this treaty. As Ambassador to the United Nations, I learned that other countries look to the United States for leadership on oceans issues such as maritime security—a role that is lessened without U.S. accession to the Convention. As Ambassador to Iraq, I saw firsthand the importance of navigational freedoms for deploying and sustaining our forces in combat zones, and how the Convention serves as a foundation for our partnerships in the Proliferation Security Initiative. Most recently, as Director of National Intelligence, I was reminded how the Convention strengthens our ability to carry out intelligence activities that other countries might seek to restrain.

Mr. Chairman, these experiences compel me to endorse—most enthusiastically and emphatically—the President's urgent request that the Senate approve the Convention, as modified by the 1994 Agreement. As the President said in his May 15 statement, joining will serve the national security interests of the United States, secure U.S. sovereign rights over extensive marine areas, promote U.S. interests in the environmental health of the oceans, and give the United States a seat at the table when the rights essential to our interests are debated and interpreted.

HISTORY

From the earliest days of its history, the United States has relied on the bounty and the opportunity of the seas for sustenance, for trade and economic development, for defense, for communication, and for interaction with the rest of the world. Today, as the world's strongest maritime power and a leader in global maritime trade and commerce, the United States has a compelling national interest in a stable international legal regime for the oceans. We have consistently sought balance between the interests of countries in controlling activities off their coasts and the interests of all countries in protecting freedom of navigation. The United States joined a group of law of the sea treaties in 1958, by which it is still bound. But those treaties left open some important issues. For example, they did not set forth the maximum breadth of the territorial sea, an issue of critical importance to U.S. freedom of navigation, and they did not set forth a procedure for providing legal certainty regarding the Continental Shelf. We therefore continued to pursue completion of a single, integrated law of the sea treaty that would attract near-universal acceptance; the U.S. delegation played a very prominent role in the negotiating session that began under the Nixon administration and culminated in the 1982 Convention.

The resulting treaty was a victory for U.S. navigational, economic, and other interests except for one important issue—deep seabed mining. Due to flaws in the deep seabed mining chapter—Part XI of the Convention—President Reagan decided not to sign the 1982 Convention. However, the other aspects of the treaty were so favorable that President Reagan, in his Ocean Policy Statement in 1983, announced that the United States accepted, and would act in accordance with, the Convention's balance of interests relating to traditional uses of the oceans—everything but deep seabed mining. He instructed the Government to abide by, or as the case may be, to enjoy the rights accorded by, the other provisions, and to encourage other countries to do likewise.

As I mentioned earlier, the first Bush administration agreed to participate in negotiations that modified part XI—in a legally binding manner—overcoming each of the objections that President Reagan had identified. The United States signed that agreement in 1994. The Convention came into force that same year, and has since been joined by industrialized countries that shared the U.S. objections to the initial

deep seabed mining chapter. There are now 155 parties to the Convention, including almost all of our traditional allies.

This administration expressed its strong support for the Convention in testimony before this committee in the fall of 2003. Thereafter we worked closely with the committee to develop a proposed Resolution of Advice and Consent, which we continue to support, that addressed a number of issues, including those relating to U.S. military interests. Since then, our conviction has only grown: We must join the Law of the Sea Convention, and join it now, to take full advantage of the many benefits it offers the United States and to avoid the increasing costs of being a nonparty.

JOINING IS A WIN-WIN

Joining is a win-win proposition. We will not have to change U.S. laws or practices, or give up rights, and we will benefit in a variety of ways. The United States already acts in accordance with the Convention for a number of reasons:

- First, as noted, we are party to a group of 1958 treaties that contain many of the same provisions as the Convention.
- Second, the United States heavily influenced the content of the 1982 Convention, based on U.S. law, policy, and practice.
- Finally, the treaty has been the cornerstone of U.S. oceans policy since 1983, when President Reagan instructed the executive branch to act in accordance with the Convention's provisions with the exception of deep seabed mining.

Thus, we are in the advantageous position in the case of this treaty that U.S. adherence to its terms is already time-tested and works well.

At the same time, the United States would gain substantial benefits from joining the Convention—these can be summarized in terms of security, sovereignty, and sustainability.

Security. As the world's foremost maritime power, our security interests are intrinsically linked to freedom of navigation. We have more to gain from legal certainty and public order in the world's oceans than any other country. Our forces are deployed throughout the world, and we are engaged in combat operations in Central and Southwest Asia. The U.S. Armed Forces rely on the navigational rights and freedoms reflected in the Convention for worldwide access to get to the fight, sustain our forces during the fight, and return home safely, without permission from other countries.

In this regard, the Convention secures the rights we need for U.S. military ships and the commercial ships that support our forces to meet national security requirements in four ways:

- By limiting coastal states' territorial seas—within which they exercise the most sovereignty—to 12 nautical miles;
- By affording our military and commercial vessels and aircraft necessary passage rights through other countries' territorial seas and archipelagoes, as well as through straits used for international navigation (such as the critical right of submarines to transit submerged through such straits);
- By setting forth maximum navigational rights and freedoms for our vessels and aircraft in the exclusive economic zones of other countries and in the high seas; and
- By affirming the authority of U.S. warships and government ships to board stateless vessels on the high seas, which is a critically important element of maritime security operations, counternarcotic operations, and antiproliferation efforts, including the Proliferation Security Initiative.

The United States has had a certain amount of success in promoting these provisions internationally as reflective of customary international law, as well as in enforcing them through operational challenges. However, these tools alone are not adequate to ensure the continued vitality of these rights. Customary law is not universally accepted and, in any event, changes over time—in this case, potentially to the detriment of our interests. There are increasing pressures from coastal states around the world to evolve the law of the sea in ways that would unacceptably alter the balance of interests struck in the Convention. Operational challenges are inherently risky and resource-intensive. Joining the Convention would put the navigational rights reflected in the Convention on the firmest legal footing. We would have treaty rights rather than have to rely solely upon the acceptance of customary international law rights by other states or upon the threat or use of force. Securing these treaty rights, and obtaining a seat at the table in treaty-based institutions, would provide a safeguard against changes in state practice that could cause customary law to drift in an unfavorable direction. Moreover, joining would promote the will-

ingness of other countries to cooperate with us on initiatives of great security importance, such as the Proliferation Security Initiative.

Sovereignty. Joining the Convention would advance U.S. economic and resource interests. Recent Russian expeditions to the Arctic have focused attention on the resource-related benefits of being a party to the Convention. Because so much is at stake in vast areas of Continental Shelf beyond 200 nautical miles, I will explain in some detail the Convention's provisions that govern these areas and why being a party would put the United States in a far better position in terms of maximizing its sovereign rights.

The Convention recognizes the sovereign rights of a coastal state over its Continental Shelf, which extends out to 200 nautical miles—and beyond, if it meets specific criteria. These rights include sovereign rights for the purpose of exploring the Continental Shelf and exploiting its natural resources, including oil, gas, and other energy resources. U.S. interests are well served not only by the Convention's detailed definition of the shelf (in contrast to the 1958 Convention's vague standard), but also by its procedures for gaining certainty regarding the shelf's outer limits. Parties enjoy access to the expert body whose technical recommendations provide the needed international recognition and legal certainty to the establishment of the continental shelf beyond 200 nautical miles.

Following such procedures, Russia made the first submission (in 2001) to that expert body, the Commission on the Limits of the Continental Shelf. The Commission found that Russia needed to collect additional data to substantiate its submission. Russia has announced that the data it collected this year support the claim that its Continental Shelf extends as far as the North Pole. Setting aside its recent flag planting, which has only symbolic value, Russia's continuing data collection in the Arctic reflects its commitment to maximizing its sovereign rights under the Convention over energy resources in that region.

Currently, as a nonparty, the United States is not in a position to maximize its sovereign rights in the Arctic or elsewhere. We do not have access to the Commission's procedures for according international recognition and legal certainty to our extended shelf. And we have not been able to nominate an expert for election to the Commission. Thus, there is no U.S. Commissioner to review the detailed data submitted by other countries on their shelves.

Norway has also made a submission to support its extended Continental Shelf in the Arctic, and Canada and Denmark are conducting surveys there to collect data for their submissions. The Commission has already made recommendations on submissions by Brazil and Ireland and is considering several other submissions. Many more are expected in the coming months.

The United States has one of the largest continental shelves in the world; in the Arctic, for example, our shelf could run as far as 600 miles from the coastline. However, as noted, we have no access to the Commission, whose recommendations would facilitate the full exercise of our sovereign rights—whether we use them to explore and exploit natural resources, prevent other countries from doing so, or otherwise. In the absence of the international recognition and legal certainty that the Convention provides, U.S. companies are unlikely to secure the necessary financing and insurance to exploit energy resources on the extended shelf, and we will be less able to keep other countries from exploiting them.

Joining the Convention provides other economic benefits: It also gives coastal states the right to claim an exclusive economic zone ("EEZ") out to 200 nautical miles. That gives the United States, with its extensive coastline, the largest EEZ of any country in the world. In this vast area, we have sovereign rights for the purpose of exploring, exploiting, conserving, and managing living and nonliving natural resources.

Sustainability. The Convention also supports U.S. interests in the health of the world's oceans and the living resources they contain. It addresses marine pollution from a variety of sources, including ocean dumping and operational discharges from vessels. The framework appropriately balances the interests of the coastal state in protection of the marine environment and its natural resources with the navigational rights and freedoms of all states. This framework, among other things, supports vital economic activities off the coast of the United States. Further, the United States has stringent laws regulating protection of the marine environment, and we would be in a stronger position as a party to the Convention as we encourage other countries to follow suit.

The Convention also promotes the conservation of various marine resources. Indeed, U.S. ocean resource-related industries strongly support U.S. accession to the Convention. U.S. fishermen, for example, want their government to be in the strongest possible position to encourage other governments to hold their fishermen to the same standards we are already following, under the Convention and under the Fish

Stocks Agreement that elaborates the Convention's provisions on straddling fish stocks and highly migratory fish stocks.

Joining the Convention provides other important benefits that straddle the security, sovereignty, and sustainability categories. For example, its provisions protect laying and maintaining the fiber optic cables through which the modern world communicates, for both military and commercial purposes; for that reason, the U.S. telecommunications industry is a strong supporter of the Convention.

WE NEED TO JOIN NOW

Some may ask why, after the Convention has been in force for 13 years, there is an urgent need to join. There are compelling reasons why we need to accede to the Convention now.

Although the first several years of the Convention's life were fairly quiet, its provisions are now being actively applied, interpreted, and developed. The Convention's institutions are up and running, and we—the country with the most to gain and lose on law of the sea issues—are sitting on the sidelines. For example, the Commission on the Limits of the Continental Shelf (which is the technical body charged with addressing the continental shelf beyond 200 nautical miles) has received nine submissions and has made recommendations on two of them, without the participation of a U.S. commissioner. Recommendations made in that body could well create precedents, positive and negative, on the future outer limit of the U.S. shelf. We need to be on the inside to protect our interests. Moreover, in fora outside the Convention, the provisions of the Convention are also being actively applied. Our position as a nonparty puts us in a far weaker position to advance U.S. interests than should be the case for our country.

We also need to join now to lock in, as a matter of treaty law, the very favorable provisions we achieved in negotiating the Convention. It would be risky to assume that we can preserve ad infinitum the situation upon which the United States currently relies. As noted, there is increasing pressure from coastal states to augment their authority in a manner that would alter the balance of interests struck in the Convention. We should secure these favorable treaty rights while we have the chance.

DEEP SEABED MINING

One part of the Convention deserves special attention, because, in its original version, it kept the United States and other industrialized countries from joining. Part XI of the Convention, now modified by the 1994 Implementing Agreement, establishes a system for facilitating potential mining activities on the seabed beyond the limits of national jurisdiction—specifically, the deep seabed beyond the continental shelf of any nation. The Convention, as modified, meets our goal of guaranteed access by U.S. industry to deep seabed minerals under reasonable terms and conditions.

Specifically, the Convention sets forth the process by which mining firms can apply for and obtain access and exclusive legal rights to deep seabed mineral resources. The International Seabed Authority is responsible for overseeing such mining; it includes an Assembly, open to all parties, and a 36-member Council. The Authority's role is limited to administering deep seabed mining of mineral resources in areas beyond national jurisdiction; it has no other authority over uses of the oceans or over other resources in the oceans. The Council is the primary decision-making body, with responsibility for giving practical effect to the requirement for nondiscriminatory access to deep seabed minerals and for adopting rules for exploration and development.

The 1994 Agreement, which contains legally binding changes to the 1982 Convention, fundamentally overhauls the deep seabed mining provisions in a way that satisfies each of the objections of the United States, as stated by President Reagan, and of other industrialized countries. President Reagan considered that those provisions would deter future development of deep seabed mining; establish a decision-making process that would not give the United States a role that reflected or protected its interests; allow amendments to enter into force without the approval of the United States; provide for mandatory transfer of technology; allow national liberation movements to share in the benefits of deep seabed mining; and not assure access of future qualified miners.

The 1994 Agreement overcomes these objections and ensures that the administration of deep seabed mining is based on free-market principles. Specifically, the Agreement:

- Deletes the objectionable provisions on mandatory technology transfer;

- Ensures that market-oriented approaches are taken to the management of deep seabed minerals (e.g., by eliminating production controls), replacing the original part XI's centralized economic planning approach;
- Scales back the deep seabed mining institutions and links their activation and operation to actual development of interest in deep seabed mining;
- Guarantees the United States a permanent seat on the Council, where substantive decisions are made by consensus—the effect of which is that any decision that would result in a substantive obligation on the United States, or that would have financial or budgetary implications, would require U.S. consent;
- Ensures that the United States would need to approve the adoption of any amendment to the part XI provisions and any distribution of deep seabed mining revenues accumulated under the Convention; and
- Recognizes the seabed mine claims established on the basis of the exploration already conducted by U.S. companies and provides assured equality of access for any future qualified U.S. miners.

The deep seabed is an area that the United States has never claimed and has consistently recognized as being beyond the sovereignty and jurisdiction of any nation. As reflected in U.S. law (the Deep Seabed Hard Mineral Resources Act of 1980), it has long viewed deep seabed mining as an activity appropriate for international administration. The United States asked for changes to the 1982 Convention's deep seabed mining provisions and got them. As George P. Shultz, Secretary of State to President Reagan, said recently in a letter to Senator Lugar: "The treaty has been changed in such a way with respect to the deep seabeds that it is now acceptable, in my judgment. Under these circumstances, and given the many desirable aspects of the treaty on other grounds, I believe it is time to proceed with ratification."

WHY STAY OUT?

Given all the valuable benefits of joining and the substantial costs of not joining, is there a persuasive argument why the United States should remain a nonparty? I do not think there is one.

Certain arguments distort the risks of joining and/or paint an unrealistic picture of our situation as a nonparty. In this regard, opponents do not offer viable alternatives to the Convention. Some say we should rely on the 1958 conventions; however, those are less favorable in many respects, such as navigational rights, the outer limits of the continental shelf, and authority to conduct boardings on the high seas. Some say we should continue to rely on customary law; however, as noted, customary law is not universally accepted, evolves based on state practice, and does not provide access to the Convention's procedural mechanisms, such as the Continental Shelf Commission. Finally, some say we should rely on the threat or use of force; however, it is implausible and unwise to think that the United States can rely on military power alone to enforce its rights, particularly economic rights.

Certain arguments against U.S. accession are simply inaccurate. And other arguments are outdated, in the sense that they may have been true before the deep seabed mining provisions were fixed and thus are no longer true. I would like to address some of these "myths" surrounding the Convention:

Myth: Joining the Convention would surrender U.S. sovereignty.

Reality: On the contrary. Some have called the Convention a "U.S. land grab." It expands U.S. sovereignty and sovereign rights over extensive maritime territory and natural resources off its coast, as described earlier in my testimony. It is rare that a treaty actually increases the area over which a country exercises sovereign rights, but this treaty does. The Convention does not harm U.S. sovereignty in any respect. As sought by the United States, the dispute resolution mechanisms provide appropriate flexibility in terms of both the forum and the exclusion of sensitive subject matter. The deep seabed mining provisions do not apply to any areas in which the United States has sovereignty or sovereign rights; further, these rules will facilitate mining activities by U.S. companies. And the navigational provisions affirm the freedoms that are important to the worldwide mobility of U.S. military and commercial vessels.

Myth: The Convention is a "U.N." treaty and therefore does not serve our interests.

Reality: The Convention is not the United Nations—it was merely negotiated there, as are many agreements, and negotiated by states, not by U.N. bureaucrats. Further, just because a treaty was drawn up at the United Nations does not mean it does not serve our interests. For example, the United States benefits from U.N. treaties such as the Convention Against Corruption and the Convention for the Sup-

pression of Terrorist Bombings. The Law of the Sea Convention is another such treaty that serves U.S. interests.

Myth: The International Seabed Authority (ISA) has the power to regulate seven-tenths of the Earth's surface.

Reality: The Convention addresses seven-tenths of the earth's surface; the ISA does not. First, the ISA does not address activities in the water column, such as navigation. Second, the ISA has nothing to do with the ocean floor that is subject to the sovereignty or sovereign rights of any country, including that of the United States. Third, the ISA only addresses deep seabed mining. Thus, its role is limited to mining activities in areas of the ocean floor beyond national jurisdiction. It has no other role and no general authority over the uses of the oceans, including freedom of navigation and overflight.

Myth: The Convention gives the United Nations its first opportunity to levy taxes.

Reality: Although the Convention was negotiated under U.N. auspices, it is separate from the United Nations and its institutions are not U.N. bodies. Further, there are no taxes of any kind on individuals or corporations or others. Concerning oil/gas production within 200 nautical miles of shore, the United States gets exclusive sovereign rights to seabed resources within the largest such area in the world. There are no finance-related requirements in the EEZ. Concerning oil/gas production beyond 200 nautical miles of shore, the United States is one of a group of countries potentially entitled to extensive continental shelf beyond its EEZ. Countries that benefit from an Extended Continental Shelf have no requirements for the first 5 years of production at a site; in the 6th year of production, they are to make payments equal to 1 percent of production, increasing by 1 percent a year until capped at 7 percent in the 12th year of production. If the United States were to pay royalties, it would be because U.S. oil and gas companies are engaged in successful production beyond 200 nautical miles. But if the United States does not become a party, U.S. companies will likely not be willing or able to engage in oil/gas activities in such areas, as I explained earlier.

Concerning mineral activities in the deep seabed, which is beyond U.S. jurisdiction, an interested company would pay an application fee for the administrative expenses of processing the application. Any amount that did not get used for processing the application would be returned to the applicant. The Convention does not set forth any royalty requirements for production; the United States would need to agree to establish any such requirements.

In no event would any payments go to the United Nations, but rather would be distributed to countries in accordance with a formula to which the United States would have to agree.

Myth: The Convention would permit an international tribunal to second guess the U.S. Navy.

Reality: No international tribunal would have jurisdiction over the U.S. Navy. U.S. military activities, including those of the U.S. Navy, would not be subject to any form of dispute resolution. The Convention expressly permits a party to exclude from dispute settlement those disputes that concern "military activities." The United States will have the exclusive right to determine what constitutes a military activity.

Myth: The International Tribunal for the Law of the Sea could order the release of a vessel apprehended by the U.S. military.

Reality: The Tribunal has no jurisdiction to order release in such a case. Its authority to address the prompt release of vessels applies only to two types of cases: Fishing and protection of the marine environment. Further, even if its mandate did extend further—which it does not—the United States will be taking advantage of the optional exclusion of military activities from dispute settlement. As such, in no event would the Tribunal have any authority to direct the release of a vessel apprehended by the U.S. military.

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

Reality: The Convention enhances, rather than undermines, our ability to wage the war on tenor. Maximum maritime naval and air mobility 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. It is essential that key sea and airlanes remain open as a matter of international legal right and not be contingent upon approval from nations along those routes. The senior U.S. military leadership—the Joint Chiefs of Staff—has recently confirmed the continuing importance of U.S. accession to the Convention in a letter to the committee.

Myth: The Convention would prohibit or impair U.S. intelligence and submarine activities.

Reality: The Convention does not prohibit or impair intelligence or submarine activities. Joining the Convention would not affect the conduct of intelligence activities in any way. This issue was the subject of extensive hearings in 2004 before the Senate Select Committee on Intelligence. Witnesses from Defense, CIA, and State all confirmed that U.S. intelligence and submarine activities are not adversely affected by the Convention. We follow the navigational provisions of the Convention today and are not adversely affected; similarly, we would not be adversely affected by joining.

Myth: The United States can rely on use or threat of force to protect its navigational interests fully.

Reality: 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. But these operations entail a certain degree of risk, as well as resources. 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 stronger position to assert our rights.

Myth: Joining the Convention would hurt U.S. maritime interdiction efforts under the Proliferation Security Initiative (PSI).

Reality: Joining the Convention would not affect applicable maritime law or policy regarding the interdiction of weapons of mass destruction. PSI specifically requires participating countries to act consistent with international law, which includes the law reflected in the Convention. Almost all PSI partners are parties to the Convention. Further, joining the Convention is likely to strengthen PSI by attracting new cooperative partners.

Myth: President Reagan thought the treaty was irremediably defective.

Reality: As explained above, President Reagan identified only certain deep seabed mining provisions of the Convention as flawed. His 1983 Ocean Policy Statement demonstrates that he embraced the nondeep seabed provisions and established them as official U.S. policy. The 1994 Agreement overcomes each of the objections to the deep seabed mining provisions identified by President Reagan. As President Reagan's Secretary of State, George P. Shultz, noted in his recent letter to Senator Lugar, "It surprises me to learn that opponents of the treaty are invoking President Reagan's name, arguing that he would have opposed ratification despite having succeeded on the deep seabed issue. During his administration, with full clearance and support from President Reagan, we made it very clear that we would support ratification if our position on the seabed issue were accepted."

Myth: The Convention provides for mandatory technology transfer.

Reality: Mandatory technology transfer was eliminated by the 1994 Agreement that modified the original Convention.

Myth: The United States could and should renegotiate a new law of the sea agreement, confined to the provisions on navigational freedoms.

Reality: Assuming, for the sake of argument, that this were a desirable outcome, other countries would have no reason or incentive to enter into such a negotiation. The Convention is widely accepted, having been joined by over 150 parties including all other major maritime powers and most other industrialized nations. Those parties are generally satisfied with the entirety of the treaty and would be unwilling to sacrifice other provisions of the Convention, such as benefits associated with exclusive economic zones and sovereign rights over the resources they contain, as well as continental shelves out to 200 nautical miles and in some cases far beyond. And parties that would like to impose new constraints on our navigational freedoms certainly would not accept the 1982 version of those freedoms.

CONCLUSION

Mr. Chairman, I am confident that the committee will agree that U.S. accession to the Convention is the best way to secure navigational and economic rights related to the law of the sea. I hope I have convinced the committee that arguments against joining the Convention are completely unfounded, that there are not viable alternatives to joining, and that we cannot just go out and negotiate another treaty, much less one that is more favorable. And we certainly cannot have much influence over development of the law of the sea in the 21st century from outside the Convention.

The safest, most secure, and most cost-effective way to lock in these significant benefits to our ocean-related interests is to join the Convention. President Bush, Secretary Rice, and I urge the committee—once again—to give its swift approval for

U.S. accession to the Law of the Sea Convention and ratification of the 1994 Agreement, and we urge the Senate to give its advice and consent before the end of this session of Congress.

Senator WEBB. Thank you very much, Secretary Negroponte.

And now we'll hear from Deputy Secretary of Defense England, who I should also point out, has served as Secretary of the Navy, and has some additional breadth of experience on this issue.

Secretary England.

STATEMENT OF HON. GORDON ENGLAND, DEPUTY SECRETARY, DEPARTMENT OF DEFENSE, WASHINGTON, DC

Mr. ENGLAND. Mr. Chairman, thank you, and Senator Lugar, thank you, distinguished members. I appreciate the opportunity to be here today.

I've been in Washington now almost 7 years, this is the first time I've had an opportunity to appear before this committee, and I thank you for the opportunity. Particularly on this important subject.

This is the second time now, in Washington, I have been able to support this treaty, and a treaty that is vitally important to the Department of Defense and, Mr. Lugar, I appreciate your comments—I believe you summarize it extraordinarily well in terms of how this—the importance of this Convention is to—not just the Navy—but the entire Department of Defense. And what I would like to do is just provide, literally, 10 overview reasons why this is important to the Department of Defense.

So, first, it is legal certainty in the world's largest maneuver space—there's over 150 nations, I believe it's up to 155 nations now—that includes major maritime powers, and it also includes almost all of our coalition partners, and as you'll hear, that's a very important point.

We need to have the global mobility, 24/7, 365 days a year with no permission slips. As Senator Lugar commented, all the CNOs since 1982 have supported a Convention. The chairman, the Joint Chiefs are all united in support, and that has been the case, I think, as long as this treaty has been debated.

Strategic mobility—the treaty preserves the DOD's navigation and overflight rights. And I emphasize, it's overflight, it's not just on the surface, but it is overflight. So, the transit passage—under, through, and over critical chokepoints.

Unrestricted military activities in foreign-exclusive economic zones in the high seas, is the right of approach and visit, and it reaffirms that our sovereign immunity of war ships, and then it extends that sovereignty to public vessels, like our maritime prepositioning ships.

We need to be able, as Secretary Negroponte commented—we need to be able to influence from inside the Convention, rather than depending on other nations to represent our interests, and particularly, we need to be able to resist coastal state attempts other countries, in terms of limiting our navigational freedoms.

Homeland security—this is a positive treaty law for our Coast Guard to enforce our port security initiatives. And, again, we have sovereignty in our territorial sea and our continue zone, and this is supported by the Commandant of the Coast Guard. Frankly, we

owe our Soldiers, our Sailors, our Airmen, Marines, and Coast Guards a treaty-based rights, as opposed to the vagurities of customary international law, and you will hear more of that from Admiral Walsh.

This is important—this support for combined operations with our coalition partners. This eliminates the seams in the coalitions, and it furthers our global partnerships. Again, as Secretary Negroponte commented, this supports a Proliferation Security Initiative—the vast majority of the Proliferation Security Initiative countries that have joined with us are parties to this Convention. And U.S. membership will eliminate the barriers to more companies, or more parties joining.

It also permits U.S. warships to board stateless vessels on the high seas. Importantly, the military activities are completely exempt from the Convention's dispute resolution procedures—that is, there are no courts or arbitration panels when dealing with military activities. Article 298 permits the United States to completely remove military activities from dispute resolutions, as Russia, China, and others have already done.

And, last, DOD recognizes that our strength is not found in our force of arms alone. It also rests on strong alliances, friendships, and international institutions which enable us to promote freedom, prosperity, and peace, in common purpose with others, and that is directly out of our national security strategy, as signed by President Bush. So, this Convention needs to be in our arsenal.

I also want to comment that I strongly endorse—which you're about to hear from Admiral Walsh, who will discuss with you in just a moment, our partnership in counterproliferation efforts. Now, Admiral Walsh served as a commander of all U.S. and coalition maritime forces in the Persian Gulf, the North Arabian Sea, the Horn of Africa, and the Red Sea from 2005 to 2007, and there's no better practitioner at sea when partnership and maritime interception operations than Admiral Walsh. So, this is a practical matter for our Nation, for the Department of Defense and for the U.S. Navy.

So, in summary, the national security benefits of the treaty are significant and they substantially and unquestionably outweigh any perceived risk. The Department of Defense strongly supports the Law of the Sea Conventions, and we ask the Senate for your advice and support in joining the Convention.

And, I thank you again for the opportunity to be with you today, and I also look forward to your questions.

[The prepared statement of Mr. England follows:]

PREPARED STATEMENT OF HON. GORDON ENGLAND, DEPUTY SECRETARY, DEPARTMENT OF DEFENSE, WASHINGTON, DC

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") and 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").

As Deputy Secretary of Defense, and a prior Deputy Secretary of Homeland Security and prior Secretary of the Navy, I am well acquainted with the Law of the Sea Convention. The legal framework that the Convention establishes is essential to the mission of the Department of Defense, and the Department of Homeland Security concurs that it is also essential for their mission. For that reason, Secretary Gates,

the Joint Chiefs of Staff, the Military Department Secretaries, all of the Combatant Commanders, and the Commandant of the Coast Guard join me in asking the Senate to give its swift approval for U.S. Accession to the Law of the Sea Convention and ratification of the 1994 Agreement.

In our judgment, the bar should be set very high for the United States to decide to join a major multilateral treaty, such as this Convention. Therefore, before the President issued his statement of support for the Convention on May 15, the administration thoroughly reviewed the benefits and challenges. As I will explain further below, the benefits to joining this Convention are significant, and they substantially and unquestionably outweigh any perceived risks.

As the President noted in his May 15 statement, joining the Convention will secure U.S. sovereign rights over extensive marine areas, promote U.S. interests in the environmental health of the oceans, and give the United States a seat at the table when rights vital to our national interests are debated and interpreted.

The President also noted that joining will serve the national security interests of the United States, including the maritime mobility of our Armed Forces worldwide. It is this point that is the focus of my testimony today. The navigation and overflight rights and high seas freedoms codified in the Convention are essential for the global mobility of our Armed Forces and the sustainment of our combat forces overseas. We are a nation at war, and we require a great sacrifice of the men and women in uniform who go into harm's way on our behalf. Joining this Convention will make our Nation stronger and will directly support our men and women in uniform.

As the world's foremost maritime power, our security interests are intrinsically linked to freedom of navigation. America has more to gain from legal certainty and public order in the world's oceans than any other country. By joining the Convention, we provide the firmest possible legal foundation for the rights and freedoms needed to project power, reassure friends and deter adversaries, respond to crises, sustain combat forces in the field, and secure sea and air lines of communication that underpin international trade and our own economic prosperity. Specifically, the legal foundation of this Convention:

- Defines the Right of Innocent Passage, whereby ships may continuously and expeditiously transit the territorial seas of foreign states without having to provide advance notification or seek permission from such states.
- Establishes the Right of Transit Passage through, under, and over international straits and the approaches to those straits. This right, which may not be suspended, hampered, or infringed upon by coastal states, is absolutely critical to our national security. This is the right that underpins free transit through the critical chokepoints of the world, such as the Strait of Hormuz, the Straits of Singapore and Malacca, and the Strait of Gibraltar.
- Establishes the Right of Archipelagic Sealane Passage, which, like Transit Passage, helps ensure free transit through, under, and over the sealanes of archipelagic nations, such as Indonesia.
- Secures the right to exercise High Seas Freedoms in exclusive economic zones, the 200 nautical milewide bands of ocean off coastal shores. The Department's ability to position, patrol, and operate forces freely in, below, and above those littoral waters is critical to our national security.
- Secures the right of U.S. warships, including Coast Guard cutters, to board stateless vessels on the high seas, which is a critically important element of maritime security operations, counternarcotic operations, and antiproliferation efforts, including the Proliferation Security Initiative.

If the United States is not a party to the Convention, then our current legal position is reduced to President Reagan's oceans policy statement of March 1983 and several 1958 Conventions on the seas that remain in force but are, in our judgment, no longer adequate. President Reagan accepted that the navigation and overflight provisions of the Convention—as well as those relating to other traditional uses of the oceans—reflected customary international law and state practice. Further, President Reagan directed the U.S. Government to adhere to those provisions of the Convention while he and successive Presidents worked to fix the Deep Seabed Mining provisions of the Convention.

In perspective, the U.S. reliance on customary international law was intended to serve as an interim measure while the Deep Seabed Mining provisions of the Convention were modified to address U.S. concerns. In his recent letter to the committee, former Secretary of State George Shultz confirms that President Reagan and his administration supported ratification of the Convention if the Deep Seabed mining provisions were fixed. Secretary Shultz also stated that the treaty has been changed in such a way with respect to the Deep Seabed that it is now acceptable

in his judgment. Mr. Ken Adelman, another former Reagan administration official who dealt directly with the Convention, has also confirmed this point.

Although reliance on customary international law has been relatively effective for us as an interim measure, neither customary international law nor the 1958 Conventions are adequate in the long term. U.S. assertions of rights under customary international law carry less weight to states than do binding treaty obligations. By its very nature, customary international law is less certain than convention law, as it is subject to the influence of changing State practice. In addition, the 1958 Conventions are inadequate for many reasons, including their failure to establish a fixed limit to the breadth of territorial seas, silence regarding transit passage and archipelagic sealanes passage, and absence of well-defined limits on the jurisdictional reach of coastal states in waters we now recognize as exclusive economic zones. If the United States remains outside the Convention, it will not be best positioned to interpret, apply, and protect the rights and freedoms contained in the Convention.

Becoming a party to the Law of the Sea Convention directly supports our National Strategy for Maritime Security. As the President noted in the opening pages of the Strategy: "We must maintain a military without peer—yet our strength is not founded on force of arms alone. It also rests on economic prosperity and a vibrant democracy. And it rests on strong alliances, friendships, and international institutions, which enable us to promote freedom, prosperity, and peace in common purpose with others." That simple truth has been the foundation for some of our most significant national security initiatives, such as the Proliferation Security Initiative. As the leader of a community of nations that are parties to the Convention, more than 150 in total, the United States will be better positioned to work with foreign air forces, navies, and coast guards to address jointly the full spectrum of 20th century security challenges.

Before closing, I would like to address some of the opposing views. Critics of the Convention argue that an international tribunal will have jurisdiction over our Navy and that our intelligence and counterproliferation activities will be adversely affected. In the judgment of the Department, these concerns have been more than adequately addressed within the terms of the Convention.

- Our intelligence activities will not be hampered by the Convention. This matter was fully addressed in a series of open and closed hearings in 2004. Just recently, the Defense Department, State Department, and Office of the Director of National Intelligence confirmed the accuracy of the testimony provided in those hearings.
- The Senate can ensure that international tribunals do not gain jurisdiction over our military activities when we join this Convention. In 2003, the administration worked closely with the committee to develop a proposed Resolution of Advice and Consent—which we continue to support—that contains a declaration regarding choice of procedure for dispute resolution. The United States rejected the International Court of Justice and the International Tribunal for the Law of the Sea and instead chose arbitration. That choice-of-procedure election is expressly provided for in the Convention itself. In addition, and again in accordance with the express terms of the Convention, the draft Resolution of Advice and Consent completely removes our military activities from the dispute resolution process. Furthermore, each state party, including the United States, has the exclusive right to determine which of its activities constitutes a military activity, and that determination is not subject to review.
- Regarding our counterproliferation efforts, which include interdiction activities at sea and in international airspace, I strongly endorse the position of the Vice Chief of Naval Operations, Admiral Walsh, who served as the commander of all U.S. and coalition maritime forces in the Persian Gulf, North Arabian Sea, Horn of Africa, and Red Sea from 2005 to 2007. There is no better authority on maritime interception operations than Admiral Walsh, and he correctly points out that not only does the Convention enhance our interdiction authorities, but not joining the Convention is detrimental to our efforts to expand the number of countries that support the Proliferation Security Initiative.
- And, as all recognize, this Convention does not affect the United States inherent right and obligation of self defense. Further, as Mr. Negroponte has explained in detail, joining the Convention gives us the opportunity to extend our sovereign rights dramatically and advance our energy security interests by maximizing legal certainty and international recognition for our extended Continental Shelf off Alaska and elsewhere.

As I noted in opening this statement, President Bush, Secretary Gates, the Joint Chiefs of Staff, the Military Department Secretaries, the Combatant Commanders,

the Commandant of the Coast Guard, and I urge the committee to give its approval for U.S. accession to the Law of the Sea Convention and ratification of the 1994 Agreement. The United States needs to join the Law of the Sea Convention, and join it now, to take full advantage of the many benefits it offers, to mitigate the increasing costs of being on the outside, and to support the global mobility of our Armed Forces and the sustainment of our combat forces overseas.

Thank you for the opportunity to make the Department of Defense's views known on this important matter.

Senator WEBB. Thank you very much, Secretary England.

Admiral Walsh, welcome to the committee, you may proceed.

STATEMENT OF ADM PATRICK M. WALSH, VICE CHIEF OF NAVAL OPERATIONS, DEPARTMENT OF THE NAVY, WASHINGTON, DC

Admiral WALSH. Mr. Chairman, thank you. Senator Lugar, members of the Committee on Foreign Relations, good afternoon.

I'd like to thank you for the opportunity to testify in support of the United States joining the Law of the Sea Convention.

By way of introduction to the committee, I'd like to take this opportunity to provide an operational perspective on how the Convention supports national security.

I'm a practitioner. I represent a service with a global view, that must represent and assert national interests on an international stage. In my previous assignment, as the Deputy Secretary described, I wore three hats: As the commander of U.S. 5th Fleet, as the commander of the U.S. naval component to U.S. Central Command, and the commander of the Combined Maritime Force in the Central Command area of responsibility.

My headquarters was located in Bahrain, staffed by officers from 18 countries working in operations, intelligence, and planning, that comprised the Coalition Maritime Force. Just as a review—these are representatives from Australia, Belgium, Canada, France, Germany, Italy, Japan, Netherlands, New Zealand, Pakistan, Portugal, Singapore, Spain, Turkey, the United Kingdom, Bahrain, and Saudi Arabia—all but one of those mentioned are parties to the Law of the Sea Convention.

The area of operations I was responsible for begins at the Suez Canal, flows through the Gulf of Aqaba in the Red Sea, the Straits of Bab el-Mandeb, the Gulf of Aden, the waters surrounding the Horn of Africa, the Western Indian Ocean, the North Arabian Sea, the Strait of Hormuz, and into the gulf itself—it's one continuous body of water. Two and a half million square miles of ocean, it encompasses three of the world's most important oceanic chokepoints, and over 6,000 miles of coastline.

Maritime forces share the sea, so by its very nature, the approach that maritime forces take recognize that we share both the benefit, as well as the responsibility for 70 percent of the Earth's surface.

The Maritime Commander and Air Commander must respect the international community's use of the oceans and the airspace above it for peaceful purposes. If we did not, then you would know about it, and we would need to answer more questions. The premise for maritime security is respect for the obligations contained in the Law of the Sea Convention, ensured through the exercise of the rights and freedoms codified in that same Convention.

There is a perception, held by some, that by joining the Convention, our Armed Forces will somehow be constrained—if not by the actual language of the convention, then by international tribunals or arbitration panels operating under the authority of the Convention. I could not support the treaty if I thought the treaty curbed the reach or the authority, or limited in any way, our actions.

First, as was stated earlier, responsible maritime forces and air forces do not operate without due regard for the requirements of international law.

Second, the Convention is an enabling element. For example, under article 110 of the Convention, coalition warships under my command were authorized to stop and board vessels when there was reason to suspect they were without nationality, or engaged in piracy. Using article 110, we were able to interdict pirates, terrorists, and drug runners tied to terrorism.

Another example is the Proliferation Security Initiative. PSI represents the collective approach of almost 90 nations, to use all available national and international authorities to interdict the shipment of weapons of mass destruction and related material. Joining the Convention will help expand the number of nations that participate in PSI.

Geographically strategic nations, such as Indonesia and Malaysia, would be more likely to join PSI if we, in turn, join the Convention. Personally, I have participated in PSI exercises. I value the strength, and see the potential these exercises have, and this initiative has in the future, and I would offer my endorsement that we would take all necessary steps to strengthen this initiative in any way we can. Senate support for this treaty is one means of doing that.

Third, we've been operating under the Convention since 1983, when President Reagan determined that, with the exception of the Deep Sea Bed Mining Provisions, which were later fixed, the U.S. Government would adhere to the Convention, and demand the same from others.

Fourth, joining the Convention will not subject our Armed Forces to the jurisdiction of international tribunals, or arbitration panels. The Convention is very clear on these points. It recognizes and confirms the sovereign immune status of warships, government vessels used for noncommercial purposes, and military aircraft. The Convention is not an arms-control treaty. The United States, like other nations, will exclude its military activities from the dispute resolution process.

So how, then, does joining the Convention support our national security? It codifies, in a manner that only a binding treaty can, the navigation and overflight rights, and high seas freedoms that are essential for the global mobility of our Armed Forces. Rights, such as the Right of Transit Passage, through, under, and over international straits, and the approaches to those straits, the Right of Innocent Passage in foreign territorial seas, and the Right of Archipelagic Sealane Passage through archipelagic nations, such as Indonesia. We need to lock in the navigation and the overflight rights, and high seas freedoms contained in the Convention, and then by acting from within the Convention, we can best exercise

our leadership to ensure that those rights and freedoms are not whittled away by foreign states.

In closing, I'd like to note that it is my deeply held belief that military leaders have a duty to ensure that our men and women can execute the demanding tasks placed upon them. Right now, where I sit, we have a deficiency, by not being party to the Law of the Sea Convention, and it is one that we must correct. This Convention is valuable to our Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen, and it's time we joined the Convention, and we owe it to them.

So, thank you, and I'm happy to answer your questions, sir.

[The prepared statement of Admiral Walsh follows:]

PREPARED STATEMENT OF ADM PATRICK M. WALSH, VICE CHIEF OF NAVAL OPERATIONS, DEPARTMENT OF THE NAVY, WASHINGTON, DC

Chairman Biden, Senator Lugar, members of the Committee on Foreign Relations, good afternoon. I would like to thank you for this opportunity to testify in support of the United States joining the Law of the Sea Convention.

As Deputy Secretary Negroponte and Deputy Secretary England have stated, accession to the Convention is an important priority for the administration. Statements supporting accession have been made by the President, senior Cabinet officials, the Joint Chiefs of Staff, Commandant of the Coast Guard, a host of former legal advisors for the Department of State, our current and former Secretaries of the Navy, and former Chiefs of Naval Operations. Their statements outline the compelling reasons for accession. Instead of trying to improve upon them, I want to take this opportunity to focus on why I support accession.

I support accession because it helps our soldiers, sailors, marines, airmen, and coastguardsmen do their job.

Our sailors' job is to make sure that fully trained and combat-ready naval forces are available to deter our adversaries and defeat our enemies, 24 hours a day, 7 days a week, 365 days a year. Our sailors' job is to ensure the uninterrupted delivery of vast quantities of materiel necessary for the sustainment of our combat troops overseas. Their job is to ensure that the sealines of communication, which underpin global trade and our domestic economic prosperity, remain open and reliable. Our sailors' job is to execute our National Security Strategy by:

1. Interdicting terrorists and preventing them from gaining weapons of mass destruction;
2. Gathering and analyzing critical intelligence;
3. Helping our friends to secure critical economic infrastructure; and
4. Expanding and strengthening global maritime coalitions dedicated to dealing with the full spectrum of 21st century security challenges.

Our Navy can better protect the United States and the American people if we join the Law of the Sea Convention.

The Law of the Sea Convention is the bedrock legal instrument for public order in the world's oceans. It codifies, in a manner that only binding treaty law can, the navigation and overflight rights, and high seas freedoms that are essential for the global strategic mobility of our Armed Forces, including:

1. The Right of Innocent Passage, which allows ships to transit through foreign territorial seas without providing the coastal state prior notification or gaining the coastal state's prior permission.
2. The Right of Transit Passage, which allows ships, aircraft, and submarines to transit through, over, and under straits used for international navigation and the approaches to those straits.
3. The Right of Archipelagic Sealanes Passage, which, like transit passage, allows transit by ships and aircraft through, over, and under normal passage routes in archipelagic states, such as Indonesia.
4. The right of high seas freedoms, including overflight and transit within the Exclusive Economic Zone.

Innocent Passage, Transit Passage, and Archipelagic Sealanes Passage are the crown jewels of navigation and overflight. These rights are vital not just to our Navy, but also to our Army, Air Force, Marine Corps, and Coast Guard. They make it possible to move vast quantities of war materiel through the Straits of Gibraltar, Singapore, Malacca, and Hormuz and into the Arabian Gulf to soldiers, sailors, air-

men, and marines in Iraq. These rights permit us to move our submarine fleet through choke points to conduct all missions. They permit the U.S. Air Force to conduct global missions without requirement to overfly foreign national airspace. And they ensure the uninterrupted flow of commerce to and from our shores.

NATIONAL SECURITY/DEFENSE BENEFITS

- Convention extremely favorable to U.S.
  - —Limits breadth of territorial sea
  - —Innocent passage
  - —Transit passage through international straits
  - —Archipelagic sealanes passage
  - —Freedom of navigation and overflight in EEZs
  - —Unrestricted military activities in high seas
  - —Right of approach and visit
  - —Legitimate coastal state authority in territorial sea and contiguous zones

The Convention also allows us to exercise high seas freedoms in foreign exclusive economic zones, including conducting military activities without coastal state interference. And this is important—the single most contentious issue in oceans law and policy today is the attempt by some foreign coastal states to treat the exclusive economic zone—or EEZ like a territorial sea. The Convention makes clear that coastal states enjoy resource rights within the EEZ, but they do not enjoy and may not assert full sovereignty within the EEZ.

Because we are not a party to the Law of the Sea Convention today, we must assert that our navigation and overflight rights and high seas freedoms are based upon customary international law. However, that approach plays directly into the hands of those foreign coastal states that want to move beyond the Convention. They too cite customary international law as the basis for their developing claims of coastal state sovereignty in the EEZ and in international straits.

We need to lock in the navigation and overflight rights and high seas freedoms contained in the Convention while we can. Then, acting from within the Convention, we can exercise effective leadership, and in conjunction with our freedom of navigation program, ensure that those rights and freedoms are not whittled away by foreign states.

NATIONAL SECURITY/DEFENSE BENEFITS

- Joining the Convention:
  - —Codifies navigational rights . . . puts them in the firmest legal category—treaty rights
  - —Provides legal certainty and stability within the world's largest maneuver space
  - —Gives us greater voice in development of rules vital to global mobility
  - —Promotes international cooperation . . . supports PSI

Joining the Convention will also strengthen maritime coalitions and further important national security initiatives such as the Proliferation Security Initiative. Over 150 nations are parties to the Law of the Sea Convention, including the vast majority of our PSI partners and members of the coalition fighting the global war on terror.

Our Maritime Security Strategy is founded upon the basic truth that nations with common interests in international commerce, safety, and security can work together to address common challenges. While the Armed Forces of the United States will always enjoy the capability to unilaterally conduct military operations wherever and whenever necessary, we also know that global security depends upon a partnership of maritime nations sharing common goals and values.

Global maritime security is undergoing significant transformation today, and as the world's foremost maritime power, the United States is both expected and required to lead that transformation. We must lead and manage a maritime security domain in which friendly navies, coast guards, and industry develop common interoperability protocols and information sharing frameworks. In turn, these arrangements must enable distributed maritime operations appropriately scaled to address the full range of 21st century maritime security challenges, including proliferation of WMD, terrorism, piracy, and transnational criminal activities such as narcotics and human trafficking.

Joining the Law of the Sea Convention is critical to the success of our Maritime Security Strategy. By joining the Convention the United States will be able to effectively develop and lead an association of maritime partners dedicated to ensuring public order in the world's oceans.

On this specific point, it is worth looking at the example of the President's Proliferation Security Initiative, or PSI. PSI began in May 2003, when 10 like-minded countries joined the United States to prevent the proliferation of weapons of mass destruction, their delivery systems, and related materials. Those 11 countries endorsed a series of PSI founding principles, including two essential principles from an operational perspective: One, that all States have broad domestic authorities to act against proliferators and, two, that acting cooperatively, they can use those authorities and international law—including the Law of the Sea Convention—to prevent proliferation. The Law of the Sea Convention recognizes numerous legal bases for taking action against vessels suspected of engaging in proliferation activities, including port state control measures, flag state authority, and the right of warships to approach and visit commercial vessels.

In just 4 years, PSI has expanded from its original 11 partner-nations to almost 90, and we have had specific operational successes in preventing the proliferation of weapons of mass destruction under PSI. However, our failure to be a party to the Law of the Sea Convention is limiting further expansion of PSI. Critically important democratic Pacific countries have indicated a desire to support our counterproliferation efforts, but they tell us that so long as we are not a party to the Law of the Sea Convention, they will not be able to convince their legislatures to endorse PSI. How, they ask us, can they convince their legislatures that PSI interdiction activities will only occur in accordance with international law including the Law of the Sea Convention, when the leading PSI nation, the United States, refuses to become a party to the Convention?

Another example of the future of maritime security operations is Task Force 150 in the Central Command area of Operations. Task Force 150, a multinational task force comprised of naval and Coast Guard forces, is responsible for maritime security in the Gulf of Oman, Northern Arabian Sea, part of the Indian Ocean, Gulf of Aden, and Red Sea. The task force is responsible for helping secure the approaches to three of the world's most important choke points: The Suez Canal, Bab el-Mandeb, and Strait of Hormuz. The task force's mission includes interdicting terrorists and WMD material, supporting local countries in developing their maritime capabilities, and addressing the full spectrum of 21st century security challenges, including narcotics trafficking and piracy. The task force is typically commanded by a flag officer from a foreign navy, such as Pakistan, the United Kingdom, Germany, the Netherlands, or France. The United States contributes forces at the tactical level and acts as the overarching coordinating authority through the Combined Force Maritime Component Command headquarters in Bahrain, which is colocated with the U.S. Fifth Fleet headquarters.

One of the most important aspects of strengthening the effectiveness of a maritime coalition, like TF–150, is to craft operations that take full advantage of the various capabilities that each country brings to the fight, while respecting their respective national political authorities and limitations. Although some differences are inevitable, for example in classification disclosure policies, others can and should be eliminated when possible. One such difference that should be eliminated is our nonparty status under the Law of the Sea Convention. When we operate with coalition partners in challenging environments, we need to use the same playbook, and the Law of the Sea Convention is a critically important part of the playbook.

Before closing, I would also like to point out that the Law of the Sea Convention directly supports our Homeland Defense and domestic maritime law enforcement interests. In addition to permitting the United States to expand its territorial sea from 3 nautical miles to 12 and claim an adjacent contiguous zone with a 24 nautical mile limit, the Convention is the legal instrument underpinning maritime port state control measures and the authority of flag states to consent to the interdiction of vessels. Initiatives relating to container security, maritime domain awareness, counternarcotics and counterproliferation are all based on the legal regimes established in the Convention. This is why the Commandant of the Coast Guard supports immediate U.S. accession to the treaty.

In closing, I would like to note that I have been responsible for leading the young men and women of our country in combat. I led strike missions over Iraq in Desert Storm, and as the recent commander of the United States Fifth Fleet, I led marines, sailors, and coastguardsmen during Operation Enduring Freedom and Operation Iraqi Freedom. It is my deeply held belief that military leaders have a sacred duty to ensure that the men and women under their command have the tools and training necessary to execute the demanding tasks placed upon them. Right now, as I sit before you, we have an identified deficiency—not being a party to the Law of the Sea Convention—but thankfully it is one that we can easily correct. It is time that we join the Convention. We owe it to them.

Senator WEBB. Thank you very much, Admiral. I appreciate the testimony of all the witnesses.

At this point I'd like to ask consent to insert several items into the hearing record. First, a letter from the Joint Chiefs of Staff in support of the Convention.

Second, a letter from Michael Chertoff, the Secretary of Homeland Security, in support of the Convention.

Third, a letter from the chairman and vice chairman of the Senate Select Committee on Intelligence, concluding that the Convention will not adversely affect U.S. intelligence collection, or other intelligence activities.

Fourth, an article from yesterday's Wall Street Journal by former Secretaries of State, George Schultz and Jim Baker.

Fifth, a memo in support of the Convention, from seven former Chiefs of Naval Operations that was submitted, as has been mentioned, to the Senate in 1998.

And, sixth, a statement by Senator Boxer.

[EDITOR'S NOTE.—The six articles submitted by Senator Webb can be found on pages 47-55 in "Material Submitted for the Record."]

Senator WEBB. We'll have 7-minute rounds of questions, and if there are further questions, people can feel free to engage in a second round.

Gentlemen, there are critics who have stated that the Convention would impair intelligence-gathering activities. They point to articles 19 and 20, and claim, for example, that they prohibit submarines from transiting, submerged, through the territorial sea of another country in order to gather intelligence, and that if caught, the coastal state could bring the case to the International Tribunal for the Law of the Sea. Do you believe that this is a legitimate concern?

Secretary Negroponte.

Mr. NEGROPONTE. No, sir. Because nothing impedes a submarine from proceeding, submerged, in the territorial sea of another country, it simply wouldn't enjoy the right of Innocent Passage.

Senator WEBB. Secretary England.

Mr. ENGLAND. Mr. Chair, if I could just add, that this was a subject of extensive briefings before the committee in 2004. They were closed briefings, but that was probably—those were not before this, it was before the Senate Committee on Intelligence. We have reviewed those hearings, both ourselves, the DNI, I believe the Secretary of State—we all still, today, support those hearings and the comments made.

The conclusion of those hearings is that this would have no effect on any of our intelligence activities, but they were closed, so I would refer you to those hearings, sir.

Senator WEBB. Admiral Walsh, would you have anything to add?

Admiral WALSH. I support comments previously made here, sir. I do not see the objections raised by the critics on this point. We have been operating, really, by the provisions of the treaty since 1983, and we have not had to change our activities as a result of following the treaty.

Senator WEBB. Thank you.

There are opponents who claim that the Convention would establish a tax on U.S. entities, and that the money would go to the United Nations, is this correct, Secretary Negroponte?

Mr. NEGROPONTE. There are no taxes, Senator, in the case of the extension of the Continental Shelf beyond 200 miles, if after 7 years an oil company is starting to generate revenues, they would have to pay 1 percent of a fee, and then it would go up in subsequent years, up to a maximum of 7 percent, I believe.

But, these are provisions that were completely agreed to and advocated by the affected interests—that is to say, the oil companies. They welcomed this provision, and—and they welcomed the provisions governing the Continental Shelf—was because of the legal certainty that it would afford them, with regard to the recognition of the extent of our shelf beyond 200 miles.

Senator WEBB. Would that money go to the United Nations?

Mr. BELLINGER. Sir, I'm John Bellinger, I'm the Legal Advisor to the Secretary of State.

No, sir; this is one of the myths about the treaty—although it is called the U.N. Convention on the Law of the Sea, it's only because it was negotiated under the auspices of the United Nations, because it was such a comprehensive treaty. But, the royalties that Ambassador Negroponte mentioned would not go to the United Nations. There is no U.N. entity, there is no U.N. bureaucracy, there are no U.N. employees.

The royalties that might ultimately be paid by our companies—and again, only if they are successfully drilling for oil—would go to a group of Member States, in which the United States would decide how they would be distributed. So, we are not paying money, taxes to the United Nations at all, this is not a U.N. entity.

Senator WEBB. How would the Member States become a part of the group that would receive those royalties?

Mr. BELLINGER. The United States—they would have to be reached by consensus, Senator. It's not decided in advance.

Senator WEBB. Geographical propinquity?

Mr. BELLINGER. There would have to be a consensus on how the money would be distributed. The United States would have—not only a seat at the table—but a permanent seat on the Council that would decide how any money would be distributed. Consequently, we would have a veto right on how any money would be distributed.

Again, the important point here is that it is not money going to a U.N. bureaucracy or entity, and the United States has a strong voice, and ultimately a veto right in how the money would be distributed.

Senator WEBB. Thank you.

Are there any concrete indications of how this treaty would erode U.S. sovereignty?

Secretary Negroponte.

Mr. NEGROPONTE. To the contrary, Senator, I think we gain sovereignty in the sense of the certainties that are acquired by this. I think the Continental Shelf is probably a good example of that. And, of course, the creation of an exclusive economic zone was an expansion of sovereign rights which is recognized by the treaty. So, I would say that in all, you'd have to say that it was a plus for

United States sovereignty. And, I can't really see any area where it's subtracted from.

Senator WEBB. Is there any portion of this treaty that you believe would impact negatively on our national security?

Secretary England.

Mr. ENGLAND. No, sir; I do not. We don't see any downside at all to the treaty, frankly. Military activities are exempt, so frankly, it doesn't cover military activities. On the other hand, it does give us freedom in terms of straits, over/under, through—as I commented before—for our ships and airplanes. It gives us the Right of Passage around the world, including in other people's economic zones, so it is freedom that we have now, guaranteed freedom to rules.

I mean we—it's very helpful for our military to understand exactly what the rules are as we go around the world, and what our limits are, in terms of going around the world, so as we navigate to have freedom of navigation, understand exactly what those freedoms are, and by the way, it's also true for our country, I mean we have—it enhances our security. The U.S. Coast Guard, strong supporter of this treaty, because of the added security, I mean, there is certainty to the 12-mile limit, there is certainty to the 200-mile limit as prescribed in terms of the freedoms that you have—particularly outside the 12-mile zone, but also the protections we have within the 12-mile zone.

So, it's important for us in terms of freedom around the world, and also for the security of the United States in terms of the authorities we have, at the 12, and then the continuous areas, out to 24 miles, and ultimately to 200 miles. So, there are all important attributes for the national security of the United States. My view is, I think the—well, I can tell you the view of the Department of Defense is—this enhances our national security.

Senator WEBB. Admiral Walsh, would you agree that there's no portion of this treaty that, in any way, impacts our national security as an operator?

Admiral WALSH. That's correct, sir. And I have looked at the treaty on issues related to immunity for warships, and some of the sovereignty concerns that have been raised as a result of the debate.

The immunity provisions, I think, are extensive, and I think they're clear and consistent throughout the treaty. So, it begins with definitions of warships with article 29, and works its way through article 32, which highlights nothing in the Convention affects the immunity of warships or other government ships operating in noncommercial service.

It describes in article 95, "Warships on the high seas have complete immunity from the jurisdiction of any state, other than the flag state." It seems to me the treaty is very consistent on this point.

Senator WEBB. Thank you very much.

Senator Lugar.

Senator LUGAR. Thank you very much, Mr. Chairman.

Critics of the treaty often start with the fact that it mentions the United Nations. Today you have replied to that critism that the United Nations was a convener of the countries that have come to

agreement, but is not involved in the administration of the treaty, recipient of taxes, or other situations.

I mention this because, rightly or wrongly, there are a large number of Americans who do not like the United Nations. As far as they're concerned, our involvement with the United Nations is an anathema, and so they start with the thought that a treaty that has the United Nations in the title, ipso facto, has some problems.

Now, leaving aside that, others would say, even if the United Nations is not involved, the question of sovereignty is. And essentially, the assertion is made by some that the real problem—which you gentlemen, the Navy and the Defense Department—have not faced is that we have 300 or fewer warships. We used to have, they would claim, 1,000. The fact is, that you don't need Law of the Sea, you don't need international law, you don't need agreements—you need 1,000 warships.

And as a result, if you want to go somewhere, you apply that force, and simply shoot it out, if necessary, until people respect that and therefore there is no need for international law. Erosion of sovereignty for them means we've had an erosion of our military authority.

In that context, Admiral, I would like to ask, Would, in fact, the Law of the Sea Treaty tend to reduce the need for dangerous operations involving the threat of the use of force, or the actual use of force, and what is the meaning of that to those Americans who serve in the U.S. Navy, in terms of their service, their longevity, their ability, to serve as Americans, by limiting risks through this type of international law?

Admiral WALSH. Thank you, Senator. There's several elements that I'd like to try and hit, and if I miss something, please remind me and I'll come back to it.

But, to begin with, this notion of sovereignty extends to warships. Warships are defined in the treaty. There is a consistent theme of protection for the sovereignty of those vessels throughout the treaty.

Incidentally, those 18 coalition partners that I was telling you about in our headquarters have got, essentially, the same set of questions that are coming up, and have had to debate the same set of issues inside their own nation-states.

As far as the ability to assert ourselves on the high seas—let me just suggest to you that there was a time and place when threats were made, and lines drawn in the water, in terms of the potential loss of life and limb on crossing international waters, and that's the Gulf of Sidra in 1981. It seemed to me the warship response, the grey-hull response, was appropriate and proportionate to the threats made at the time.

So, the question before the committee, is that the appropriate approach that we want to take, with exaggerated claims of baselines, economic, or environmental interest, is to respond with a warship? Seems to me that's better set aside for those best prepared for that kind of discussion, which, I would recommend, are people on that side of the table.

It would be, in my view, important to point out that many of the partners that we have in the global war on terror who have put life, limb, and national treasure on the line, are some of the same

ones where we have disagreements on what they view as their economic zone or their environmental laws. It does not seem to me to be wise to now conduct Freedom of Navigation operations against those very partners that we—are in our headquarters—trying to pursue a more difficult challenge ahead of us, which is a global war, a global war on terror.

It seems to me that, no matter how many ships we have, and I realize that if I want 1,000 ships, I need to go to the other committee to ask for that. [Laughter.]

It seems to me, no matter how——

Senator WEBB. You would have one vote on that other committee, by the way. [Laughter.]

Admiral WALSH. It seems to me that no matter how many ships that we have, we're going to come across the same issue, which is the allocation of precious resources and assets throughout 90 percent of the globe. So, we can conduct those sorts of assertions of our sovereignty, if the committee sees fit to, but I would recommend against it, and see that we could better use our resources, and our people, in the global war on terror.

Senator LUGAR. I thank you for that answer. I agree with it, but I think this is a part of the issue and one of the reasons the treaty has not progressed. There is a group of people in America that are prepared to shoot it out, and believes that's what sovereignty is all about, and what we ought to be about. But, I thank you for your response.

Let me just say, there was a quarter-page ad in the Washington Times yesterday that the U.S. taxpayers need to know about, U.N.'s Law of the Sea Treaty, and it asserts, "The U.N.'s Law of the Sea is the biggest giveaway of American sovereignty and resources since the Panama Canal Treaty, and lays the groundwork for another U.N. corruption scandal, worse than the Oil for Food, by setting up a scheme to facilitate payoffs based on revenue derived from global taxes or fees. It gives the U.N. control over billions of dollars worth of oil, gas, and minerals in the so-called international waters known as the area. And finally, the International Seabed Authority, based on the Island of Jamaica, but maintaining a relationship agreement with the United Nations controls the area."

Now, I mention that, not in a sense of being an adversary or to ridicule, but to show that these are the arguments that are being made. As we can all view here today, unanimously, everybody in the National Security Council, the President of the United States, those who served as Secretaries of State under President Reagan and so forth, it remains that the treaty has not moved. And, in part, it's because of holds, parliamentary by Senators, and unwillingness by the leadership to bring it up and forget the holds. But, second, by the thought that there must be a large group of Americans out there, who somehow believe that this is a giveaway, of sovereignty, of money, of U.N. domination.

Mr. ENGLAND. Senator.

Senator LUGAR. Do you have a response?

Mr. ENGLAND. Well, my only comment is, rather than a national security, from an economic point of view, the United States has the most to gain. I mean, our Exclusive Economic Zone goes out 200

nautical miles, I mean, we have one of the largest coastlines in the world, when you think of Alaska, the Hawaiian Islands, and the East/West Coast, Gulf of Mexico. You think of our coastline, 200 miles, and we have exclusive economic rights in that area. And, in addition, as Secretary Negroponte said, we go out to the Continental Shelf off of Alaska, that could be as much as 600 miles, and we have exclusive economic rights in that area. It would seem to me that, contrary to your comments about what the newspaper said, the ad taken out, it is the opposite of that.

I mean, some people have said this is a big U.S. land grab, because, you know, there's so many rights that accrue to the United States because of our huge coastline. So, it would seem to me this is hugely beneficial to the United States, rather than a disadvantage, it's a huge advantage to the United States in terms of our economic, as well as our security interests.

Senator LUGAR. Thank you, sir.

Senator WEBB. Secretary Negroponte, did you want to add something?

Mr. NEGROPONTE. If I could just add briefly—I think some of these arguments, Senator Lugar, are issues of fact. Like it's just not a fact that this Seabed Regime is going to be run by the United Nations, nor is it going to have control over anything else other than the licensing of seabed mining operations in the area, if and when they take place. And so, I think those doubts can be dispelled by just pointing out the facts of the agreement.

But, I think there's also an issue of judgment, as to whether we would have been better off without this treaty being negotiated, and with the historical perspective I've got, I recall that our big concern back in the 1970s was, if we allow countries to expand their territorial sea to 12 miles and their economic zone from 200-miles, could you end up having creeping jurisdiction from 12 miles for territorial sea and 200 for the economic zone today to 50 miles and 300 or 400 miles tomorrow? So, in a way, the treaty has the effect of freezing these claims in time.

And second, with those claims, was that going to somehow impede these vital navigational rights, specifically the transit through international straits, which I think was probably one of the greatest concerns we had. Would the fact that countries could now have 12-mile territorial seas, and therefore there would be a lot of international straits where they'd be overlapping territorial claims, could we come up with a satisfactory regime? And so, you can imagine that we felt we'd really achieved a very significant accomplishment when we got the right of Straits Passage for our military and other vessels. And, we think that's a very important achievement for our national security and other interests that needs to be memorialized by our ratifying the Convention. Lest others, maybe at some future time, become tempted to say, "well, the United States hasn't signed this thing, maybe we want to change our attitude toward this, and expand our claims somehow."

Senator LUGAR. Thank you.

Senator WEBB. Senator Corker.

Senator CORKER. Mr. Chairman, thank you and I join the others in welcoming this distinguished panel, we appreciate you being here.

Senator Lugar referred to one form of conflict resolution, which is shooting it out, if you will, on the open seas. There will be, though, conflicts that arise, obviously, and I know he wasn't advocating that, he was referring to another line of thinking, but there will be conflicts that arise. And I'd like for you, if you would, to expand a little bit on how conflict resolution—when there are disputes, if you will, about various issues, and it's my understanding that from the standpoint of military issues, there is not dispute there, it's well laid out, and we have complete sovereignty. But, on commercial interests, other kinds of issues that arise, talk to us a little bit about how the treaty lays out the resolution of those?

Mr. NEGROPONTE. In general terms, Senator, and then if Mr. Bellinger wants to add anything, if that would be all right.

Basically, as you mentioned, military activities are exempted from the conflict resolution provisions of the treaty explicitly and so is the issue of the administration of the Exclusive Economic Zone, particularly fisheries.

There are conflict resolution provisions that allow for a choice among arbitration, the International Tribunal for the Law of the Sea, or the International Court of Justice. We have indicated that we would go the route of arbitration in any disputes that might arise under the Convention.

Senator CORKER. So, in essence, this arbitration is binding arbitration, is that correct? Would you give us a little bit of the layout of how that is set up? And, I can see someone more technically oriented will answer that question.

Mr. BELLINGER. The dispute resolution mechanisms are exactly what we wanted, because we could, in fact, imagine that there might be disputes among states, in which we would not want to send the Navy in to resolve. We have exempted ourselves—as we are allowed to do under the treaty—from the jurisdiction of the International Court of Justice and from the International Tribunal for the Law of the Sea except for a very narrow category. Instead we will take to arbitration, any disputes that we would want resolved.

If an arbitral panel makes a decision, that would be final, and that's exactly the way we would want it. So, for example, if we challenged another country for asserting too great a right to its territorial sea, we take them to arbitration, and if we won, we would not want them to be able to have that decision overturned in one of their foreign courts. So, the dispute resolutions are binding, but that's exactly the way that we want it, we are comfortable with that, and as has been alluded to several times, military activities may be exempted under the treaty, and our proposed Resolution of Advice and Consent would definitely take advantage of that opt-out for military activities. So, those would not be addressed at all in any dispute resolution mechanism.

Senator CORKER. And the arbitration panel is made up, how?

Mr. BELLINGER. As with any international arbitration, arbitrators are chosen by the sides. So, we would pick the arbitrators in conjunction with the other side, that we would want. We have very effective lawyers in arguing in arbitrations, we win quite regularly, and you have got arbitrators who you hope will rule fairly. It is, of course, possible that one can lose cases, but you also can win

cases. And we think we are quite comfortable with the dispute resolution mechanisms in the commercial set of cases that they'd apply to, but again, it is very important to recognize that no International Court of Justice, Tribunal, or arbitral panel could judge the activities of our military. That's just off the table.

Senator CORKER. I've been here a short time, and haven't had the opportunity yet to vote on a perfect bill, and I doubt that I will. [Laughter.]

My guess is this treaty, while you support it strongly, is not perfect, and obviously there have been people—as is always the case here—that have made allegations that are just not based on fact.

But on the other hand, I'm sure there are some shortcomings, and I would like for you all, if you would, to, if you will, outline some of those things that you wish would have been addressed in a little bit better way in this treaty.

Mr. NEGROPONTE. I'm not sure I'm prepared, Senator, to try and enumerate blemishes or flaws, but maybe this is a helpful point, and it maybe also goes to the issue that Senator Lugar raised earlier about why it's taken so long to hopefully, now, be on the verge of getting this treaty ratified.

And, I think it was true that chapter 11, the original chapter 11 of the Law of the Sea Treaty was defective. The chapter that dealt with deep seabed mining provisions. It had mandatory technology transfer provisions, and it did not give us the kind of representation in the decisionmaking body that we would have liked, among other objections that we had to it. So, improvements were made.

I suppose, in the ideal, one might say, "well, we would have preferred to have no regulation," I mean, some might have argued, "of deep seabed mining, no international regulation of deep seabed mining beyond 200 miles." But then, on the other hand, if you make that argument, what will happen? In terms of regulating the behavior of other state actors on the international scene.

So, I'd be reluctant to try to enumerate specific shortcomings. I think the preponderant balance of benefits of this agreement, I think we all believe at this table, is overwhelming.

Senator CORKER. Thank you, I know my time is expired.

Senator WEBB. Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman.

And thank you gentlemen, welcome. I appreciate the testimony that you have given today and for the collective years of service that we see represented in your various capacities. Thank you very much.

Certainly Alaska has a great deal of interest in what is happening with the Law of the Sea Treaty. We have half the coastline of the United States in the State of Alaska. When we recognize that the United States is an Arctic nation, we are an Arctic nation because of Alaska. So, we've got a very keen interest when we discuss a treaty that governs the world's oceans and the ocean floors.

Ambassador Negroponte, you said that the United States has a distinct disadvantage when it comes to exercising sovereign rights on, particularly on the Continental Shelf. There's a new Time Magazine this week that has a very intriguing picture, floating iceberg out there with multiple flags, "Who own the Arctic?" And the article is about the debate over what happens as global warming, cli-

mate change, advances. And we see greater exposure in the North, we see commerce opening up in a part of the globe that we haven't seen before—that we've only dreamed about.

But we recognize that the landscape is changing up there, and as it changes, the discussion about who owns what is rather intriguing. You've got a—you can't see this, but it's the top of the globe, the northern portion—redrawing the map with the respective flags of what Canada thinks is theirs, what Greenland thinks is theirs, what Sweden and the United States thinks is theirs. But there's a big difference between thinking what is yours and what your legal claim to that may be.

And I think that this was very clearly demonstrated just a few months back when the Russians went down and planted a flag on the bottom of the ocean seabed. And if there's anything good that came out of that, I think it, again, sparked the question of, what is the status? And getting to the legal certainty, I think, is where, from my perspective, I'm looking at the Law of the Sea Treaty and saying this is incredibly important for the United States to be a full participant and to be sitting at the table when these decisions are made as to who has what.

The Coast Guard Cutter *Healey* just came back from a mapping exploration of the Arctic to determine the extent of the U.S. Continental Shelf in the Arctic.

Ambassador, if you can tell me what you believe the significance of the *Healey*'s mission is in terms of the U.S. overall policy as it relates to the Arctic, and what is the importance of the Law of the Sea when it comes to our Arctic policy? And I recognize that right now we are still working to update that Arctic policy. But if you can just tell me how they mesh here?

Mr. NEGROPONTE. Right. The key aspect, Senator—and I agree with everything you said—the key aspect is the fact that the Convention provides for a commission on the delimitation of the Continental Shelf. And therefore, and that commission is where countries would submit their data that would justify their claim to whatever extention of the Continental Shelf it is that they choose to assert, and then that commission is the one that makes the judgment as to whether the claim is justified. So, if we ratify the treaty, we will most likely get a seat on that commission and we'll be in a position to comment on the claims of other countries, which we're not able to do. And we'll also be able to submit our claim, based on data collected by the Coast Guard Cutter *Healey* or whatever activities we do, in order to map what we think should be our claim to the Continental Shelf. And then, we will get the legal certainty, if we are members of that commission, that will come from the commission agreeing to the merits of our claim.

So, I would agree with you. It's very, very important. And in terms of a whole host of shelf activities, would add an element of certainty that doesn't exist at the moment.

[EDITOR'S NOTE.—The following was submitted by Deputy Secretary Negroponte as a clarification for the record:]

There is a need to clarify my answer to Senator Murkowski's first question.

The United States would have a permanent seat on the Council of the International Seabed Authority, not on the Commission on the Outer Limits of the Continental Shelf. Regarding the Commission, we would be able to nominate an expert

for election. We anticipate that, given U.S. expertise on Continental Shelf matters, the U.S. nominee would be elected.

Ambassador Negroponte's written statement correctly noted that, as a nonparty, "we have not been able to nominate an expert for election to the Commission [on the Limits of the Continental Shelf]. Thus, there is no U.S. Commissioner to review the detailed data submitted by other countries on their shelves."

Senator MURKOWSKI. So let me ask you then, if, for instance, the Russians have, I understand, a couple years to file their claim to what they believe their claim to be on the Continental Shelf. If the information that the *Healey* brings back allows us to challenge that claim, and if we are not a signatory to the treaty, then the United States would not be able to contest Russia's claim?

Mr. NEGROPONTE. That's correct. We have no standing in that Commission.

Senator MURKOWSKI. Let me ask also, about Canada's claim that the Northwest Passage is an internal waterway and thus, under their sovereign control. Has there been any progress in reaching an agreement on this matter and would this be something that would be addressed bilaterally or through the Law of the Sea mechanisms?

Mr. NEGROPONTE. We have dialog with Canada on this subject and we reached an understanding during the administration of President Reagan, on the basis of which our Coast Guard vessels have navigated through the Northwest Passage, but we have never agreed with the Canadian claim that it is internal water.

Senator MURKOWSKI. So, would it be an issue that would then come under the auspices of the Law of the Sea, if we were to sign onto that treaty?

Mr. NEGROPONTE. You know, I don't know the answer to that question. I'd have to submit that for the record, Senator.

Senator MURKOWSKI. If you would, I'd appreciate it. Thank you.

[The submitted written response by Deputy Secretary Negroponte to the requested information follows:]

The United States does not agree with Canada's position that the Northwest Passage is internal waters. The Northwest Passage is a strait used for international navigation. Therein, all ships and aircraft enjoy the right of transit passage, in accordance with international law as reflected in the Law of the Sea Convention. This view is shared by others in the international community, including the European Union.

Becoming a party to the Convention would bolster the ability of the United States to advocate and advance its rights under the Convention.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Senator WEBB. Senator DeMint.

Senator DEMINT. Thank you, Mr. Chairman.

I thank all the witnesses as well, as I really appreciate you being here, very complex and interesting subject to consider.

I know the United States wants to be a constructive part of the international community and I know that's a lot of the motivation to work with other countries in a nonmilitary way to work out differences around the world. I do think we have to recognize, as we look at treaties like this, that the United States does have a very different role than all of the other signatories to this treaty. Our role and responsibility in this world is very different than any other country and the expectations of us are very different. And the need to act independently, as we have seen many times in the last decade, is very important, not only to us, but the world itself.

I believe that was Reagan's philosophy. I've heard him quoted today. It's interesting, his diaries have come out and he said on Tuesday, June 29, 1982, "Decided in the National Security Council meeting, and will not sign Law Sea Treaty, even without seabed mining provisions." And he wanted us to go along with the treaty, obviously, and work with the international community, but recognized the dangers of signing up to this.

I think the question before us is, Do we want to submit the United States to another international body? And I think as we consider it, we need to think of these other international bodies that we have a part of. Certainly, if we look at the United Nations, the concern of the Nation and many here in Congress continues to grow, at their unwillingness to act in the best interest of the world, and particularly not in the best interest of the United States. Every member of the United Nations signs the Universal Declaration of Human Rights, including Cuba and North Korea and Iran. We know they don't follow that. But the United States follows the rules, which puts us at a distinct disadvantage whenever we sign a treaty with other countries that don't.

The Kyoto Protocol, which we have fortunately not signed, yet. Those who have signed it, have not met any of their targets. Yet we know if the United States is a party of that, we will do everything we can. The attitude of the international community appears to be, that if everyone cheats, they will too. We know the World Trade Organization, which is important to trade around the world. A number of our citizens feel and we can see many examples where the United States tries to follow the rules and are put at a distinct advantage to other countries that don't.

And we can see clearly in the Law of the Sea Treaty. Russia is a party to the Law of the Sea Treaty. They signed up to it, but they didn't go to this authority to ask where their sovereignty reached. They planted a flag. Canada is part of this agreement as well.

And if we think, as a Congress, that the members, the signatories to this Sea Treaty are going to vote in favor of the United States, we need to look at the list. Iran has an equal vote to us, so does Saudi Arabia, and a number of the countries that don't have our interest or have demonstrated they do not have the world's interest in their mind. Yet we are submitting ourselves to this.

I know in theory, that everything we're talking about is good and it would work, but I'm astounded at the thought of legal predictability that you're talking about, legal certainty with an international community, when we have yet to see that demonstrated in any international community, that we can count on other nations to respond to a body like this with no enforcement authority. The theory is good, but I think it is unreasonable for us, as we look at the other bodies that we're a party of, to submit ourselves again to an international group.

I think America and our fellow countrymen are deeply sensitive about it now. We saw that during the immigration debate. The e-mails and phone calls we got, a lot of them had nothing to do with immigration. They were concerned about our sovereignty, our borders. They were concerned about Congress not acting in their best interest and not really trusting us to act in their best interest.

All of us get e-mails and phone calls about the North American Union that people are concerned about, or the NAFTA highway.

And I would just contend to all of you, as we move forward with debating this, this is not a good time to bring something like this back up in front of the American people. I'm a little confused at the testimony today. Because you've told us a number of times and a number of different ways that it's working beautifully right now. And you've told us at the same time, that there are important military interests, yet this treaty will have no influence on our military activity around the world. And I'm just confused.

We know there's already creeping jurisdiction within the authority of this treaty. We've seen that they claim jurisdiction on land pollution in Great Britain. And we know what happens when we turn authority over to a third party, that what we think is their mission, will soon be greatly expanded all over the world to the disadvantage of the United States. If we look at the parties to this agreement, they will not vote—and have demonstrated in the United Nations and other bodies that they will not vote—in the best interest of the United States. And so, we need to consider jurisdiction.

I would just like to ask, and I'll start with you, Director Negroponte, how will this entity, this authority as it's called in the treaty, enforce their decisions? I mean, we're in Iraq today because the United Nations would not enforce their own resolutions and the parties to the United Nations would not support us in that. How can they enforce? How are they going to enforce with Russia, their flag on the bottom of the ocean, or Canada's claim, when these groups apparently do not even respect the treaty they've already signed up to? I would like you to think of that. And how can you say this international body's going to give us legal certainty? So just start with those questions, please.

Mr. NEGROPONTE. First of all, Senator, when we talk about the treaty, as Senator Lugar pointed out, despite the title of the Convention, this is not a U.N. body.

Senator DEMINT. It is a new international——

Mr. NEGROPONTE. It's a new agreement amongst the parties and there are a lot of Conventions of this kind, where the parties agree to carry out certain activities. And I'm familiar, for example, with the Antarctic Treaty Convention, where we carry out a lot of constructive activities through agreement amongst the parties down there. That would be my first point.

Second, with regards to how do you enforce? With respect to this Russian claim, they haven't—they've symbolically planted the flag, but they're actually going through the process laid out in the Convention by gathering the information that they need to justify their claim to the technical body that addresses the Continental Shelf beyond 200 miles.

And that information is being studied by that Commission. And that Commission, which is a technical body, will have the responsibility of saying whether they think this claim is justified or not. And if they say it's not justified, Russia will still be entitled to make a claim, but it's not going to have the legal certainty, if you will, and the international recognition that comes with—if you have the blessing of the Commission. So that would be one point.

On the Seabed Authority, let's be clear. We're only talking about seabed activity beyond 200-mile jurisdiction, if and when deep seabed mining activity takes place, which until this date, it has not done. So, I don't think that this is some kind of a sweeping matter, regarding the entire use of the oceans. And we've already mentioned all the different activities that we believe are protected by the language of the Commission.

Senator DEMINT. But they've already identified a land source of pollution and basically charged Great Britain with polluting the oceans. Is there any reason to think that they won't find something in the air 200 miles off of California and try to make some claim on the United States?

I mean, obviously we're concerned with mission creep and I know you can't answer that question. And I, my talk was more to express a concern than question. They have no way to enforce anything that they do. So they're based—the whole premise is based on countries that abide by the law.

Mr. NEGROPONTE. But when it comes to economic activity, which a lot of this deals with, whether it's seabed mining or Continental Shelf exploitation, if you don't have some kind of international recognition, it becomes a lot harder to find investors and companies that are going to be willing to take the kind of risks that are involved in exploitative economic activities, in what, I think, are fairly characterized as usually quite hazardous and challenging conditions when you're getting out into the seabed.

Senator DEMINT. I know my time has expired. Thank you very much.

Admiral WALSH. Mr. Chairman, if I could respond to the question raised by the Senator on certainty. I think there's some national security points here that are germane to this if I could follow up.

Senator WEBB. Alright, Admiral. Admiral Walsh, go ahead.

Admiral WALSH. Yes, sir; thank you.

Senator WEBB. I'd ask you to be fairly brief if you could. We're trying to get through the round here.

Admiral WALSH. Yes, sir.

Senator WEBB. But go ahead.

Admiral WALSH. One of the challenges, sir, with regard to legal certainty is customary international law. That's the practice here that states operate with. We don't have much experience with that here at home. And so, it's hard to recognize when we see it. I can tell you from living in the neighborhood what it looks like. It's when a state starts doing something different.

And in this particular case, since the 1975 Algiers Accord between Iran and Iraq, which had codified the border between the two countries, what that had done during the Iran-Iraq war at the termination of hostilities, Saddam made some arrangements that no one really knows or understands. And what has happened in place since the end of that war in 1990, is a custom, is a practice of who owns what water. These are waters in dispute. And we have measurably and seen demonstrated, now changes to customary international law in Iran.

You may remember that as the UK15 who were picked up in Iraqi territorial waters. What we are witnessing over time, is assertions, exaggerated assertions, illegal assertions, by a country that

is not party to the Convention, that is now migrating through course of habit and practice, intentionally moving the line into Iraqi territorial waters. And so, for those of us who live here, this is hard to see. This is a huge issue for those who live in the region. The legal certainty that we ask for in this treaty, is the codification of understanding what the territorial seas are, what the contiguous zone is, what the economic exclusion zone is. That's what we mean by legal certainty.

Senator DEMINT. OK. And Iran is a signatory?

Admiral WALSH. No. No, sir; they're not.

Senator DEMINT. Well, they're on the list.

Admiral WALSH. I've got the list here.

Senator DEMINT. I don't think it's been ratified, but they're on the list.

Senator WEBB. Apparently Iran has signed the treaty.

Senator DEMINT. Right.

Senator WEBB. But has not ratified.

Senator DEMINT. And will not abide by it.

Senator WEBB. Thank you, Admiral.

Senator Isakson.

Senator ISAKSON. Thank you, Mr. Chairman. And I appreciate Chairman Biden and yourself having this hearing. I was one of the ones that asked for this hearing, since this is my first year on the Foreign Relations Committee.

In 1963, we had a Cuban Missile Crisis and we blockaded Cuba. That was, I guess, under the old or existing law which at the time was the Law of the Oceans of 1958. Is there any—and we did that unilaterally and ultimately stood down Khrushchev and the Soviet Union—is there anything——

Senator WEBB. For the record, Senator, that was 1962.

Senator ISAKSON. Was it 1962?

Senator WEBB. Yes.

Senator ISAKSON. I was in college then, I just—my memory was bad as to which year it was. [Laughter.]

Anyway, is there anything in the Law of the Sea Treaty that would not allow that same thing to take place again today, were our interests to be threatened militarily?

Mr. NEGROPONTE. Nothing would prevent us from doing that if we determined it to be in our national security interest to do so.

Senator ISAKSON. What else did I get wrong?

Mr. NEGROPONTE. I was junior officer in Hong Kong during that crisis. And because of the way that quarantine, as it was called, was enforced, we designated quarantine officers all over our diplomatic and consular establishments. And I was the quarantine officer in Hong Kong, which involved going down to all the shipping companies and telling them what would happen to their ships if they tried to cross the line.

Senator ISAKSON. And that's why it worked.

With regard to this whole question about the United Nations, as I understand your legal counsel's explanation when I was listening earlier, as a signatory you become a member of the Commission that governs the treaty. Is that correct?

Mr. BELLINGER. We would become a permanent member of the Council for the International Seabed Authority, but none of this, is not a U.N. entity.

Senator ISAKSON. No; I understand. Is everybody that signs a member of the Council?

Mr. BELLINGER. No; they're not. We would be in a privileged position.

Senator ISAKSON. Is that designated by the treaty?

Mr. BELLINGER. It is. Frankly it was clever, because it gives a seat at the table to the country, as of the date of the amendments, the new agreement in 1994, to the country with the largest GDP at that time. There was only one country that had that. That was the United States.

Senator ISAKSON. That was good negotiating. The——

Mr. BELLINGER. And it's a permanent seat.

Senator ISAKSON. On that question, the tax question which was raised earlier and I heard your answer to be, that if, in fact, deep seabed mining takes place and if, in fact, revenues start to flow, there'd be a 1-percent up to 7-percent flow of revenue to the Council. Is that to be decided on its distribution within the Member Nations, I presume?

Mr. BELLINGER. Yes, sir; to the Authority and then it would not flow anywhere until the Council decided where it would be distributed to and we would have a veto. The Council has to reach decisions by consensus. We have a permanent seat on the Council, so we could block any decision, with respect to distribution, if they decided, to give it to a country we didn't like.

Senator ISAKSON. The current 12-mile sovereignty or 12-mile limit, is that established under the 1958 law?

Mr. NEGROPONTE. They couldn't agree on the extent of the territorial sea.

Senator ISAKSON. Where does the 12 miles come from?

Mr. NEGROPONTE. That comes from this, internationally, from this Law of the Sea Convention, the one that we're—is under consideration.

Senator ISAKSON. What is the 200 miles?

Mr. NEGROPONTE. Also, those were the two, the extension of sovereignty out to 12 miles, full sovereignty and exclusive economic jurisdiction out to 200 miles—are key features of this.

Senator ISAKSON. Well, that leads to my question.

Mr. NEGROPONTE. And the tradeoff was, in exchange for acknowledgement, of those jurisdictional extensions, are that fundamental security and navigational rights would be recognized.

Senator ISAKSON. That leads to what will be my last question. I would imagine our Admiral here will be able to—I should direct it to him. At the Port of Savannah and the Port of Brunswick both in my State, I have gone down with the Coast Guard, flown out to the outer limit, watched their activities in the interest of Homeland Security, in terms of cargo ships coming in. That's within the 12-mile limit. That's going to remain restricted to 12 miles because it's not an economic function, it's an enforcement function, I presume. Is that correct?

Mr. NEGROPONTE. What there is, is also a so-called contiguous zone, which is the 12 miles beyond our 12-mile jurisdictional

zone—which we can use to enforce some of these port states', if you will, regulations.

Senator ISAKSON. And I think that's a very important point, in terms of national security and, in particular, port security.

Now, last, you said we're not restricted from boarding an unflagged ship?

Admiral WALSH. Stateless vessels, yes, sir.

Senator ISAKSON. But you are—you are restricted from boarding a flagged ship?

Admiral WALSH. There is language in the treaty that talks about some of the restrictions, with regard to flagged states.

Senator ISAKSON. On that question, and you probably know the answer to this, if you have a flagged ship that does not have a known shipper certificate, cargowise, would you, in the interest of your port security, be able to board that ship to search the cargo to make sure it's safe?

Admiral WALSH. There is a long list of operating definitions that elaborate on what we mean by stateless vessel. We have seen the ruse by some masters to change flags, to not have certification, to not be able to identify the master. I mean, these are typically fishing vessels run by men that have Rolex watches and clean hands and no fishing nets. So, we do have experience in this area and have operated under the provisions of article 110, that have allowed for boardings in that circumstance.

Senator ISAKSON. And last—that was my last question, I've got one more—under the treaty, I think you said we have free, even though 200 miles expansion would cover the entire Strait of Hormuz from one side to another, I guess from Abudabeh all the way over to Iran, we still have rights of passage through there unfettered. Is that correct?

Admiral WALSH. Yes, sir.

Senator ISAKSON. And any other restricted, I mean, not restricted, but tight passages.

Admiral WALSH. Yes, sir. I mean, the Strait of Hormuz is about 19 miles of operating water and yes, within the strait, the language is very clear. The protections are there and the document is very consistent on that.

Senator ISAKSON. Thank you very much, gentlemen.

Senator WEBB. Senator Vitter.

Senator VITTER. Thank you all for being here and, more importantly, thank you all for your service.

My concerns about the treaty concern our military and our sovereignty. We have discussed, and you made a very important point earlier, that military activities are not subject to review by arbitration panels or the International tribunal of Law of the Sea under the treaty. However, I still have a significant outstanding concern that has not been addressed: Who decides what is, and what is not, a military activity?

Mr. NEGROPONTE. We will decide that.

Senator VITTER. Where does——

Mr. NEGROPONTE. We consider that within our sovereign prerogative.

Senator VITTER. Where does the treaty say that we determine what constitutes a military activity and that an arbitral body does not have the authority to rule on this as a term of the treaty?

Mr. ENGLAND. My understanding, and I'll ask, I guess, my lower behind me, that that's in the treaty, that we make that determination and that's not subject to review by anyone else.

Senator VITTER. It's not in the treaty. I'd like to point you to Article 298(1)(B), where it simply says, "Disputes concerning military activities are not subject to dispute resolution." What the treaty fails to address is who has the authority to determine what is and what is not in fact a military activity.

Mr. ENGLAND. No; you're right. In my confusion, I believe as in the resolution, the basic consent that in 2003—is that correct—it went, came before the Senate, so that would be a provision of approval. So, we would reserve that right as part of our approval of this Convention. Have I said that right?

Senator VITTER. But that provision, which is in the Resolution of Ratification, is our language. This language is not included in the treaty. And the treaty says, specifically in article 309, that the treaty is the treaty; no reservations or exceptions may be made to the treaty's provisions. The fact that we are concerned enough about the issue of military activities that we've included it in the Resolution of Ratification only heightens my concern.

Mr. BELLINGER. Could I take a crack at that?

Senator VITTER. Including an exception insisting that only we can define what constitutes military activities for our own military in the resolution simply serves to highlight that it's not in the treaty.

Mr. BELLINGER. With respect to almost all treaties, there are vague terms in the treaties. And if they're not defined, then a country will take understandings as to how it understands certain terms to be accepted. And this is a regular thing that this committee does. So in this case, with military activities not defined in the treaty, it is up to the countries to decide what that is going to mean.

And in this case, we are sufficiently concerned that we want to make clear, that we decide, that we would put that in as an understanding, as part of the Senate's understanding. And this is a very common practice, almost all treaties that the Senate approves have got some understandings as to what the shared understanding between the Executive and the Senate is, with respect to particular terms.

Senator VITTER. Right. My point is, just because this may be our understanding, it does not necessarily follow that it is the understanding of other signatories to the treaty. Is that correct?

Mr. ENGLAND. Can I ask the Admiral to make a comment, who's behind me, who is our legal counsel. Because I believe there are declarations that are allowed and this is one of the declarations. Could I have my legal just comment?

Senator VITTER. Sure.

Mr. ENGLAND. Because this is a technical but hugely important point.

Rear Admiral MACDONALD. Senator, you're correct in saying that the treaty doesn't allow reservations to be taken. It specifically

says you can not take a reservation to the treaty. But it does specifically provide that you can take, you can make a declaration. And that's what we're going to take if the Senate approves the treaty and the Resolution of Advice and Consent, we would make this a declaration, that the United States alone determines what is or is not a military activity. Other nations have taken the military activities exemption. When this was debated back in 2004, this was an issue in 2004, and after the debate, the PRC, the Chinese came in, and took the military activities exemption.

Senator VITTER. Let me rephrase my concern another way. Isn't it true that there would be nothing to prevent another country, with a different understanding about U.S. military activities, to bring a dispute regarding what is, or is not, a U.S. military activity to this mandatory arbitral process, to which we would be bound?

Mr. BELLINGER. Senator, they can always try, but the treaty specifically states that parties may opt out of any disputes having to do with military activity. All other major countries have done that and we would do that.

Senator VITTER. The other country does not agree that the matter concerns a military activity. The disagreement would be about defining what is, and what is not, a military activity as a term in the treaty about which two members disagree. This type of dispute falls under the treaty.

Mr. BELLINGER. It is up to countries to decide what are their own military activities.

Senator VITTER. That was my first question, Where does it say that in the treaty?

Mr. BELLINGER. Unless an interpretation is contrary to the object and purpose of a treaty, it is going to be up to a country to decide what those terms mean. And this is, in fact, an issue that we've thought about. It's one reason why the administration recommended in the Resolution of Advice and Consent that we be very clear on this point. But I would defer to my military contacts when they say its a risk.

Senator VITTER. I have limited time, so I want to go on to some other things.

I would just say that the fact that this is actually included in the Resolution for Ratification heightens my concern. It underscores the fact that the treaty doesn't include this protection. We attempt to tack it on in the resolution.

But let me go on to some other points and related issues: Are intelligence activities included as military activities?

Mr. ENGLAND. The question: Are they affected?

Senator VITTER. Are intelligence activities considered to be excluded from the treaty's jurisdiction as a military activity?

Mr. ENGLAND. To the best of my knowledge they are. Again, Bruce, do you have a—can you help me specifically to the language. You need to answer.

Mr. BELLINGER. Senator, why don't I take a crack at that also? It would be up to us to determine that there's nothing in the treaty that limits our intelligence collection activities.

Senator VITTER. No.

Mr. BELLINGER. It would be up to us, if we considered an intelligence activity to be a military activity. And you've heard the Sen-

ate Intelligence Committee assure us that they do not think it would interfere with our intelligence activities.

Senator VITTER. Well again, this has heightened my concern, because we say it would be up to us, yet no other treaty signatory has agreed to this. And to help demonstrate about how parties can disagree on this point, around Capitol Hill, for instance, in terms of committee jurisdiction, we consider intelligence a distinct category separate from the military issues. So, that's really heightening my concern.

If I could have 1 or 2 more minutes, Mr. Chairman.

Senator WEBB. Certainly.

Senator VITTER. Thank you very much.

Another concern is regulation of domestic activity. It seems to me the treaty clearly states jurisdiction over land-based pollution sources. Why do we want to open that Pandora's Box?

Mr. BELLINGER. Senator, I think it clearly does not allow regulation over land-based pollution sources. That would stop at the water's edge. As far as, at least dispute resolution involving them, there can be limitations on the pollution that could emanate, but as far as the ability of any other country to complain and bring us to dispute resolution over pollution that would come from land, that's not permitted under the treaty.

Senator VITTER. Well Article 213 says, "States shall enforce their law on and shall—shall," mandatory, "adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce, and control pollution." Well, it sounds to me like the Kyoto Protocol is an international standard and we shall pass laws to enforce that.

Mr. BELLINGER. Well, this is not a backdoor way to subject us to the Kyoto Protocol. There is no way that the standard, that those standards could be standards that someone could subject us to in dispute resolutions.

Senator VITTER. Why? The treaty states we shall pass laws to enforce international environmental standards. So why couldn't a state clearly take us before the Tribunal or Arbitration Panel to say, "You're not doing that. You need to heighten environmental laws A, B, C, D, and E."

Mr. NEGROPONTE. There are some environmental issues that are the subject of international agreements, such as ocean dumping, for example. But the—when you talk about land-based pollution, our view is that that's just not covered by the treaty, Senator. I think that's the point, that we believe that there is no jurisdiction over marine pollution disputes involving land-based sources.

Senator VITTER. If it is not covered by the treaty, why is there a section entitled, "Pollution From Land-Based Sources"?

Mr. BELLINGER. It's just the dispute resolution. The treaty has got a number of general hortatory provisions, but the dispute resolution mechanisms are extremely limited for this very reason. We wanted dispute resolution to have things we could use in our favor. If our vessels were seized, people didn't let us go through their territorial seas.

Senator VITTER. Let me follow up on your answer, because section 6, specifically and directly deals with enforcement of the trea-

ty's land-based pollution provisions. You said it's not part of the dispute resolution process, but section 6, is titled "Enforcement." The article is titled, "Enforcement With Respect to Pollution From Land-Based Sources." Why is that article there if there is no enforcement, with regard to pollution from land-based sources?

Mr. BELLINGER. I think this gets sufficiently technical. We have worked our way through the treaty, we are confident that pollution from land-based sources would not be subject to the jurisdiction of the tribunals or arbitral panels, but we're happy to write it down for you on paper and get it to you, Senator.

Senator VITTER. Well, I would point you to section 6, article 213, page 176, which is about enforcement, with respect to pollution from land-based sources. It seems to me, the very title of that article at least sets up a prima facie case that your statement isn't correct.

Mr. BELLINGER. We will have a look at it, Senator. Although again, the bigger picture of the enormous national security benefits of the treaty, and certainly our military will tell you that they would not enter into anything where they thought there would be legal risks to the military. But we will—we will have a close look at the provision on land-based pollution.

Senator WEBB. Would the Senator——

Senator VITTER. Thank you.

Senator WEBB [continuing]. Be amenable to receiving a response in writing, within a reasonable—like a really reasonable period of time addressing this point?

Senator VITTER. Sure.

[The submitted written response by Mr. Bellinger to the requested information follows:]

The Convention addresses various forms of marine pollution, including pollution from land-based sources (for example, article 207).

However, alleged marine pollution by the United States from land-based sources is not subject to dispute settlement under the Convention, whether by the Tribunal, arbitration, or otherwise. Because of the sensitivities of coastal states concerning their land-based (and certain other) activities, the Convention sets forth limitations on the obligations related to marine pollution that can be subject to dispute settlement.

Specifically, article 297(1)(c) provides that only certain coastal state obligations related to marine pollution are subject to dispute settlement. Among other things, there needs to be a "specified" international rule or standard "applicable" to the coastal state.

In the case of land-based sources of marine pollution, the Convention does not obligate the coastal state to follow an international rule or standard, much less a specified one. On the contrary, recognizing the sensitivity surrounding land-based activities, under article 207, coastal states are merely to "take into account" internationally agreed rules, standards, etc.

Thus, there are no specified rules regarding land-based sources that are applicable to the United States that would be subject to dispute settlement. (It should be noted that, even if there were specified rules/standards applicable to the United States, article 207 would not require the coastal state to follow such standards, just to take them into account.)

The "enforcement" provisions in part XII (such as article 213) do not address party-to-party dispute settlement. Rather, they either allocate enforcement responsibilities as among flag states, port states, and coastal states or they address enforcement by parties vis-a-vis private actors, such as their flag vessels or foreign flag vessels.

In the case of land-based sources, article 213 provides for parties to enforce their respective land-based sources laws and to implement "applicable" international rules. It does not address party-to-party dispute settlement, which is covered by article 297 and other provisions in the dispute settlement chapter.

Senator WEBB. All right. Thank you. And on one follow-on question before we close the hearing. I want to make sure that, for the record, your position on the other point that Senator Vitter mentioned, is clearly stated. Let me just ask you if my understanding is correct. I believe what you were saying, if, looking at article 298. It basically exempts disputes concerning military activities, but from my reading of it, is silent as to what the enforcement mechanism would be. And as someone who used to draft legislation here, I'm not sure this directly applies, but I want to, this is my understanding, what your position is, that anytime legislation is silent, existing law prevails. And anytime this sort of treaty provision is silent, it goes back to the law of the individual country involved. Is that essentially what you're saying?

Mr. BELLINGER. Yes, sir. We specifically negotiated the treaty and at—we had the same interests as other major powers, like the Russians or Chinese, who certainly did not want to have their military activities subject to dispute resolution. So we had a commonality of interests here, to have a provision that allowed us in the treaty, to opt out of any dispute resolution involving our military activities. That's a right you have under the treaty and we would do that. Then, the Senator has raised a fair question, as to, who decides what's a military activity. It's not defined in the treaty, so under general treaty practice, if it's not contrary to language in the treaty, it would be up to us to decide.

Senator WEBB. Right.

Mr. BELLINGER. And I'm sure that other major countries would take exactly the same position.

Senator WEBB. That was my understanding of what you were saying. I wanted to make sure we had that clear for the record.

Senator VITTER. Mr. Chairman, if I can follow up——

Senator WEBB. Yes.

Senator VITTER [continuing]. On that very briefly. First, I am concerned that, when the treaty is silent about defining what constitutes military activities, and the treaty sets up, specifically, a mandatory dispute resolution mechanism to settle differences regarding interpretation of the treaty's terms, it would be a very reasonable position to assert that the dispute resolution mechanism can be utilized to determine what constitutes a military, and a nonmilitary activity.

Second, I'm particularly concerned that we think, and hope, intelligence is considered military, but that this certainly isn't stated in the treaty text. And around here, just again to use Capitol Hill as an example, with committee jurisdictions et cetera, intelligence is treated as a very distinct smokestack from military activities.

Senator WEBB. Well, the Senator has made his point. And again, we have the letters from the chairman of the Intelligence Committee and the ranking member, but his point is appreciated and we will examine it.

This series of hearings will continue next week with other witnesses. Gentlemen, we thank you very much for your time today.

And the hearing is adjourned.

[Whereupon, at 4:24 p.m., the hearing was adjourned.]

MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. JOSEPH R. BIDEN, JR., U.S. SENATOR FROM DELAWARE

I regret that I am unable to attend today's hearing on the Convention on the Law of the Sea, a framework treaty that governs the use of the world's oceans. I am grateful to Senator Webb for presiding in my stead. As a former Secretary of the Navy, he is uniquely qualified among the members of this committee for this task.

This is the second time that the committee has considered this treaty. Senator Lugar convened two hearings in October 2003. In 2004, the committee endorsed the Convention by a unanimous vote of 19–0. Unfortunately, the Convention was not considered by the full Senate.

This time I hope things will be different. In one respect, they already are: President Bush has made a strong statement urging the Senate to approve the Convention. In May he said that the Convention: "Will serve the national security interests of the United States, including the maritime mobility of our Armed Forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable natural resources they contain. Accession [to the Convention] will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted."

The President's statement is an excellent summary of the reasons why the United States should ratify this Convention. Let me briefly echo and elaborate on his statement.

The United States is a major naval power and trading nation. Freedom of navigation for military and commercial vessels on the seas is therefore essential to U.S. national and economic security. The Convention sets forth the rules for navigation in a way favorable to these interests. Without the benefit of the Convention, we will be left to rely on the vagaries of customary international law—an unwritten set of rules that results from the practice of nations.

Today, 155 nations are party to the Convention, including all of our NATO partners, except Turkey. So, too, are major maritime powers such as Russia, China, and India. Also members are allies in Asia such as Australia, Indonesia, Korea, and Japan. If navigational rules are going to change, it will occur within the framework of the Convention. If the United States is not a party, our voice will be severely weakened as those changes are developed.

As a nation with large coastlines, we have an interest in the sustainable use of the natural resources off our coast, and in protecting the marine environment. The Convention gives us control over these resources out to 200 nautical miles, including those on the Continental Shelf. No nation may fish or exploit the minerals of this area without the permission of the United States. Far from threatening our sovereignty, the Convention allows us to secure and extend our sovereign rights.

I am grateful to Senator Lugar for his efforts on the treaty during his chairmanship, and to Senator Webb for presiding at today's hearing.

LETTER FROM THE DIRECTOR OF THE JOINT CHIEFS OF STAFF

CHAIRMAN OF THE JOINT CHIEFS OF STAFF,
Washington, DC, 26 June 2007.

Hon. JOSEPH BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As the world's preeminent maritime power, leader in the War on Terrorism, and Nation with the largest exclusive economic zone, the United States should accede to the Law of the Sea Convention during this session of Congress. No country has a greater interest in public order for the world's oceans. Becoming a Party to the Convention will ensure our leadership role in the continuing development of oceans law and policy.

The Convention codifies navigation and overflight rights and high seas freedoms that are essential for the global mobility of our Armed Forces. It furthers our National Security Strategy, strengthens the coalition, and supports the President's Proliferation Security Initiative.

From sustaining forward deployed military forces, to ensuring the security of our ports and waters as well as advancing our most important economic and foreign policy objectives, it is important that the United States become a Party to the Convention.

In closing, we offer our gratitude for your efforts and those of Senator Lugar to bring this important Convention to the Senate for consideration.

Very Respectfully,

GEN PETER PACE,
U.S. Marine Corps, Chairman.

ADM E.P. GIAMBASTIANI,
U.S. Navy, Vice Chairman.

ADM M.G. MULLEN,
U.S. Navy, Chief of Naval Operations.

GEN T. MICHAEL MOSELEY,
U.S. Air Force, Chief of Staff.

GEN J.T. CONWAY,
Commandant of the Marine Corps.

GEN GEORGE W. CASEY,
U.S. Army, Chief of Staff.

LETTER FROM SECRETARY MICHAEL CHERTOFF, HOMELAND SECURITY

SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY,
Washington, DC, September 26, 2007.

Hon. JOSEPH BIDEN,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN: As Secretary of the Department of Homeland Security, I reiterate the strong support that the Department has provided since its inception to the United States becoming a party to the 1982 United Nations Convention on the Law of the Sea. Admiral Thad A. Allen, the Commandant of the U.S. Coast Guard (USCG), has repeatedly stated that the United States "can best maintain a public order of the oceans through a universally accepted law of the sea treaty that preserves and promotes critical U.S. national interests." In addition, four former USCG Commandants recently wrote a joint letter to your Committee. They argue that accession to the Convention will enable the USCG to better carry out its missions to protect the security and welfare of the citizens of the United States. I am equally convinced of the importance of the Convention to promote other missions of my Department.

Becoming a party to the Law of the Sea Convention would greatly enhance the U.S. global position in maritime affairs, as well as our ability to protect the security of the American public. It promotes the efforts of the USCG to protect and manage the living and non-living resources of the ocean and to preserve the marine environment. The Convention strikes the appropriate balance between the exclusive interests of all countries in controlling many activities off their coasts with the inclusive interests of all countries in protecting freedom of navigation and overflight in ocean space. The Convention gives coastal states the right to protect their marine environment, manage their fisheries and off-shore oil and gas resources within the 200-nautical mile exclusive economic zone (EEZ), and secure sovereign rights over resources on and under an extended continental shelf beyond 200 miles. The U.S. has the largest and richest EEZ in the world. Moreover, our extended continental shelf has enormous potential oil and gas reserves, particularly in the Bering Sea and Arctic Ocean. Only by becoming a party to the Law of the Sea Convention and participating in its processes can the United States obtain secure title to these vast resources. In my opinion, no American business enterprise is going to invest the many billions of dollars necessary to develop an off-shore oil or gas field, no matter how rich it might be, unless it has an undisputed right to do so under both national and international law.

The Convention is also critical in promoting our national and homeland security interests. U.S. military forces, including USCG units, rely heavily on the freedom of navigation and overflight principles codified in the Convention. These principles allow the use of the world's oceans to meet challenging national security requirements, including those necessary to fight the Global War on Terrorism. In this regard, worldwide mobility requires undisputed access through international straits and archipelagic waters. The Convention also ensures our warships and USCG cutters will have their sovereign immunity protected wherever in the world they may be operating.

Let me briefly acknowledge that there is a small group of strident opponents who have raised a number of badly flawed arguments against the Convention. While many experts have convincingly refuted each of those objections, let me quote part of the "24-star letter" that the Chairman, Vice Chairman, and every other member of The Joint Chiefs of Staff signed and sent to your Committee on June 26, 2007: "From sustaining forward deployed military to ensuring the security of our ports and waters as well as advancing our most important economic and foreign policy objectives, it is important that the United States becomes a party to the Convention." The entire civilian and military leadership responsible for our Nation's security, from the President and his National Security Advisor on down, unanimously support the Convention without reservation. I include myself among those who strongly support the Convention.

For these reasons, and others developed in testimony before and submissions to the Committee, I strongly urge the Committee and the full Senate to approve accession to the Law of the Sea Convention during this session of Congress. I want to particularly commend your efforts and those of Senator Lugar for bringing this vitally important Convention to the Senate for its advice and consent.

An identical letter has been sent to Senator Reid, Senator McConnell, and Senator Lugar.

Sincerely,

MICHAEL CHERTOFF.

LETTER FROM SENATE SELECT COMMITTEE ON INTELLIGENCE

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC, September 14, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman,
Committee on Foreign Relations,
U.S. Senate, Washington, DC.

Hon. RICHARD G. LUGAR,
Ranking Member,
Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN AND SENATOR LUGAR: On May 15, 2007, the President issued a statement urging the Senate to act on the United Nations Convention on the Law of the Sea (the Law of the Sea Convention) during this session of Congress. Because concerns have been expressed about the relationship between the Law of the Sea Convention and U.S. national security, we feel it important to describe publicly our Committee's inquiry into, and assessment of, the question of whether the Law of the Sea Convention would have any impact on U.S. intelligence capabilities.

On June 8, 2004, the Select Committee on Intelligence held a closed hearing on the intelligence implications of United States accession to the Law of the Sea Convention. In that hearing, the Director of Naval Intelligence, the Assistant Director of Central Intelligence for Collection, and the Legal Advisor at the Department of State expressed their support for accession to the Law of the Sea Convention, and stated that the Convention does not affect the conduct of intelligence activities.

Given the renewed interest in U.S. accession to the Law of the Sea Convention, we recently asked the Secretary of State, the Secretary of Defense, and the Director of National Intelligence to confirm that the Administration continues to support the conclusion that the Law of the Sea Convention would not affect U.S. intelligence activities, as presented in the testimony presented in June of 2004.

The Director of National Intelligence responded with the attached letter, which was coordinated with the Department of State and Department of Defense. This letter accurately represents the conclusions of the classified testimony of the Department of Defense, Department of State, and Intelligence Community officials on this matter in 2004. The unclassified statement of William H. Taft IV, the former Legal Advisor to the U.S. Department of State, which is referenced in the letter from the Director of National Intelligence, is also attached.

Based on our consideration of these matters, we concur in the assessment of the Intelligence Community, the Department of Defense, and the Department of State that the Law of the Sea Convention neither regulates intelligence activities nor subjects disputes over intelligence activities to settlement procedures under the Convention. It is therefore our judgment that accession to the Convention will not adversely affect U.S. intelligence collection or other intelligence activities.

We will be pleased to make available to you and the other members of the Committee on Foreign Relations, and to appropriately cleared staff, our full record of that hearing and related materials.

Please let us know if we can be of assistance in any other way in the Committee's and the Senate's consideration of the Law of the Sea Convention.

Sincerely,

JOHN D. ROCKEFELLER IV, *Chairman.*
CHRISTOPHER S. BOND, *Vice Chairman.*

Attachments.

DIRECTOR OF NATIONAL INTELLIGENCE,
Washington, DC, August 8, 2007.

Hon. John D. Rockefeller IV,
Chairman, Select Committee on Intelligence,
U.S. Senate, Washington, DC.

Hon. Christopher S. Bond,
Vice Chairman, Select Committee on Intelligence,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN AND VICE CHAIRMAN BOND: In response to your July 6, 2007, letter regarding the Law of the Sea Convention, the testimony provided at the June 8, 2004, closed hearing continues to represent the Administration's position about the intelligence impact of the Convention.

Rear Admiral Richard B. Porterfield, then Director of Naval Intelligence, delivered classified testimony at the 2004 hearing. We are advised by the Department of Defense that the following conclusions can be shared in an unclassified form:

> I realize that this Committee is concerned about whether the Convention prohibits our naval operations, in particular our maritime intelligence activities. I can say without hesitation that it does not . . .
>
> [T]he Convention is, if anything, more favorable to our navigation and security interests than are the 1958 treaties. Bottom line: Acceding to the Convention will not change the legal regime under which our intelligence operations have been conducted for decades.
>
> Mr. Chairman, since 1983 the Navy has conducted its activities in accordance with President Reagan's Oceans Policy statement, to operate in a manner consistent with the Convention's navigational freedoms provisions. If the U.S. accedes to the Convention, we would continue to operate as we have done since 1983 . . .

In addition, Mr. Charles Allen, then Assistant Director of Central Intelligence for Collection, presented the following unclassified testimony:

> First, the overwhelming opinion of Law of the Sea experts and legal advisors is that the Law of the Sea Convention simply does not regulate intelligence activities nor was it intended to . . .
>
> Second, the Convention provides that a party may exclude military activities from jurisdiction of the Convention's dispute settlement procedures . . . the term "military activities" includes intelligence activities.
>
> Third, the definition of "innocent passage" in the 1982 Convention seems to provide a small advantage over the 1958 Convention, which the U.S. ratified and [under] which we currently operate . . .
>
> Fourth, the 1982 Convention explicitly recognizes an additional right of passage through international straits, a recognition that is absent from the 1958 Convention. This right of transit passage through one part of the high seas to another further reinforces the freedom of navigation for U.S. vessels and may thereby facilitate national security activities.
>
> Fifth, regardless of any party's attempt to bring forth a claim under the Convention, the Convention makes clear that parties shall not be required, in the course of any dispute settlement, to disclose information that may be contrary to the party's essential interests of security. This protection against compulsory disclosure is not in the current 1958 Convention to which the U.S. is a party.

Finally, William H. Taft IV, then Legal Advisor at the Department of State, provided unclassified testimony that may be used in its entirety.

> We also would call your attention to the Report of the Committee on Foreign Relations in the Senate of the 108th Congress (Executive Report 108–10 dated March 11, 2004), and in particular to Part VI, which discusses Committee recommendations and comments. The points of understanding

that the Committee noted with respect to military activities and innocent passage are particularly relevant.

This response has been coordinated with both the Department of State and the Department of Defense. We appreciate the support of the SSCI as we move forward on this critical initiative.

If you have any questions regarding this matter, please contact the Director of Legislative Affairs, Kathleen Turner.

Sincerely,

J.M. McCONNELL.

STATEMENT OF WILLIAM H. TAFT IV, LEGAL ADVISOR, U.S. DEPARTMENT OF STATE, WASHINGTON, DC, BEFORE THE SENATE SELECT COMMITTEE ON INTELLIGENCE—JUNE 8, 2004

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. Administration witnesses have previously testified before that committee, the Senate Armed Services Committee, the Senate Environment and Public Works Committee, and the House International Relations Committee in support of U.S. accession to the Convention and reviewed the benefits of becoming a party from a national security, economic, resource, and environmental point of view. This testimony focuses on the intelligence-related issues posed by this committee.

I must say at the outset that I have been puzzled by recent criticisms of the Convention, particularly the notion that the Convention is not in our national security or military interest. 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 rightly rejected the deep seabed chapter of the treaty, and later as Deputy Secretary of Defense. In all that time I never heard it suggested by any Chief of Naval Operations or Chairman of the Joint Chiefs of Staff that there would be any adverse impact on the United States from a national security point of view as a party to the Law of the Sea Convention. And the current Chief of Naval Operations and Chairman of the Joint Chiefs of Staff both strongly support accession.

BACKGROUND

Before turning to intelligence issues, I would note that 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 30 years. The United States is already a party to several 1958 conventions 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. It sets forth a comprehensive framework governing uses of the oceans that is strongly in the U.S. interest, including by providing for U.S. global mobility through freedom of navigation and overflight.

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 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 urge the Senate to give its advice and consent to this Convention, on the basis of the proposed Resolution of Advice and Consent, to allow us to take full advantage of the many benefits it offers.

INTELLIGENCE ISSUES

Turning to intelligence issues in particular, I would note at the outset that the concerns that have been raised about U.S. accession to the Convention appear to involve two basic issues:

- Whether, as a matter of substance, the Convention prohibits or regulates intelligence activities in some way; and
- Whether a potential challenge to intelligence activities of a party would be subject to the Convention's dispute settlement procedures.

The Convention does not prohibit or regulate intelligence activities. And 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. As such, joining the Convention would not affect the conduct of intelligence activities in any way, while supporting U.S. national security, economic, and environmental interests.

I will now turn to the issues raised in the letters of invitations to the witnesses on this panel, grouped by subject matter.

With respect to whether articles 19 and 20 of the Convention would have any impact on U.S. intelligence collection, the answer is "No." 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 noninnocent activities is exhaustive and because it generally uses objective, rather than subjective, criteria in the listing of activities.) A ship does not, of course, under this Convention any more than under the 1958 Convention, enjoy the right of innocent passage in the territorial sea if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act aimed at collecting information to the prejudice of the defense or security of the coastal state; however, such activities are not prohibited or otherwise affected by the Convention. In this respect, the Convention makes no change in the situation or legal regime that has existed for many years and under which we operate today. As to whether our understanding of these provisions' effect (or lack of effect) on intelligence collection is shared by other states, we are not aware of any state's taking the position, either under this Convention or under the 1958 Convention, that the provisions setting forth the conditions for the enjoyment of the right of innocent passage prohibit or otherwise regulate intelligence collection or submerged transit of submarines.

Concerning whether any current Convention party restricts intelligence collection activities in its exclusive economic zone and the potential impact of U.S. ratification in relation to such a party, the Convention does not prohibit, regulate, or authorize the coastal state to regulate intelligence activities in the EEZ. On the contrary, high seas freedoms of navigation and overflight are ensured, including the right to engage in intelligence activities. Certain parties have published regulations purporting to prohibit military activities in general (which are presumably intended to cover intelligence activities) in their EEZs, including Bangladesh, Brazil, Cape Verde, China, India, Malaysia, the Maldives, Mauritius, Pakistan, and Uruguay. If the United States were to become a party to the Convention, while I could not speculate as to whether this would end or affect Chinese or other challenges to intelligence activities, we would be in a stronger position to protest such unlawful assertions of coastal state jurisdiction.

Turning to whether U.S. intelligence operations could be affected by compulsory dispute resolution under the Convention, the Convention expressly permits parties to exclude matters of vital national concern from dispute settlement. Specifically, it permits a state through a declaration to opt out of dispute settlement procedures with respect to disputes concerning military activities. The proposed Senate resolution of advice and consent not only contains such a declaration but also makes clear that a party has the exclusive right to determine whether its activities are or were "military activities" and that such determinations are not subject to review. Thus, 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.

Concerning the question whether the Intelligence Community is now operating under any treaty "that combines a treatment of intelligence activity with United Nations compulsory dispute resolution procedures," the answer is "No." And, for reasons already stated, neither would this Convention be such a treaty. It does not prohibit or regulate intelligence activity; further, the dispute settlement procedures (which, I would also note, are not "United Nations" procedures, but autonomous procedures established by treaty) would not apply to any dispute concerning military activities, including intelligence activities.

Concerning the question whether executive branch priorities already have an impact on intelligence collection activities and the implications of U.S. accession, review from a foreign policy point of view does not include the Law of the Sea Convention, because it does not affect or impair those activities. No change is expected if the United States accedes to the Convention, noting that we have been operating

for decades under the 1958 conventions and customary international law, as reflected in the 1982 Convention.

Regarding the safety of U.S. intelligence collection personnel, U.S. accession to the Convention would not change the current situation that vessels not entitled to the right of innocent passage are subject to appropriate coastal state action if detected. If anything, as Admiral Clark testified before the Senate Armed Services Committee, U.S. accession will help protect U.S. personnel "so that our people know when they're operating in defense of this Nation far from our shores that they have the backing and that they have the authority of widely recognized and accepted law to look to, rather than depending only upon the threat or the use of force."

Turning to the package of declarations and understandings set forth in the proposed Resolution of Advice and Consent, we worked closely with the Senate to ensure that such declarations and understandings satisfied the concerns and issues identified by the administration, including highlighting the importance of the exclusion from dispute settlement of disputes concerning military activities, which includes intelligence activities. And we urge Senate advice and consent on the basis of that resolution.

PROLIFERATION SECURITY INITIATIVE

I would also like to take this opportunity to address the relationship between the Convention and the President's Proliferation Security Initiative, an activity involving the United States and several other countries. The Convention will not affect our efforts under the PSI to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction. 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. 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 control in the 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.

CONCLUSION

Mr. Chairman, thank you for the opportunity to appear today in support of U.S. accession to the Law of the Sea Convention. In my view, the United States should lock in the favorable provisions, including especially those relating to freedom of navigation and national security, that we achieved in negotiating the Convention and Agreement. Joining the Convention will not have any adverse effect on our intelligence operations or activities. The members of this committee should join the unanimous Foreign Relations Committee and support U.S. accession.

ARTICLE FROM THE WALL STREET JOURNAL

[From the Wall Street Journal, Sept. 26, 2007]

WHY THE "LAW OF THE SEA" IS A GOOD DEAL

(By James A. Baker III and George P. Shultz)

The Convention of the Law of the Sea is back. It will be the subject of Senate hearings this week. If the U.S. finally becomes party to this treaty, it will be a boon for our national security and our economic interests. U.S. accession will codify our maritime rights and give us new tools to advance national interests.

The convention's primary functions are to define maritime zones, preserve freedom of navigation, allocate resource rights, establish certainty necessary for various businesses that depend on the sea and protect the marine environment. Flaws in the deep-seabed mining chapter that prevented President Reagan from supporting the convention were fixed in 1994. Both President Bill Clinton and George W. Bush have supported accession. Yet, the U.S. remains one of the few major countries not party to the convention.

Our participation would increase our ability to wage the war on terror. The convention assures maximum maritime naval and air mobility, which is essential for our military forces to operate effectively. It provides the stability and framework for our forces, weapons and materials to be deployed without hindrance—ensuring our ability to navigate past critical choke points throughout the world.

Some say it's good enough to protect our navigational interests through customary law. If that approach fails, then we can employ the threat of force or the use of it. However, because customary law is vague, it does not provide a strong foundation for critical national security rights. Meanwhile, the use of force can be risky and costly. Joining the convention would put our vital rights on a firmer legal basis, gaining legal certainty and legitimacy as we operate in the world's largest international zone.

This is why the U.S. military has been a strong advocate of joining the Law of the Sea Convention. This point was reinforced in a recent letter sent by the Joint Chiefs of Staff to Senator Joe Biden, chairman of the Senate Foreign Relations Committee, calling on the Senate to support U.S. accession because "[i]t furthers our National Security Strategy, strengthens the coalition, and supports the President's Proliferation Security Initiative."

The convention also provides substantial economic benefits to the United States. It accords coastal states the right to declare an Exclusive Economic Zone—an area where they have exclusive rights to explore and exploit, and the responsibility to conserve and manage, living and non-living resources extending 200 nautical miles seaward from their shoreline. Our nation's EEZ is larger than that of any country in the world—covering an area greater than the landmass of the lower 48 states. This zone can be extended beyond 200 nautical miles if certain geological criteria are met. This has potentially significant economic benefits to the U.S. where its continental shelves may be as broad as 600 miles, such as off Alaska, an area containing vast natural resources.

Further, as the world's pre-eminent maritime power with one of the longest coastlines, the U.S. has more to gain and to lose than any other country in terms of how the convention's terms are interpreted and applied.

Accession would increase our influence by allowing us to nominate experts for the technical bodies that apply the convention's terms, address proposals to amend the convention from within (rather than from the sidelines), and increase our credibility as a leader in international ocean policy.

As we speak, international deliberations for rights to energy- and mineral-rich areas in the Arctic beyond the traditional 200-mile EEZ are proceeding without U.S. input. Just recently, Russia placed its flag on the North Pole's ocean floor. While seen as largely symbolic, the part of the Arctic Ocean claimed by Russia could hold oil and gas deposits equal to about 20% of the world's current oil and gas reserves. If the U.S. was party to the treaty, we would strengthen our capacity to influence deliberations and negotiations involving other nations' attempts to extend their continental boundaries.

As a non-party, however, the U.S. has limited options for disputing claims such as these and is stymied from taking full advantage of resources that could be under U.S. jurisdiction. Similarly, lack of participation in the convention is jeopardizing economic opportunities associated with commercial deep-sea mining operations in international waters beyond exclusive economic zones—opportunities currently being pursued by Canadian, Australian and German firms.

The continuing delay of U.S. accession to the convention compromises our nation's authority to exercise its sovereign interests, jeopardizes its national and economic security, and limits its leadership role in international ocean policy.

Given President Bush's public statement of support for the convention, the support of prior presidents and their administrations and the strong, bipartisan and diverse support it has from all major U.S. ocean industries, the environmental community and national security experts, it is clearly time for the Senate to act by supporting accession to the Convention on the Law of the Sea.

MEMO FROM FORMER CHIEFS OF NAVAL OPERATIONS

Memorandum for: Hon. Strom Thurmond, Chairman, Committee on Armed Services; Hon. Trent Lott, Senate Majority Leader; Hon. Jesse Helms, Chairman, Foreign Relations

Subject: Law of the Sea

On February 5, 1998, Secretary of the Navy John Dalton testified before the Senate Aimed Services that one of the Navy's top three legislative priorities for this year is Senate Ratification of the Law of the Sea (LOS) Convention. As former

Chiefs of Naval Operations, we want to underscore Secretary Dalton's request that the Senate act promptly to ratify the Law of the Sea Treaty.

For over three decades the Navy has advocated that the United States push for a multilateral legal and management system which codifies and respects the myriad commercial, resource, and national security interests which we have in the oceans. When President Reagan decided in 1982 that the United States would not sign the 1982 LOS Convention because of deep seabed mining flaws, he reiterated that the United States was committed to a multilateral ocean's regime and the rest of the Convention protected our commercial and national security interests. The Convention was subsequently modified to satisfy our concerns. The modified 1982 Law of the Sea Convention has entered into force and virtually all of our allies and trading partners are now Party. The time is now right for the U.S. to join.

There are no downsides to this treaty—it contains expansive terms, which we use to maintain forward presence and preserve U.S. maritime superiority. It also has vitally important provisions, which guard against the dilution of our navigational freedoms and prevent the growth of new forms of excessive maritime claims. We can ill afford to conduct our foreign policy in the ocean's arena through proxies. It is therefore important that we act now to ratify the Convention to solidify our position of leadership in oceans matters and ensure that our interests are well represented in the organs which will implement the LOS Treaty.

Ratification is a win for the Navy and the Nation as a whole.

F.B. KELSO, *Admiral, USN, (Ret.).*
C.A.H. TROST, *Admiral, USN, (Ret.).*
J.D. WATKINS, *Admiral, USN, (Ret.).*
T.B. HAYWARD, *Admiral, USN, (Ret.).*
J.L. HOLLOWAY, *Admiral, USN, (Ret.).*
E.R. ZUMWALT, *Admiral, USN, (Ret.).*
T.H. MOORER, *Admiral, USN, (Ret.).*

PREPARED STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM CALIFORNIA

Thank you, Chairman Biden for holding this hearing on the United Nations Convention on the Law of the Sea.

I would like to express my support for this treaty. The Law of the Sea has been called an international constitution for our oceans. It is an important international framework that defines maritime zones, protects the marine environment, preserves freedom of navigation, and promotes sustainable development.

I urge that the full Senate strongly support the Convention. Along with ratification we must include important declarations and understandings that clarify how the United States will interpret the Convention to safeguard our environmental, economic, and national security interests.

This treaty has an impressively broad level of support including industries—such as fisheries, oil and gas, and marine transportation—environmental interests, the scientific community, our military, and the President.

It is also hard to ignore its strong bipartisan support, as evident in 2004 when the Senate Foreign Relations Committee voted 19–0 in favor of this treaty, with no abstentions.

In addition, the Presidential-appointed U.S. Commission on Ocean Policy and the privately funded Pew Oceans Commission—recently assembled to develop national ocean policy reform—unanimously recommended accession to the Law of the Sea.

Currently, 155 countries are party to the Convention, including all member countries of NATO, except Turkey and the United States. As a world leader in ocean protection, sustainable use, and maritime power—and with the world's largest Exclusive Economic Zone (EEZ)—it is critical that the United States be at the table, and a party to this treaty.

No country has a greater need to be able to fully participate in governance of the world's oceans. Among many other benefits, this will allow our ocean-related Federal agencies to fully participate in crucial international discussions and negotiations.

In supporting the Law of the Sea we need to ensure that we balance freedoms of navigation with rights to conserve and manage our coastal resources.

As chairman of the Senate Committee on Environment and Public Works, I am committed to ensuring that we maintain our right to safeguard the health of our oceans, our public, and our economy.

I believe we can and must become a party to the U.N. Convention on the Law of the Sea, and protect our national interests with the inclusion of declarations and understandings which provide our interpretation of the Convention.

I look forward to working with you, Mr. Chairman, the Foreign Relations Committee, and other Senate colleagues to support the ratification of the Law of the Sea. Thank you.

COORDINATED RESPONSES OF DEPUTY SECRETARY NEGROPONTE, DEPUTY SECRETARY ENGLAND, ADMIRAL WALSH, AND THE DEPARTMENT OF THE INTERIOR MINERAL MANAGEMENT SERVICE TO QUESTIONS SUBMITTED BY SENATOR BILL NELSON

Question. Is the equidistance principle considered customary international law?

Answer. "Equidistance" is a methodological tool. Article 15 of the 1982 Law of the Sea Convention (the "1982 Convention"), like its analogue in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (to which the United States is a party), refers to equidistance as the applicable methodology for delimitation of overlapping territorial seas, unless the opposite/adjacent countries agree otherwise or unless historic title or other special circumstances call for a different delimitation.

Articles 74 and 83 of the 1982 Convention do not refer expressly to the equidistance methodology with respect to delimitation of overlapping exclusive economic zones (EEZs) or continental shelves between opposite/adjacent countries. Rather, they provide that delimitation is to be effected by agreement, on the basis of international law, in order to achieve an equitable solution. In this regard, the United States has generally taken the position internationally that the equidistance methodology—absent special circumstances—leads to an equitable solution.

Question. Does the Convention on the Law of the Sea either explicitly or implicitly endorse the equidistance principal for maritime boundaries?

Answer. The 1982 Convention sets forth provisions regarding the delimitation between countries of overlapping territorial seas, EEZs, and continental shelves.

With respect to the territorial sea, Article 15 provides that delimitation is to be based on equidistance, unless the parties agree otherwise or unless historic title or other special circumstances call for a different delimitation. It should be noted that this provision is identical to that in the 1958 Convention on the Territorial Sea and Contiguous Zone, to which the United States is a party.

With respect to the EEZ and continental shelf (areas beyond 12 nautical miles from the baseline), Articles 74 and 83 of the 1982 Convention provide that delimitation is to be effected by agreement, on the basis of international law, in order to achieve an equitable solution. Unlike the 1958 Convention on the Continental Shelf, to which the United States is a party, this provision does not refer to equidistance, but rather focuses on an "equitable solution."

As in the case of the 1958 law of the sea treaties, the 1982 Convention does not address boundaries between political entities within a country, such as U.S. States. It only addresses boundaries between countries. As a result, if the United States were to accede to the 1982 Convention, the Convention would not apply as between U.S. States, only internationally with respect to maritime boundaries between countries.

Question. Could ratification of the Convention be interpreted as an American endorsement of the equidistance principle?

Answer. No. As noted, the Convention's provisions on maritime boundary delimitation either repeat verbatim the provision from the relevant 1958 Convention (in the case of the territorial sea) or replace the reference to equidistance in the relevant 1958 Convention with a reference to an "equitable solution" (continental shelf). (There is no EEZ in the 1958 treaties.)

Question. If the Convention could be interpreted to endorse the equidistance principle, would its ratification have an effect on how that principle is interpreted by United States courts, particularly with respect to maritime boundaries between U.S. States?

Answer. The 1982 Convention would apply only to maritime boundary delimitation between countries. As noted, the Convention, like the 1958 law of the sea treaties to which the United States is a party, does not address boundary delimitation between U.S. States.

Question. Have any United States courts addressed the issue of whether the equidistance principle applies as to the maritime boundaries between U.S. States?

Answer. In the late 20th century, the U.S. Supreme Court applied the equidistance methodology in three Original actions involving lateral boundaries between adjacent coastal states (*Texas* v. *Louisiana, Georgia* v. *South Carolina,* and *New*

Hampshire v. *Maine*). These cases did not involve delimitation of the Continental Shelf seaward of the States' waters (3 or 9 nautical miles).

Question. Could ratification of the Convention have any effect on oil drilling boundaries off the coast of the United States, in particular the Eastern Gulf of Mexico Planning Area?

Answer. No. U.S. accession to the Convention would not have any effect on any Outer Continental Shelf oil drilling boundary between U.S. States, including the Eastern Gulf of Mexico Planning Area.

POLICY BRIEF SUBMITTED BY THE NICHOLAS INSTITUTE FOR ENVIRONMENTAL POLICY SOLUTIONS, DUKE UNIVERSITY, DURHAM, NC

[Prepared by Raphael Sagarin, Associate Director for Ocean and Coastal Policy, the Nicholas Institute for Environmental Policy Solutions; Larry Crowder, Stephen Toth Professor of Marine Biology, Nicholas School of the Environment and Earth Sciences; Megan Dawson, Research Assistant, Nicholas Institute for Environmental Policy Solutions; Jon Van Dyke, Professor of Law, School of Law, University of Hawaii; Michael Orbach, Professor of the Practice of Marine Affairs and Policy Nicholas School of the Environment and Earth Sciences]

SUMMARY

The Nicholas Institute for Environmental Policy Solutions has gathered leading experts on the U.N. Law of the Sea Convention (LOSC) to provide guidance in the ongoing debate over whether the United States should accede to the Convention. Rather than provide a complete summary of LOSC provisions, we highlight in this short paper three important considerations:

1. Emerging territorial disputes over expanding Arctic waters, most recently highlighted by Russia's claims to mineral resources under the North Pole, will be resolved within the Convention framework by Convention signatories.
2. Concerns about the role of international tribunals in making decisions that affect U.S. military, economic and environmental protection interests have been addressed through changes made at the request of the United States.
3. The United States would benefit from Convention provisions which help member nations balance the need to navigate freely for security and commerce with its need to protect its vast coastal natural resources.

Overall we find:

- Arctic melting is creating a vast rush by several nations, including Russia, to claim navigation and resource rights around the North Pole. Claims and disputes over these resources will be resolved under the LOSC framework. The best opportunity for the United States to achieve standing to make and counter such claims is through joining the LOSC.
- Major points of contention raised by the Reagan administration, related to seabed mining, technology transfers to developing nations and representation on key committees have been resolved in the United States' favor through negotiated changes to the Convention.
- The LOSC provides dispute settlement tribunals and arbitration panels. The United States would have control over the type of dispute settlement body cases involving U.S. interests were brought before and would have significant representation on those bodies.
- The LOSC recognizes the competing interests of navigational freedom (for military and commerce) and coastal resource protection (for fisheries, oil and minerals and environmental resources) and attempts to balance them. Perhaps no nation has more at stake in striking this balance than the United States which has both the largest claimed Exclusive Economic Zone (EEZ) and the largest blue water navy.
- Support for accession to LOSC is surprisingly broad, including the Navy and Coast Guard, maritime industries, the White House, and private public partnerships such as the Joint Ocean Commissions Initiative. At the same time, opposition to the LOSC convention has narrowed to an ideological position based primarily on mistrust of U.N.-based treaties.

WHAT IS THE CONTROVERSY OVER THE LAW OF THE SEA CONVENTION?

The 1982 Law of the Sea Convention (LOSC) is a treaty resulting from 40 years of international diplomacy that was set into motion by the 1945 Truman Proclama-

tion,[1] where the Continental Shelf of the United States was claimed as a sovereign zone, spawning a subsequent claim-and-response period for seabed sovereignty. The United States had a particular interest in codifying this "constitution of the oceans," to protect its marine living resources and maritime interests. In its current form the treaty designates a 200 nautical mile exclusive economic zone (EEZ) where nations have sovereign rights "for the purpose of exploring and exploiting, conserving and managing the natural resources." The treaty provides parties with the ability to define those activities that are military while navigating in any part of the ocean, thus putting few restrictions on "peaceful" military navigation. Additionally it protects the living resources, facilitates military and maritime activities, and strengthens U.S. national security. Many of the benefits of LOSC are already utilized by the United States because most aspects of the treaty are already part of customary international law, to which all nations subscribe.

Despite the great lengths the treaty traveled in regards to maritime interests, living resource conservation, maritime dispute-settlement procedures and several other issues, by the early 1980s the United States still saw some key flaws highlighted by the Reagan administration. President Reagan supported most aspects of the treaty and stated officially that the United States would act in accordance with those provisions. However, his administration opposed perceived limits on free enterprise with regards to resources to be extracted from deep seabeds and the mandated technology transfers to poorer countries.[2] Over the next decade, culminating in 1994, the United States was successful in negotiating an Agreement that made key changes in the LOSC, including provision for a permanent seat for the United States on the governing Council of the International Seabed Authority and a seat on the powerful Finance Committee. Decisions by these bodies are by consensus, thus ensuring U.S. ability to effectively "veto" unfavorable judgments. These changes also eliminated the mandatory technology transfers that riled some parties as "welfare" for poorer nations.

Though all of the problems cited by President Reagan were resolved in these negotiations, the United States has yet to ratify the treaty. Some continued opposition to accession to LOSC, typically focused on concerns with the jurisdiction of international tribunals, perceived threats to national security and commerce, or uncertainty about claims to wide Continental Shelf margins (as is currently being debated with regard to the Arctic, see below) may be based on incomplete knowledge of the treaty. Beyond these concerns, continued opposition to LOSC is largely ideological, stemming from a strong distrust of U.N.-based organizations and treaties as well as other international bodies having decisionmaking powers. The roots of these ideological objections are deeper than LOSC and thus beyond the scope of this paper. Here we deal specifically with how U.S. accession to the LOSC would affect: (1) The current disputes over the resources and navigation rights to the Arctic; (2) the negotiating powers and standing of the United States; and (3) the balance the United States needs to achieve between various uses of coastal seas.

SOLVING DISPUTES OVER SOVEREIGNTY IN THE ARCTIC

In most parts of the world debates over limitations on navigation versus protection of natural resources are played out within well-defined Exclusive Economic Zones (EEZs). There are, nonetheless, several areas of active dispute over marine territory. The most dramatic example is the Arctic—a large, resource rich area where the territorial claims are almost completely unresolved. The confluence of three major forces—climatic, economic, and political—have made the Arctic a focal point for a new round of territorial claims that will be debated under the LOSC framework. Climatically, global warming has literally opened the Arctic[3]; 2007 saw the lowest level of recorded ice[4] and the trend toward more open sea in the Arctic is likely to continue. This melting is already having dramatic effects on arctic wildlife, but it will also open up new shipping routes and fishing grounds and make previously out of reach mineral and oil resources attainable. Economically, the demand for new oil and mineral supplies and associated high prices has made the Arctic an attractive target for resource extraction. Politically, nations such as Russia are eager to expand their territory and demonstrate their economic and technological might. Likewise, Canada has expressed claims of sovereignty over the Northwest

[1] Truman Proclamation On The Continental Shelf; Presidential Proclamation No. 2667; 28 September 1945.

[2] Adelman, Ken. "Scuttle Diplomacy." The Wall Street Journal. June 2–3, 2007, A11.

[3] Belkin, Douglas. "As Arctic Ice Melts, Northwest Passage Beckons Sailors." Wall Street Journal, Sept. 13, 2007.

[4] Schmid, Randolph. "Arctic Sea Ice Shrinks to Record Low." August 17, 2007. Associated Press, Science Writer.

Passage, which will become increasingly ice free.[5] More prosaically, several Arctic nations are faced with upcoming deadlines under LOSC to make scientifically supported claims that their continental shelves are contiguous with the Arctic sea floor.

The renewed focus on the Arctic was highlighted in news coverage and response by other Arctic nations to a Russian expedition which placed a Russian flag on the sea floor under the North Pole.[6,7] Several Arctic bordering nations including the United States, responded with expeditions of their own to establish the geological relationship between the Arctic and their own Continental Shelf.[8] It is likely that the territorial rights to the Arctic's riches will be settled within the LOSC framework. Accession to the LOSC would provide the United States with a legitimate and internationally recognized pathway for making and disputing claims on Arctic resources.

The flurry of activity related to Arctic claims suggests an urgency for U.S. accession to LOSC. This urgency is driven both by what the United States can do and what it can undo as a party to LOSC. During the 1983–1994 period, the United States negotiated for a permanent seat at the Commission on Limits of the Continental Shelf, where voting would be done in groups and by consensus. Perhaps more compelling may be the ability for the United States, as a member of LOSC, to block and contest applications to exploit resources or limit transit by other nations. While we currently can comment on proposals by other LOSC nations,[9] accession to the treaty would give the U.S. standing to substantially modify or block proposals that the United States found detrimental to its national interests. This could be done by preparing its own claim to the Continental Shelf Commission, or to work cooperatively with other Arctic nations to develop logical rules to govern exploitation of resources and other uses of the Arctic Sea. This latter strategy reflects one of the biggest benefits of U.S. accession to LOSC—namely that it would generate goodwill and a sense of cooperation over a shared mission to responsibly use the resources of the sea while protecting the oceanic environment for generations to come.

JURISDICTION AND PARTICIPATION IN INTERNATIONAL TRIBUNALS

The United States has considerable power to determine how accession to LOSC would affect its national interests. This is primarily a function of the many years of negotiations getting the treaty to its 1994 form. More recent specific guidance provided by the U.S. Senate Foreign Relations Committee on conditions for U.S. accession to the treaty are laid out in a lengthy resolution identifying very specific declarations, understandings, and conditions that ensure protection of U.S. interests.[10] The conditions address a wide array of issues including representation on treaty decisionmaking bodies, ability to enforce U.S. environmental law, and rights to free navigation, as well as harmonization of the treaty with specific aspects of U.S. law. A particular concern to many in the United States is the specter of foreign courts making decisions about navigation and resource protection activities that ultimately affect U.S. interests. This concern could be said to be overstated for three reasons. First, accession to LOSC will allow the United States to have a say in the election of members of the Tribunal and to select members of arbitration panels making decisions. Second, and more important, is the fact that the United States, as part of its accession (or any time thereafter), has the legal right to request the type of body it wants decisions concerning U.S. interests to be made under.

The choices the United States would have include:

1. A hearing before the International Tribunal for the Law of the Sea (ITLOS), a standing tribunal of 21 judges, each from a different nation, that serve 9-year terms. The earliest the United States could get a seated judge would be in late 2008, when seven seats open.

2. A hearing before the International Court of Justice (ICJ), a U.N. court of 15 judges appointed by the General Assembly and Security Council. The United States currently has one sitting judge.

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[5] Alexander, Bryan and Cherry. "Drawing Lines in Melting Ice." The Economist.com. World International. August 16, 2007.

[6] Zabarenko, Deborah. "U.N. Must Decide Russia Arctic Claim: Russian Experts" August 9, 2007. Reuters Online.

[7] Blomfield, Adrian. "Russia Claims North Pole With Arctic Flag Stunt" August 1, 2007, London Telegraph.

[8] Esser, Doug. "U.S. Icebreaker to Map Arctic Sea Floor" August 11, 2007. Associated Press.

[9] E.g., The U.S. submitted an Official Statement from the Department of State to the Commission on the Continental Shelf on 18 March 2002, contesting Russian claims to the Arctic.

[10] U.S. Senate Committee on Foreign Relations. March 11, 2004. Report on the United Nations Convention on the Law of the Sea. Executive Report 108–10.

3. A special arbitral tribunal under "Annex VIII" made up of environmental, marine science, navigation, and fisheries experts of which the United States would pick two of the five arbitrators.

4. A hearing before an "Annex VII" arbitration panel composed of five members of which the United States would be allowed to choose one and be involved in the appointment of at least three others.

The United States has already indicated its decision to adjudicate conflicts under the last two options, using the third option for fisheries, environmental, and navigational disputes, and the fourth option for other disputes, meaning that all decisions concerning U.S. interests would go to a small arbitral body whose members are selected with U.S. input. Finally, nations may opt out of any of the above adjudication procedures when the issue debated concerns such issues as scientific research, boundary disputes, military activities, and setting of limits in natural resource extraction within a nation's EEZ.[11]

BALANCING ECONOMIC, MILITARY AND ENVIRONMENTAL SECURITY

At the core of disputes in the exclusive economic zone (EEZ) as codified by LOSC and territorial waters is the tension between nations that are primarily maritime nations and those that are primarily coastal nations. Maritime nations are chiefly concerned with the ability to move cargo, fishing, and military vessels flying their flag freely through the high seas, EEZs, and territorial waters as well as in the air above. Any attempt to limit transportation, such as movement of shipping lanes to protect species or speed limits within certain zones will cost these nations money and are thus met with resistance. Coastal nations, by contrast, are concerned with protecting their own resources in the EEZ, especially fisheries. These nations will propose any number of regulations to protect the environment, keep shipments of nuclear materials far off shore, or ensure that ships are not engaged in illegal fishing.

Of course, many nations have a vigorous interest on both sides of this dichotomy, but none more so than the United States. With the largest claimed EEZ of any nation (due in part to the long coast of Alaska, the Aleutian Islands and Pacific territories) the United States is a coastal nation and as such demands protection for its coastal natural resources. From this perspective, the United States may wish to limit transport by other nations in its EEZ to protect habitats or to ensure that illegal fishing is not occurring. Indeed, the United States has imposed mandatory ship reporting requirements to protect right whales,[12] and is seeking approval of the International Maritime Organization for limitations on transit in the northwest Hawaiian Islands, which has recently been designated a National Monument. But with the largest and most wide-ranging blue water Navy, the United States is a maritime nation that must maintain its existing rights to passage throughout the world's oceans and seas. Moreover, the United States is reliant on international shipping imports and restrictions on navigation will raise costs to U.S. consumers. These conflicts are concentrated in nations' territorial seas and straits, although conflicts in the wider boundaries of the EEZ are emerging.

A natural effect of this split interest is that any one-sided argument about the perils of the United States joining LOSC is immediately contradicted. For example, alarmist arguments that LOSC nations have or will impose limitations on transit are contradicted by the fact that the United States does impose some limits to transit in our own EEZ and has plans to continue to do so. Indeed, the very fact that the United States has perhaps the world's strongest interest in both protection of coastal resources and right of free transit on, under, and above the ocean, is the most compelling reason to join LOSC. As four former U.S. Coast Guard Commandants stated in a letter urging the chairman of the U.S. Senate Foreign Relations Committee to support accession to the treaty: "As a global maritime power and a nation with one of the longest coastlines, the United States has strong interests both in preserving freedom of the seas and in protecting our own coastal areas, including offshore marine resources. The Convention strikes the right balance between these sets of interests."[13]

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[11] These are addressed in sections 297 and 298 of the United Nations Convention on the Law of the Sea of 10 December 1982. The full text of which is available at: http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

[12] Jon Van Dyke. 2005. The disappearing right to navigational freedom in the exclusive economic zone. Marine Policy. 29:107–121.

[13] Letter from Thomas H. Collins, James M. Loy, Robert E. Kramek, Paul A. Yost to Joseph Biden, Chairman, Senate Foreign Relations Committee. August 15, 2007.

WHO SUPPORTS THE LAW OF THE SEA CONVENTION?

Support for U.S. accession to LOSC is surprisingly broad.[14] Some of the architects of plans to scuttle the LOSC treaty under the Reagan administration have now come around to support it because the more odious provisions were amended or eliminated since that time.[15] The Navy, Coast Guard, National Oceanic and Atmospheric Administration, the State Department and the White House, support accession. These groups support accession despite the fact that they occasionally squabble over its implementation, largely due to the dual interest of the United States (e.g., the environmental protection mandate of the Coast Guard versus the security mandate of the Navy has put these two forces at odds in the past[16]). Likewise, major resource extracting industries and their trade groups, who are often at odds with environmental groups over regulations, share a common interest with many of these groups in ratifying LOSC. Finally, the most authoritative body on U.S. ocean science and policy ever assembled, the Joint Ocean Commissions Initiative, chaired by retired Navy Admiral James Watkins and former Congressman and White House Chief of Staff Leon Panetta, has indicated U.S. accession to LOSC as one of its highest priorities.

LETTER FROM FREDERICK S. TIPSON, SENIOR POLICY COUNSEL, MICROSOFT CORP.

SEPTEMBER 24, 2007.

Re United Nations Convention on the Law of the Sea

Senator JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

Senator RICHARD G. LUGAR,
Ranking Minority Member, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR SENATORS BIDEN AND LUGAR: I was chief counsel to the committee under Chairman Charles H. Percy in 1982 when the original version of the Law of the Sea Convention was concluded and opened for signature. (The committee's hearing today happens to fall on Senator Percy's 88th birthday.) I would like to join with the wide range of supporters of this treaty in urging the committee to recommend early and favorable advice and consent by the full Senate.

Treaties were my particular responsibility on the committee staff in the early 1980s. I was also a specialist on the Law of the Sea before joining the committee, having been Assistant Director of the Center for Oceans Law and Policy at the University of Virginia School of Law. I followed the Law of the Sea negotiations from the time of their initiation by the Nixon administration, attended several sessions of the negotiations as an observer during the Ford and Carter administrations, and was briefly a member of the U.S. delegation in 1980 as counsel to the ranking minority member, Senator Jacob K. Javits.

In my opinion, becoming a party to this Convention is very important for the security, economic, and diplomatic interests of the United States. The original problems with the treaty, which caused President Reagan to decline signature of the agreement in 1982–83, were almost exclusively about part XI, relating to the deep seabed mining provisions. As the principal vote counter on treaties for the committee at that time, I advised the chairman and the administration that because of part XI, the Convention would not, in my judgment, receive the necessary two-thirds vote for advice and consent in the Senate. I largely concurred with the assessment made by the Reagan administration of the particular problems with part XI of the Agreement, and had advised Ambassador Elliot Richardson of those concerns during the final stages of the negotiations.

However, as the committee is well aware, the problems in part XI were later addressed by a series of amendments negotiated by the United States in 1994. By that time, I had been in the private sector (at AT&T) for 10 years. I was, frankly, astounded that the United States was able to negotiate those changes the consequence of major shifts in the international political environment to be sure, but also the result of some very skillful diplomacy by the U.S. officials involved. Most people ex-

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[14] For full list see lugar.senate.gov/sfrc/questions.html.

[15] Ken Adelman. "Scuttle Diplomacy" Wall Street Journal, June 2–3, 2007 weekend edition, A11.

[16] Jon Van Dyke. 2005. "The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone. Marine Policy. 29: 107–121.

pected that the United States would then follow through and join the Convention without further delay. Unfortunately, despite a favorable hearing by this committee that year, the full Senate did not take up the treaty, and it remained on the committee calendar until the hearings held by the Foreign Relations, Armed Services, and Environment and Public Works Committees several years ago.

The compelling reasons for the United States to become a party to this treaty will be ably and authoritatively addressed by the distinguished witnesses at the hearing today. It will significantly advance our security interests, greatly expand our territory and resources, and confirm our political values and diplomatic leadership. I will not elaborate on those arguments here, except to suggest that, in my opinion, the final judgment about the value of this treaty to our country is not even a close call. The arguments in favor overwhelm any reservations I have yet heard from opponents.

So, if the Law of the Sea Convention is that favorable to the United States, this committee and the full Senate have a right to wonder: Why is it that this treaty, as amended in 1994, was not long ago approved by the Senate? I suggest that the answer to that question can be summarized under three headings:

1. "FREE RIDER" FALLACIES

Some observers may say that the value of this agreement to the United States can be derived without having to become a formal party. Most international law experts would tell you that the jurisdictional and navigational provisions in this agreement represent "customary international law" that applies to every nation-state, whether or not they have ratified or acceded to the agreement. On its face, this is a good argument for most of the provisions in the treaty, and the United States has repeatedly relied on the text of the Convention as evidence of accepted standards for state behavior in those areas.

But, in reality, the argument from customary law is a fall-back position, argued out of necessity and pending the far stronger position the United States will be in when we become a party to the Convention. Customary international law is itself a developing process, subject to revisions through widespread practice that may begin to diverge over time as conditions change and new issues and attitudes arise. Assertion of our legal rights under the agreement can easily be met with the counterargument that we should not be able to rely on a treaty we have for years failed to ratify. And the suggestion that we can simply enforce our interests with naval power is grossly out of touch with current political and military realities.

The current series of claims and counterclaims in the Arctic region illustrates the problems for the United States in remaining out of the treaty framework. The basic situation in the Arctic has changed in recent years as the melting of the ice cap has made both navigation and resource exploitation feasible in ways that were not deemed likely at the time this Convention was concluded. Our ability to resist the claims of other States is undercut by our status as treaty outsider. In an even more practical way, we have been unable to participate in the Commission established under the treaty to establish the limits of the continental shelves beyond 200 miles—areas of huge resource potential. So our abstention is not only pointless, it is harmful.

2. "MOUNTAINS OUT OF MOLEHILLS"

Other commentators argue for Senate rejection on the basis of relatively minor examples of problematic language, exaggerated interpretations, or far-fetched speculations—as if the point of Senate review is to find any possible gap or weakness in a text, rather than to weigh the agreement as a whole for its overall value to the United States. Having handled many treaties for the committee, I can say that this sort of "gotcha" approach—or "pronouncement by pot shots"—is a poor way for Senators to assess the national interest in a comprehensive setting like oceans policy. The negotiation of this treaty, with the 1994 amendments, was a huge accomplishment in advancing and protecting U.S. interests. We should not lose sight of the big picture by picking through the pixels.

Furthermore, this particular treaty is already in force for the majority of countries, and having agreed to a series of major U.S. amendments once before without U.S. followthrough, we can be sure that these countries will not again agree to "fix" or redraft its provisions prior to U.S. accession. On the other hand, once the United States becomes a party, and regains our stature as a leader and supporter of the LOS framework, we are in a far stronger position to propose improvements or additions to this agreement to meet the changed conditions of the future.

3. SOVEREIGNTY EXTREMISM

Finally, this treaty has been maligned by a range of critics who regard virtually all treaties as objectionable because they commit the United States to principles and procedures which limit our freedom to act unilaterally, immediately, and with impunity. This attitude toward U.S. sovereignty is both extreme and naive. Never mind that the commitments undertaken here involve actions—such as the free passage of vessels through straits and territorial seas or the conservation of fisheries—that the United States itself wants to undertake, and that the real significance of the agreement is the restraints it places on the behavior of other countries, including some otherwise inclined to resist these provisions—not to mention the positive framework of cooperation it creates. And never mind that the Convention ratifies and protects the sovereignty of the United States over additional territories the equivalent of the entire lower 48 States. Extreme views of U.S. sovereignty would read out of the Constitution the option of reaching treaties of any kind—including those that strengthen U.S. sovereignty, protect our military and economic interests, and extend our influence and leadership as this one does.

What is particularly ironic about many of these objections to the Law of the Sea Convention is that they are made on the basis of values or principles said to be "conservative" in nature. Yet there is a strong tradition of conservative thought in the United States which has viewed the rule of law, not as a radical reformist agenda, but as a conservative strategy for protecting and promoting American interests through negotiation and agreement with like-minded countries. Whether or not any particular agreement does, in fact, conserve those values and interests is a legitimate question for the Senate when asked to review any international agreement. But a stable international order is one of the paramount values which American conservatives have rightly sought to promote through the years, and this Convention is a huge advance for the rule of law over nearly three-fourths of the Earth's surface. Conservatives in both parties should be able to support this agreement with enthusiasm.

For, in the end, the languishing of the Law of the Sea Convention on the committee calendar has not been the result of a careful, balanced assessment of its merits by the Senate. Given that body's enormous agenda, year in and year out, the window of opportunity to consider any single measure—especially one as comprehensive and detailed as this Convention—is rare and limited. This treaty has been the victim not of substantive problems, but of problematic process. All it has taken to derail the process of Senate advice and consent is for one critic or another to convince a single member of the Senate—however well-intentioned and responsible—that there is something wrong with this treaty, and that has resulted in a "hold" on its consideration—a hurdle which postpones and thereby stalls indefinitely a thorough assessment of its merits. Leave aside that the concern expressed may be far outweighed by the benefits and advantages incurred by the United States through participation. The Senate has never been able to debate that assessment.

The committee should remedy this situation and lead the Law of the Sea Convention favorably through the Senate without further delay.

Sincerely,

FREDERICK S. TIPSON

[Chief Counsel, Senate Foreign Relations Committee, 1981–1984. The author is currently a Senior Policy Counsel at the Microsoft Corporation. But the views expressed are entirely personal and do not reflect the review or approval of the corporation, which takes no position on the Convention and has no direct interest in its consideration by the committee.]

THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (TREATY DOC. 103–39)

THURSDAY, OCTOBER 4, 2007

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room SD–419, Dirksen Senate Office Building, Robert Menendez, presiding.

Present: Senators Menendez, Lugar, Corker, Murkowski, DeMint, Isakson, and Vitter.

OPENING STATEMENT OF HON. ROBERT MENENDEZ, U.S. SENATOR FROM NEW JERSEY

Senator MENENDEZ. This hearing will come to order.

Today, the Foreign Relations Committee continues its examination of the Convention of the Law of the Sea. I'd like to thank Chairman Biden and Ranking Member Lugar for calling this important hearing, as well as all of our witnesses for appearing.

Simply put, the Law of the Sea Convention creates an international framework that will protect our national security, foster economic opportunity, and promote stewardship of the environment. It codifies international law; in particular, the laws on Freedom of Navigation that are essential to our military as it carries out missions around the world. The Convention provides clear rules that affect numerous marine-based industries represented by our second panel.

The real decision we have before us is not whether we want the United States to operate under the International Law of the Sea. The question is whether we want a seat at the table to help shape its future trajectory. The few vocal opponents of the treaty have tried to obscure the real issues and, instead, appeal to people's fears. I urge my colleagues to listen to the experts. What the experts in the military, in business, and in the administration are saying is that this treaty will be a boon to U.S. maritime interests.

The Law of the Sea Convention will firmly secure the rights of our military as they need to travel the world's oceans and move troops quickly to hotspots around the globe without hindrance. This freedom is achieved by limiting the ability of coastal states to regulate foreign navigation to an area within 12 miles from the coasts. But, even there, all states enjoy the Right of Innocent Passage. And, as I am sure ADM Vern Clark will testify to later, the Convention will also allow for the U.S. Navy to freely travel through

straits for international navigation. Codifying these rights to navigation is essential to our modern military.

The Law of the Sea Convention will also allow the United States to secure valuable resource rights. For 200 nautical miles from our shores, we will have the sovereign right to explore, extract, and manage our living and nonliving natural resources. Because of our vast coastlines, the United States will have the largest exclusive economic zone in the world. In addition, because the Convention allows for claims for economic rights for continental shelves that extend beyond the 200-mile EEZ, we could have internationally recognized rights to natural resources as far as 600 miles from our shores in some areas.

This treaty provides us with numerous benefits, while it demands little from the United States in return. There are no onerous standards, no threats to U.S. power, no dilution of U.S. sovereignty. In fact, today the United States already follows the rules of the Convention. This has prompted some to ask, So, why should we join the treaty? We should be a party to the Convention, because it gives us a seat at the table. The Law of the Sea is leaving the dock without us. Some 155 countries are a party to it, including all of our NATO partners, except Turkey, as well as Japan and Australia. It has been in effect for over a decade, and its institutions are up and running. Unlike the Kyoto Protocol of the Comprehensive Test Ban Treaty, the Law of the Sea Convention will go forward whether we ratify it or not.

Not only is the Convention widely accepted around the globe, but it also enjoys wide support in this country. I cannot think of another coalition of supporters that includes oil companies, environmental groups, fishermen, shippers, military officers, telecommunication firms, the current and former Secretaries of State, the New York Times, and President Bush all together. [Laughter.]

The fact of the matter is that you never see a coalition like this, and you can only get such a distinguished and diverse coalition behind a convention that makes sense and that is a great benefit to the country.

Now, I have talked about what the Law of the Sea Convention is, but I want to spend a few minutes talking about what the Law of the Sea is not. This is simply not the same agreement President Reagan resisted in the 1980s. President Reagan's objections to the treaty had to do exclusively with the deep seabed mining provisions of the Convention. We know this, because in a 1983 ocean policy statement President Reagan directed the U.S. Government to abide by everything else in the Convention other than the deep seabed mining provisions. A 1994 implementing agreement fixed the flawed deep seabed mining provisions to address each of President Reagan's objections.

There's been a good deal of discussion regarding the International Seabed Authority and whether the United States has sufficient influence on its decisionmaking or whether mandatory technology transfers are still required. The fact is, the United States would have an effective veto on important decisions of the Seabed Authority. Any decision that would result in a substantive obligation, including any amendments to the deep seabed provisions, or

that would have financial or budgetary implications, would require U.S. consent.

The 1994 agreement also eliminated mandatory technology transfers. Moreover, article 302 of the Convention explicitly provides that nothing in the Convention requires a party to disclose information that is "contrary to the essential interests of its security."

The 1994 agreement also eliminated any production controls and ensured that market-oriented approaches are taken to the management of deep seabed minerals.

The International Seabed Authority is also not some large U.N. bureaucracy that is capable of producing endless and burdensome regulations over the objection of the United States. The Authority is an independent institution, created by the Convention, which employs approximately 30 people and has an annual budget of $6 million. And any regulation of substance must be agreed to by the United States.

Another thing this Convention is not is a tacit acceptance of Russia's claims over mineral rights in the Arctic. To the contrary, by becoming a party we will likely be able to secure the appointment of a U.S. scientist to the Continental Shelf Commission, the body that is reviewing Russia's claim.

In 2001, Russia made a claim for its extended Continental Shelf that reached the North Pole. The Commission determined that Russia did not have enough data to prove its claim, but, ever since then, Russia has been collecting more data to bolster its case.

In conclusion, I hope my colleagues will dispassionately weigh the evidence and see the benefits of ratifying the Law of the Sea Convention and how far they outweigh any possible costs. In my view, it's a relatively clear call. If we want to continue to protect our maritime security and economic interests, the United States should be a party to this Convention.

Before I turn to my distinguished ranking member of the full committee, I just want to take the privilege of the Chair to recognize someone who has been of service to me, and to our efforts, for nearly 5 years, as my senior foreign policy advisor, first in the House of Representatives, where I was the ranking Democrat on the Western Hemisphere, and served there for 13 years, and now, since I came to the Senate, and on this committee, and as the subcommittee chair on our Foreign Assistance—she is an exceptional individual who has an incredible depth of knowledge, substantive knowledge, and who, over the years, has taken that substantive knowledge and added to it the ability to understand the confluence of good public policy, of politics necessary to achieve that public policy, and the process in which we ultimately make legislation happen. That is a rare confluence of skills that exists, so, when you do have it, it's just an exceptional person. So, that is why I have filed a demarche with Senator Reid, who has stolen her from my office, to become his senior foreign policy advisor. The demarche has been somewhat dismissed out of hand, but I just wanted to recognize her exceptional service, and, as she moves to Senator Reid's office as a senior foreign policy advisor, we continue to look to work with her.

So, Jessica Lewis, thank you so much. Stand up, Jessica. Thank you very much for your service.

[Applause.]

Senator MENENDEZ. With that, let me recognize the distinguished ranking member, Senator Lugar.

OPENING STATEMENT OF HON. RICHARD G. LUGAR, U.S. SENATOR FROM INDIANA

Senator LUGAR. Well, thank you very much, Mr. Chairman. And I join you in welcoming our witnesses.

At the first hearing of the Law of the Sea, 1 week ago, we heard unequivocal testimony from the State Department, the Defense Department, and the Navy in support of U.S. accession to the Convention. It was clear from this testimony, as well as from President Bush's statement on the Law of the Sea, and communications from the Joint Chiefs of Staff, and Homeland Security Secretary Chertoff, that the United States national security leadership is strongly united in favor of this treaty.

As ADM Patrick Walsh, the Vice Chief of Naval Operations and former commander of the Fifth Fleet testified: "Right now, where I sit, we have a deficiency by not being party to the Law of the Sea Convention, and it's one that we must correct. This Convention is valuable to our soldiers, sailors, airmen, marines, and coastguardsmen, and it's time we joined the Convention, and we owe it to them."

The Commander in Chief, the Joint Chiefs of Staff, and the U.S. Navy, in time of war, are asking the Senate to give its advice and consent to this treaty. Our uniformed commanders and civilian national security leadership are telling us that the Law of the Sea Convention is a tool that they need to maximize their ability to protect U.S. national security with the least risk to men and women charged with this task.

I noted, in our previous hearing, that historically the overwhelming presumption in the U.S. Senate has been that if our Armed Forces asked us for something to help them achieve a military mission, we do our best to provide them with that tool. It would be ironic if, just weeks removed from defending the role, expertise, and integrity of General Petraeus as he pursues his mission in Iraq, Senators disregarded the unanimous and sustained view of our military on this treaty.

I would offer a historical reference for our discussion today. In 1950, the Soviet Union was boycotting the United Nations over the issue of designating the Communist Government of China as a legitimate representative of the Chinese people. During this boycott, North Korea invaded South Korea. The Truman administration quickly introduced, and passed, resolutions in the Security Council to condemn the invasion and authorize the use of force to resist it. Because they were absent, the Soviets could not exercise their veto in the Security Council. Soviet interests, as they perceived them, clearly were not served by the boycott.

In absenting ourselves from the Law of the Sea Convention, we are risking making the same type of mistake that the Soviets made in 1950. Opponents seem to think that if the United States declines to ratify the Law of the Sea, the United States can avoid any mul-

tilateral responsibilities or entanglements related to the oceans. But, unlike some treaties, such as the Kyoto Agreement and the Comprehensive Test Ban Treaty, where the United States non-participation renders the treaty virtually inoperable, the Law of the Sea will continue to form the basis of maritime law, regardless of whether the United States is a party. Consequently, the United States cannot insulate itself from the Convention merely by declining to ratify. If we fail to ratify this treaty, we are allowing decisions that will affect our Navy, our ship operators, our offshore industries, and other maritime interests to be made without U.S. representation.

If the United States does not ratify this treaty, our ability to claim the vast extended Continental Shelf off Alaska will be seriously impeded. We will also put ourselves in a position of self-imposed weakness as we are forced to rely on other nations to oppose excessive claims to Arctic territory by Russia and perhaps others. Further, in an era in which our growing energy vulnerability exposes us to the machinations of oil-rich states, we will be constraining the opportunities of our own oil companies to explore beyond the 200-mile limit by perpetuating legal uncertainty that is likely to prevent the large-scale investments that are required. We'll be complicating the job of the Navy in asserting navigational rights and weakening our ability to constrain negative drift in customary international law. And we will not even be able to participate in the amendment process to this treaty, which is likely to dominate the evolution of accepted ocean law.

This is a partial list of the costs of not joining the Convention, but it should illuminate, for members, that we do not have a free pass to this treaty. If the Senate does not give its advice and consent, we will be incurring tangible costs in both the short and long terms on issues of vital importance to our economy and our national security.

As I have listened to the arguments critics have made, some, I believe, are simply false, others are highly speculative or sensationalist claims that are sharply contradicted by our national security leadership, including President Bush. But some objections can be traced to baseline philosophical objections to the fundamental idea of a multilateral treaty that delineates rights and responsibilities of Member States.

As I mentioned in the first hearing, these philosophical objections often have been connected to the wish for a U.S. ocean policy that relies on power projection to protect U.S. interests. But, as Admiral Walsh testified, this is not a practical solution in the real world. He pointed out: "Many of the partners that we have in the global war on terror who have put life, limb, and national treasure on the line are some of the same ones where we have disagreements on what they view as their economic zones or their environmental laws. It does not seem to me to be wise to now conduct Freedom of Navigation operations against those very partners that are in our headquarters trying to pursue a more difficult challenge ahead of us, which is the global war, a global war on terror."

Even a mythical 1,000-ship U.S. Navy could not come close to patrolling every strait, protecting every economic interest, or assert-

ing every navigational right. Attempting to do so would be prohibitively expensive and destructively confrontational.

It is this recognition, coupled with the understanding of the limits of customary international law that has impelled a succession of seven Presidents to move the concept behind this treaty toward realization. The last seven administrations have understood that treaty law is the best option for gaining maximum leverage for U.S. ocean interests.

If anyone doubts that President Reagan did not act to legitimize the concept of the Law of the Sea Treaty, I would refer them to President Reagan's two fundamental Presidential statements on ocean policy. The first was issued on January 29, 1982. The President said: "Last March, I announced that my administration would undertake a thorough review of the current draft and the degree to which it met United States interests in the navigation, overflight, fisheries, environmental, deep-sea mining, and other areas covered by that Convention. Our review has concluded 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. I am announcing, today, that the United States will return to these negotiations and work with other countries to achieve an acceptable treaty."

President Reagan then enumerated the problems with the deep seabed mining provisions, and, after doing so, he continued: "The United States remains committed to the multilateral treaty process for reaching agreement on Law of the Sea. If, working together at the conference, we can find ways to fulfill these objectives, my administration will support ratification."

The following year, President Reagan issued a statement declaring that the United States would abide by all provisions of the Law of the Sea, except the deep seabed mining provision. By explicitly endorsing the multilateral treaty process, objecting only to deep seabed mining provisions, delineating precisely the steps required to fix those provisions, announcing that his administration would support ratification if they were fixed, and, finally, declaring that the United States would abide by all other provisions of the treaty, President Reagan conferred enormous validity on the basic purposes, concepts, and provisions of the Law of the Sea.

The January 1982 statement was not a casual document. It was a deliberate and carefully considered culmination of a thorough 9-month study of the treaty by the Reagan administration. And it's telling that the President did not raise any objections to any provision of the Convention, outside the deep seabed mining section. President Reagan made no demands for other changes in the treaty.

It was perfectly within President Reagan's power to say that Presidents Nixon, Ford, and Carter were wrong to have engaged in negotiations on the Law of the Sea. He could have withdrawn the United States from further consideration of the treaty. He could have announced that the United States regarded Law of the Sea as an illegitimate exercise and would not recognize the treaty's validity to bind any U.S. interests. That would have been real repudiation. Instead, his actions preserved American engagement with the treaty.

In 1990, President George H.W. Bush initiated further negotiations to resolve U.S. objections to the deep seabed mining regime. And under President Clinton, these talks culminated in a 1994 agreement that comprehensively revised the regime to address the problems President Reagan identified in 1982.

To illustrate how far away from repudiation President Reagan's actions were, we need only to compare his actions with the actions of President George W. Bush on a different treaty. Less than 16 months into his first term, after a similar treaty review, President Bush formally renounced U.S. obligations as a signatory to the 1998 Rome statute to establish International Criminal Court. The Bush administration went so far as to promote passage of the American Serviceman's Protection Act, which prohibits U.S. cooperation with the Court, and even restricts U.S. military aid to countries that refuse to sign an agreement pledging to shield U.S. troops on their territory from ICC prosecution. Imagine, instead, that President Bush had said: "I am not going to ask the Senate to ratify the International Criminal Court, because it has one flawed section that needs to be fixed, but I hereby declare that the United States will abide by all but one provision. Further, I am defining the set of requirements for fixing the flawed provision and sending my negotiations back to the table." Such an action obviously would not have been seen as a repudiation of the treaty. It would have been a fundamental endorsement of most of the provisions of the treaty, and, more importantly, the underlying principles.

Finally, we should not miss the irony that, in 2002, the year that President Bush decisively repudiated the Rome statute, he also sent a treaty priority list to the Senate Foreign Relations Committee designating the Law of the Sea as one of just five urgent treaties requiring action. President Bush has not been regarded as an enthusiast for multilateral agreements, and yet, he understands what his six predecessors understood, that the Law of the Sea is our best opportunity to bolster international law related to the oceans in a way that benefits U.S. interests.

I thank the Chair, and I look forward to our discussion this morning.

Senator MENENDEZ. Thank you, Senator Lugar.

Senator Corker.

Senator CORKER. I'm not going to make any opening comments. I know we're 30 minutes in, and want to hear from the panelists. But I do want to thank you for having this hearing and for the thoughtful comments most of you—both of you made.

Senator MENENDEZ. Senator Isakson.

Senator ISAKSON. I prefer to hear from the witnesses, rather than myself, so I'll yield back my time.

Senator MENENDEZ. Senator DeMint.

Senator DEMINT. I'll pass, as well. Thank you.

Senator MENENDEZ. Thank you.

With that, let me welcome our witnesses and introduce them. In our first panel, we welcome ADM Vern Clark, a former Chief of Naval Operations for the U.S. Navy. He retired from that position in 2005, after 37 years of service in the Navy. He currently serves on the board of directors of Raytheon. He is a distinguished pro-

fessor of leadership at the Regent University in Virginia Beach; Mr. Frank Gaffney, who is the president of the Center for Security Policy in Washington. Mr. Gaffney served as the Deputy Assistant Secretary of Defense for Nuclear Forces and Arms Control Policy in the Department of Defense during the Reagan administration, and, before that, as a professional staff member on the Senate Armed Services Committee; Mr. Bernard Oxman, professor of law at the University of Miami School of Law. He served as the U.S. Representative and Vice Chairman of the United States Delegation to the Third U.N. Conference on the Law of the Sea, and was an assistant legal advisor for oceans, environment, and scientific affairs at the Department of State; and Mr. Fred L. Smith, the president of the Competitive Enterprise Institute. Prior to founding the Institute in 1984, Mr. Smith served as the director of government relations for the Council for a Competitive Economy.

We welcome all of you to the hearing. In the interest of time and a dialog, we ask that you keep your opening statements to 5 minutes. You'll—we'll include your full written testimony for the record.

And, with that, let me start with Admiral Clark.

STATEMENT OF ADM VERN CLARK, USN (RET.), FORMER CHIEF OF NAVAL OPERATIONS, U.S. NAVY, PHOENIX, AZ

Admiral CLARK. Thank you, Mr. Chairman, Senator Lugar, members of the Committee on Foreign Relations. Good morning.

I want to thank you for the opportunity to testify today, and especially to have the chance to appear alongside a luminary like Professor Oxman, the two of us speaking in support of the Law of the Sea Convention.

As you said, Mr. Chairman, I was privileged to serve as the Chief of Naval Operations. The chance of a lifetime. And, while I was the Chief of the Navy, it was said that I had to have several speeches—a 30-minute speech on why we had to have a Navy, a 20-minute speech, a 10-, a 5-, and a 30-second one. My 30-second version said that our Navy's purpose was to take credible, persistent combat power to the far corners of the earth, the sovereignty of the United States of America, protecting our national security, extending the influence of the United States, and providing options for the Commander in Chief anywhere, anytime, without a permission slip.

In Vern Clark's view, that requirement is more true today than ever. It is our ability to operate freely across the vast expanses of the world's oceans that makes this far-reaching combat power possible. And, as the world's foremost maritime power, the United States relies on full—and I underline "full"—freedom of navigation upon, over, and under the world's oceans to protect its national security interests.

Today, I come to this committee as a repeat witness. Don't get to do that often in my profession. I appeared here in uniform several years ago to speak in favor of the treaty.

This Convention supports our ability to operate wherever, whenever, and however needed under the authority of widely accepted law. The Convention codifies our rights to transit through, over, and under essential international straits and archipelagic waters. It reaffirms the sovereign immunity of our warships and other pub-

lic vessels. And it preserves our right to conduct military activities and operations in exclusive economic zones. These guarantees are of utmost importance to those of us who have served in times when such guarantees did not exist. I remember those days.

And I come here today as a former Chief of the Navy. What is significant, I believe, is that every living CNO—and they go back to Admiral Holloway, now, who began his term over 33 years ago as Chief of the Navy in 1974—everyone believes that this treaty is in the best interest of the United States of America.

Joining the Convention now will support and enhance ongoing and future U.S. military operations. It will enable our Armed Forces to defend, at home and abroad, with full legal authority and certainty. It will provide a stable and predictable legal regime within which to conduct our operations today, and help us realize our vision for the future.

Mr. Chairman, as I testified before the Senate in 2004, the real issue for me was always the people—our freedoms, to be sure—but, to accomplish our mission, I had to think, every day, about the people who were willing to serve this country. As a CNO, it was my privilege to lead the sons and daughters of America who have chosen to wear what I like to call "the cloth of the Nation." Twenty-four by seven, 365 days a year, our sailors are operating at the tip of the spear, and, on any given day, one-third of our Navy is out there, forward deployed. Sometimes, we have to place them in harm's way to do the country's business, and they do it willingly.

For many years now, we have remained outside this Convention. We have asked our young men and women to conduct Freedom of Navigation operations. And, as I testified in 2004, one such operation resulted in the Black Sea bumping incident between the United States and Soviet warships. And, as a commander in the U.S. Navy and the commanding officer of the U.S. ship *Spruance,* I had the duty of conducting those kind of operations in what ended up at being too close quarters. Operating in the Black Sea, I came within inches of being rammed by another warship. Since we weren't party to this treaty, we were engaging in activity to guarantee our rights to the practice of customary international law.

Mr. Chairman, in my view, we need a better venue. We need more than just Freedom of Navigation operations to maintain freedom of the seas. We should not rely on limited ability to formalize our international posture. We can do better than that. We should look for every possible guarantee that we can find to ensure our sailors' safety and to keep them from needlessly going into harm's way. And that's why I believe that we need to join the Law of the Sea Convention, so that our people know, when they're operating in defense of this Nation's national interests far from our shores, that they have the backing and that they have the authority of widely recognized and accepted law to look to, rather than depending upon only the threat or the use of force or customary international law that can be too easily changed.

And so, again, I thank the committee for offering me—now civilian Vern Clark—to appear before this committee today, and I'm happy to answer any questions that you might have.

[The prepared statement of Admiral Clark follows:]

PREPARED STATEMENT OF ADM VERNON CLARK, USN (RET.), FORMER CHIEF OF NAVAL OPERATIONS, U.S. NAVY, PHOENIX, AZ

Mr. Chairman, Senator Lugar, members of the Committee on Foreign Relations, good afternoon. Thank you for the opportunity to testify today in support of the Law of the Sea Convention.

While serving as the Chief of Naval Operations I often said that our Navy is built to take persistent, credible, combat power to the far corners of the earth, fighting our enemies, protecting our national security and extending the influence of the United States anywhere and at anytime we choose to do so. This is true now more than ever. And it is our ability to operate freely across the vast expanse of the world's oceans that makes this far-reaching combat power possible. As the world's foremost maritime power, the United States relies on full freedom of navigation upon, over, and under the world's oceans to protect its national security interests.

We depend on a strong Navy to secure and promote our maritime safety and security. However, it is clear that the United States and its Navy cannot effectively do it alone. We must rely on partner nations and coalition efforts to provide for a free and secure maritime domain. Global partnerships of like-minded nations are the future of our national security strategy. Through mutual assistance, nations can leverage common interests and increase their potential. While the United States is and will continue to conduct unilateral operations when necessary, we can share the burden and improve readiness of allies' navies through cooperative efforts with maritime nations who share a common interest and a reliance upon international commerce, safety, security, and freedom of the seas. To maximize the effectiveness of these efforts to combat transnational criminal organizations and other dangerous uses of the oceans to disrupt sealane passage and global commerce, we need to close the seams among like-minded nations.

We and our coalition partners need to be fully committed to the same set of rules for the full range of maritime operations, but your Navy is at a distinct disadvantage with the United States being outside the Law of the Sea Convention. One hundred and fifty-four nations are owners of a Magna Carta for the oceans that guarantees robust navigational freedoms throughout the world's largest maneuver space. We on the other hand only get to use it on loan and have to filter our support for what it provides through the lens of customary international law.

A prime example of the kind of international cooperation we need to expand is the President's Proliferation Security Initiative (PSI). The Law of the Sea Convention strengthens this initiative, which aims to impede and stop shipments of weapons of mass destruction, their delivery systems, and related materials. Being party to the Convention will greatly enhance the Navy's ability to support the objectives of PSI by reinforcing and codifying freedom of navigation rights on which the Navy depends for operational mobility. Currently, the vast majority of our PSI partners are party to the Convention. We cannot remain outside the Convention and convince other nations that we truly believe in the importance of the rule of law when we are not party to the Convention which provides legal certainty throughout the world's oceans.

The Law of the Sea Convention supports our ability to operate wherever, whenever, and however needed under the authority of widely accepted law. The Convention codifies the right to transit through, over, and under 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 from or prior notice to foreign governments.

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 have relied upon for our navigational freedoms is under challenge. Our participation in the Convention will better position us to maintain law of the sea rights and freedoms vital to our national security. We will be able to guide and influence the interpretation of rules, protecting our interests and deflecting inconsistent interpretations. The agreement is being interpreted, applied, and developed right now and we need to be part of it to protect our vital security interests.

Future threats and issues will likely emerge in places and in ways that are not yet fully clear. For these and other undefined future operational challenges, we should rejoin the community of 154 nations inside the Convention to be able to take maximum advantage of its widely accepted navigational rights and chart the course of future ocean developments from a position of leadership.

We must be able to get to the fight rapidly. Strategic mobility is more important than ever. The oceans are fundamental to that maneuverability and joining the Convention supports the freedom to get to the fight, 24 hours a day and 7 days a week, without a permission slip.

Joining the Convention now will support and enhance ongoing U.S. military operations, including the continued prosecution of the global war on terrorism. It will enable our Armed Forces to defend us at home and abroad with legal certainty. It will provide a stable and predictable legal regime within which to conduct our operations today, and realize our vision for the future.

As I testified before the Senate Armed Services Committee in 2004, the real issue for me is people. As the CNO, I had the privilege to be entrusted with the task and responsibility to lead the sons and daughters of America who have chosen to wear the cloth of the Nation. Twenty-four by seven, 365 days a year, our sailors are operating at the tip of the sphere. On any given day, a third of our fleet is forward deployed. Sometimes we must place them in harm's way to do our country's business, and they do so willingly. For many years now, we have remained outside the Convention. We have asked our young men and women to conduct freedom of navigation operations. One such operation resulted in the Black Sea bumping incident between U.S. and Soviet warships. As a commanding officer, I had, unfortunately, the privilege of conducting those kinds of operations at too close of quarters.

What that means to me is that these kinds of operations, because these are what we're largely left with when we do not have agreements with other nations, and clear international standing, sometimes puts us at great risk to challenge the excessive maritime claims that other countries may make to prevent those claims from becoming customary international law.

Mr. Chairman, in my view, we need a better venue. We need more than just freedom of navigation operations to maintain freedom of the seas. We should not rely only on that limited ability to formalize our international posture. We can do better than that. We should look for every possible guarantee that we can find to ensure our sailors' safety and to keep them from needlessly going into harm's way. And that's why I believe that we need to join the Law of the Sea Convention, so that our people know when they're operating in the defense of this Nation's national interests, far from our shores, that they have the backing and that they have the authority of widely recognized and accepted law to look to, rather than depending only upon the threat or the use of force or customary international law that can be too easily changed.

Senator MENENDEZ. Thank you, Admiral.

Mr. Gaffney.

STATEMENT OF FRANK J. GAFFNEY, JR., PRESIDENT, CENTER FOR SECURITY POLICY, WASHINGTON, DC

Mr. GAFFNEY. Mr. Chairman, I appreciate your invitation to appear.

As you indicated, I had the privilege of working for President Reagan, and, like him, I believe that the Law of the Sea Treaty is not consistent with our national security and sovereignty interests. I'm joined in that view by 18 other members of the Reagan administration, including his National Security Advisor, his Attorney General, and his Secretary of the Navy, in a letter that is, I hope, going to be made part of your record, as well.

I must say a few words, if I may, please, about the process, before turning to the criticism of the treaty.

And you also indicated I had the privilege of working in this body. I admire this institution. I revere its responsibilities. In particular, what I consider to be one of its most important, which is the responsibility to advise and consent on treaties by a two-thirds majority. I believe the Framers gave the Senate that sacred trust because they understood how dramatically treaties could affect our Constitution and the rights of the people. In so doing, I don't think they contemplated something like the Law of the Sea Treaty, but it certainly was something they were anticipating. And I believe

the facts, contrary, with all due respect, to your opening statement and the ranking member's opening statement, are that the costs of this treaty vastly exceed the putative benefits. And it pains me that, with the exception of my colleague here, Fred Smith, the two of us are likely to be the only two people who will discuss those costs with you, in a different way than all of the people that you have arranged to have speak to the benefits of this treaty, and to deprecate those costs.

This amounts to, with respect, a rubberstamp, not the world's greatest deliberative body at work. I have written—and I would ask your permission to include this in the record, as well—letters to eight other committees of the Senate—serious committees with serious responsibilities—encouraging them to look at the costs of this treaty in their areas of responsibility. These include the Armed Services Committee, the Intelligence Committee, the Environment and Public Works Committee, the Energy Committee, the Finance Committee, the Judiciary Committee, the Homeland Security Committee.

As of this moment, as best I can tell, not one of those committees will hold a single hearing, let alone hear from witnesses like Fred Smith and I—and there are lots of them—who bring to this subject real expertise, real conviction that there are serious problems associated with this treaty for the United States, for its national security, for its energy policies, for its environmental policies, and, not least, Mr. Chairman, for the responsibilities and prerogatives of this body, because I submit to you that one of the things that will come about as a result of empowering a supranational organization by becoming a party to this treaty is that you will derogate to them responsibilities that currently are vested with you. You will have no choice but, in the future, to implement regulations and rules that they will promulgate without our representation, except as one member of a 150-member country organization.

In short, on the process side, I would strenuously urge this committee to exercise real leadership on this treaty by encouraging such further oversight, not only by this committee, but by your colleagues. I think you would thereby maximize the chances of informed and sound decisions being made about this treaty, rather than ill-considered, hasty, and possibly lethal ones that will prove, as a practical matter, to be irreversible. Such a comprehensive review would demonstrate the confidence that supporters of this treaty claim to have in this accord. In the alternative approach, allowing for only the most superficial examination of this treaty—5 minutes for each of the opposition witnesses, of whom there will only be two out of something like 11—is grossly unfair, and it allows, I'm afraid, the reasonable conclusion to be drawn, that, in fact, as we believe, this treaty cannot withstand close scrutiny.

And now let me turn, very quickly, in the 4 seconds remaining to me under my 5 minutes, to what's wrong with this treaty. I would ask your indulgence to give me a few more minutes, Mr. Chairman, to review, at least briefly, what the problems are here from a national security and sovereignty point of view; my——

Senator MENENDEZ. Mr. Gaffney——

Mr. GAFFNEY [continuing]. Colleague will speak to the others.

Senator MENENDEZ [continuing]. Your 5 minutes to protest, which I respect you having the ability to do so, but you've used your 5 minutes to protest. So, I'll give you another 2 minutes to give us the essence.

Mr. GAFFNEY. I appreciate that, Mr. Chairman.

Senator MENENDEZ. All right.

Mr. GAFFNEY. The first problem is the nature of the Law of the Sea Treaty itself. It was brought to us initially by the U.S. Navy and others who sought to codify, for reasons Vern Clark has described, the rules of navigation. Unfortunately, it was hijacked along the trail. It is a treaty that largely reflects something that is unimaginably out of date today; namely, the preferences of the majority of those who were responsible for creating this: The Soviet Union, the so-called nonaligned, and transnationalists who have tried to create, hereby, a "Constitution for the Oceans," as they call it.

Along the trail, they've created organizations that will be used to implement that world view, a redistributionist, socialist, and fundamentally hostile-to-the-United-States view of those parties.

Specific problems arise, I believe, from the dispute resolution mechanisms that are stacked against us. Every single one of these will be—have the determining vote, selected by people who are predictably hostile to this country. And, from that, I believe, flows lots of problems. And I will dwell on only one in the remaining minute I have.

I wear, with the greatest of pride, a token of an award that I received from the Navy League of the United States. It's called the Alfred Thayer Mahan Award. It was given to me, I believe, because of confidence in my judgment about what is in the long-term interests of the Navy. And I say this with the greatest of respect to my friends in uniform. But creating circumstances in which the Navy will be subjected to mandatory dispute resolution, notwithstanding the exemptions they think they have, because some of these resolutions—some of these disputes will almost certainly be cast as environmental in character. For example, sonar and the impact that it has on whales and dolphins. This is going to be used as an example of the sort of lawfare that the Navy is already struggling with. And the Secretary of the Navy today is very, very concerned about the environmental burden that he is currently struggling with in doing the Navy's job. This will only get worse if the Law of the Sea Treaty is implemented ditto, technology transfer implications; ditto, proliferation security implications, and on and on.

I hope that Members of the Senate, before acting on this treaty, will look with care at the lengthy statement that I've submitted to the record. And I ask you, Mr. Chairman, to give us an opportunity to further this discussion, rather than have it abbreviated artificially today.

Thank you.

[The prepared statement of Mr. Gaffney follows:]

PREPARED STATEMENT OF FRANK J. GAFFNEY, JR., PRESIDENT AND CEO, CENTER FOR SECURITY POLICY, WASHINGTON, DC

Mr. Chairman, I appreciate your invitation to contribute to your deliberations on the United Nations Convention on the Law of the Sea, better known as the Law of the Sea Treaty (LOST). I had the privilege of working for President Reagan's ad-

ministration and it is my considered judgment that Mr. Reagan was correct in his judgment that LOST was not consistent with U.S. national security, sovereignty, and economic interests. I believe that remains the case today and strongly encourage the Senate to decline to consent to the ratification of this defective accord.

THE SENATE'S DUTY

Before turning to the substance of the treaty, I feel constrained to make an observation about the process.

At an early and formative moment in my career, I had the privilege of working on the staff of what has been known as the "World's Greatest Deliberative Body," the United States Senate. Under the tutelage of two of its most formidable members, Democrat Henry M. "Scoop" Jackson and Republican John Tower, I saw firsthand the exercise of one of the Senate's most important duties under the Constitution: Its responsibility to advise and consent to treaties by a two-thirds majority.

I believe the Framers wisely entrusted this role to the upper body—and set the bar for treaty approval so high—precisely because they understood that treaties would become "the supreme law of the land," with potentially far reaching implications for the Nation and its Constitution. In my opinion, that has never been more true than with respect to the Law of the Sea Treaty.

It is, therefore, frankly appalling to me that the present approach to Senate consideration of this accord amounts to little more than a rubber-stamp. To be sure, I am delighted to be allowed to critique this treaty—an opportunity that this committee previously denied those of us who oppose LOST.

The Senate leadership's seeming intention, however, to restrict such criticism to two experts each of whom is being given 5 minutes publicly to inform the Senate about a vast array of concerns concerning one of the most far-reaching international agreements in history virtually amounts to the same thing: A determined effort to keep the American people in the dark about what is going to happen to their rights, their constitutional, representative form of government and our national interests until after LOST is ratified and is too late to do anything about it.

In my capacity as a participant in the Coalition to Preserve American Sovereignty, I have written the chairmen and ranking members of eight committees of the U.S. Senate. Important aspects of each of those committees' jurisdiction will be affected, in some cases profoundly, by the Law of the Sea Treaty. I would ask that these letters be made a part of the permanent record of this proceeding.

As one who feels privileged to have served on the staff of this body and cherishes its constitutional role as a "quality control" mechanism on treaties, I feel obliged to be blunt: It would be incomprehensible and irresponsible were each of these eight panels to fail to conduct their own hearings into LOST's implications.

This committee can and should exercise real leadership by encouraging such further oversight by your colleagues. You would, thereby, maximize the chances that informed and sound decisions are made—rather than ill-considered, hasty and possibly lethal ones that will prove, as a practical matter, to be irreversible.

Such a comprehensive review would, moreover, demonstrate the confidence that supporters of the Law of the Sea Treaty have in this accord. The alternative approach, allowing for only the most superficial examination of the treaty, by contrast simply reinforces our belief that LOST cannot withstand close scrutiny.

THE CASE AGAINST THE LAW OF THE SEA TREATY

Let me turn now to a review of the arguments against U.S. accession to the U.N. Convention on the Law of the Sea. With the understanding that my colleague, Fred Smith of the Competitive Enterprise Institute, is going to cover the treaty's many problematic repercussions for the American economy and businesses should this country become a state party, I am going to confine myself to the following aspects: LOST's negative impact on U.S. sovereignty and national security interests.

LOST is a vast and complex undertaking, with obligations and implications that go far beyond the codification of common navigation rights and arrangements that were the initial impetus for the treaty.

We cannot safely ignore the fact that, during its negotiation, LOST became a vehicle for advancing an agenda promoted by the Soviet Union and so-called "nonaligned movement" during the 1970s, known as the New International Economic Order (NIEO). The NIEO was a classic "united front" effort aimed at undermining the economic and military power of the industrialized West—particularly the United States—in the name of a centrally planned, global redistribution of wealth to the benefit of developing nations.

Toward this end, LOST creates various supranational bodies to develop and enforce its provisions, complete with an executive branch, legislature, and judiciary.

These agencies operate on the basis of one-nation/one-vote—an arrangement that has proven in the United Nations and elsewhere to be highly disadvantageous to the United States.

The Reagan Objections

The foregoing considerations were among the reasons that prompted Ronald Reagan to reject the Law of the Sea Treaty. Even prior to his election to the White House in 1980, Mr. Reagan had made known his opposition to LOST, which was then still under negotiation. Then, as President in 1982, he formally rejected the draft treaty and identified a large number of changes required to make it acceptable to his administration. Those changes were not adopted in subsequent negotiations and Mr. Reagan refused to sign what he considered to be a defective accord.

Among the specific concerns with LOST identified by President Reagan in 1982 were:

- The lack of adequate American influence within the decisionmaking bodies of the International Seabed Authority (ISA), in charge of regulating deep seabed mining in the oceans;
- Limitations on exploitation of the deep seabed;
- Mandatory technology transfers to the ISA and developing countries;
- The competitive advantage given to a supranational mining company affiliated with the ISA known as the "Enterprise";
- The imposition of financial burdens on deep seabed mining operations; and
- The potential for the ISA to impose regulatory burdens on the American mining industry.

In other words, President Reagan was concerned not simply with specific provisions of Part XI of the Law of the Sea Treaty that dealt with deep seabed mining. As his chief negotiator for LOST, the late Ambassador James Malone, noted in a Foreign Policy article in 1984: ". . . Security and economic interests vital to national well-being and the principles that form the foundation of American democracy must be given priority by those individuals entrusted to make public-policy decisions. It was this basic responsibility that made it necessary for the President to decide against U.S. acceptance of the United Nations Convention on the Law of the Sea in 1982."

Many of President Reagan's chief lieutenants—including: His National Security Advisor, Judge William Clark; his Counselor and Attorney General, Edwin Meese; his Secretary of Defense, the late Caspar Weinberger; his U.N. Ambassador, the late Jeane Kirkpatrick; and his Secretary of the Navy, John Lehman—agree that what Mr. Reagan found objectionable about LOST could not be fixed by relatively minor reworking of its provisions related to the International Seabed Authority.

The 1994 Agreement Did Not Amend LOST

There are those who nonetheless assert that the Agreement negotiated in 1994 by the Clinton administration addressed and corrected the problems President Reagan had with the Law of the Sea Treaty. This is inaccurate on its face given that, by LOST's own terms, the treaty could not be amended for a decade after it entered into force. Since the treaty did not enter into force until 1994, it was not available for amendment until 2004—10 years after the 1994 Agreement was signed.

Even if LOST had been available for amendment, moreover, the 1994 Agreement did not conform to the procedures specified by the treaty for adopting amendments. As a result, the terms of the treaty have not been formally altered.

Presumably, it is for these reasons that the 1994 Agreement does not explicitly amend LOST. Rather, the Agreement states that "The provisions of this Agreement and Part XI [of LOST] shall be interpreted and applied together as a single instrument."

At the time the Agreement was signed, a representative of the American ocean mining industry cited this shortcoming in testimony before Congress: "[The 1994 Agreement] does not even purport to amend the Convention. It establishes controlling 'interpretive provisions' that will control in the event of a dispute. *This is not an approach that gives confidence to prospective investors in ocean mining."* (Emphasis added.)

Neither does the 1994 Agreement require any of the LOST tribunals to abide by the Agreement. This increases the likelihood that such panels, when hearing disputes between parties, will view LOST itself as the basis for resolving the dispute, and not the 1994 Agreement.

That is especially so since roughly 16 percent of the parties to LOST—fully 25 member countries—have yet to sign the 1994 Agreement. It is far from clear on what basis these countries could be expected to view the Agreement's purported re-

visions to the treaty as legitimate. How, for instance, would resolutions be achieved in disputes between countries that are party to both LOST and the Agreement, on the one hand, and countries that are party only to LOST, on the other? At the very least, the latter could legitimately challenge claims by the United States (or others) to be bound by terms other than those contained in the Law of the Sea Treaty's agreed text.

The 1994 Agreement's Shortcomings

The foregoing issues aside, the Agreement falls significantly short of meeting Mr. Reagan's concerns—even with respect to the problematic sections of LOST that it does address. For example:

- *The Lack of U.S. Influence:* The 1994 Agreement requires that any ISA Assembly decisions concerning administrative, budgetary, and financial matters must be based on recommendations by the ISA Council. While the Agreement effectively guarantees the United States a seat on the Council, it does not assure this country a veto. To the extent the Council operates on the basis of consensus, America may have what amounts to such leverage. But nothing prevents the Council from acting instead on the basis of majority rule—in which case, Mr. Reagan's concerns would still apply.

  For example, the 1994 Agreement still allows the ISA to amend LOST without American consent. The U.N. Secretary General can convene a conference, at which the Assembly and Council can vote to accept an amendment to LOST. It then requires the approval of three-fourths of LOST's states parties to become final. As is often the case in U.N. settings, the United States could simply be outvoted.

  Furthermore, the argument that the United States would have to ratify any "amended treaty" to be bound by its terms ignores the reality of how LOST would likely work in practice. Changes that affect the United States could manifest themselves in the form of regulations decided upon within LOST bodies, which would not be ratified externally. Additionally, whether or not LOST is being "amended" in the formal sense would be dependant upon the subjective views of the LOST deliberative bodies. The United States could therefore find itself bound by modifications to LOST even without U.S. ratification of such changes.
- *Mandatory Technology Transfers:* Although the 1994 Agreement purports to modify some troubling LOST provisions on the obligatory sharing of sensitive information and technologies, it fails to address, let alone alter, other coercive provisions. These include LOST's requirement that states parties "promote the acquisition, evaluation, and dissemination of marine technological knowledge and facilitate access to such information and data."

  Neither does the Agreement speak to LOST's requirement to transfer information and perhaps technology pursuant to the treaty's mandatory dispute resolution mechanisms. Parties to a dispute are required to provide the tribunal with "all relevant documents, facilities, and information." This amounts to an invitation for competitors to bring the United States and/or its companies or adversaries before a LOST tribunal to obtain sensitive data and know-how. These are hardly the sorts of safeguards upon which President Reagan had insisted.
- *LOST's Implications for U.S. Businesses:* Another topic unaddressed by the Agreement is LOST's requirement that half of each area surveyed by an American mining company must be turned over to the ISA for exploration by the Enterprise—with the ISA choosing which half President Reagan correctly viewed this arrangement as one that would force American companies to assist their competitors.
- *LOST's Financial Burdens:* Although the 1994 Agreement purports to lessen some of the onerous costs associated with exploiting the deep seabeds' natural resources, other burdens imposed by LOST go unaddressed. The latter include taxes and fees that companies and countries must pay to the ISA, notably an application fee for required permits, an annual fixed-fee and royalties payments. Likewise, the Agreement does not try to alter the ISA's authority to redistribute such revenues to other countries on the basis of "equitable sharing," with special emphasis on developing nations—in other words, the kind of socialist, global wealth-redistribution scheme that Mr. Reagan viscerally opposed.
- *LOST's Regulatory Burdens:* The 1994 Agreement does little to address President Reagan's concerns about the Law of the Sea Treaty's regulatory burdens. For example, the ISA still maintains the right to adopt "appropriate rules, regulations, and procedures for . . . the prevention, reduction, and control of pollution and other hazards to the marine environment," which would undoubtedly

impose significant costs on American businesses and promote big (supranational) government.

Taken altogether, it is a canard to claim that the problems with the Law of the Sea Treaty that prompted President Reagan to reject it have been "fixed." To the extent that the 1994 Agreement has any force and effect, it addresses only some of Mr. Reagan's concerns. That accord does not even purport to alter much of what the President found unacceptable in this supranational government-empowering treaty. Insofar as the Agreement does not actually amend even those parts of LOST that it does address, it is misleading to contend that the treaty would now be acceptable to Ronald Reagan—or that it should be to those who share his vision and values.

LOST and the United Nations

Some treaty proponents insist that the Law of the Sea Treaty does not involve, let alone unwisely empower, the United Nations. Such claims try to dismiss the fact that the accord's official name—"United Nations Convention on the Law of the Sea"—correctly indicates otherwise. In fact, the "world body" at Turtle Bay has played a decisive role in giving birth to the treaty's preparation via U.N.-sponsored negotiations and, subsequent to its entry into force, in LOST's administration and implementation.

The official title also reflects the fact that the LOST's various international governmental agencies are modeled after, and work in much the same manner as, the U.N. and associated multilateral institutions. In some respects, however, the treaty departs from past practice by conferring on its agencies unprecedented powers—notably for mandatory dispute resolution and for the management of vast natural resources for which those agencies are given responsibility.

Since the Law of the Sea Treaty entered into force two decades ago, LOST's executive, legislative, and judicial entities have largely operated in obscurity and, with a few exceptions, in uncontroversial ways. The question occurs: Would U.S. accession to LOST precipitate changes in the conduct of the treaty's agencies? Would the result be the emergence of a formidable new international entity? In the process, would the influence and power of the United Nations and other supranational organizations be enhanced at the expense of nation-states like ours? The answers to these questions can be derived from the following facts:

- The Law of the Sea Treaty and its agencies are indisputably linked to the United Nations, both substantively and organizationally. What benefits one, benefits the other.
- On the substantive plane, other U.N. agencies routinely promote treaties and regulations designed to build on and reinforce LOST's importance and the authority of its agencies. A recent example is instructive: A report of a U.N. review conference on progress between 2004 and 2006 in the implementation of the Convention on Biological Diversity "recognizes the United Nations General Assembly's central role in addressing issues relating to the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction."

  The report goes on to "recall that United Nations General Assembly Resolution 60/30 emphasized the *universal* and unified character of the United Nations Convention on the Law of the Sea, and reaffirmed that the United Nations Convention on the Law of the Sea sets out the legal framework within which *all* activities in the oceans and seas must be carried out, and that its integrity needs to be maintained, as recognized also by the United Nations Conference on the Environment and Development. . . ." (Emphasis added throughout.)
- At a practical level, the ties between the United Nations and LOST are no less palpable. For example: All staff associated with LOST bodies are paid by the U.N. system. Day-to-day monitoring of activities regulated by LOST is conducted by U.N. staff employees. Employees of LOST-related agencies participate in the U.N. pension plan. And, under the terms of the treaty, the U.N. Secretary General plays a direct role in choosing the fifth arbiter for five-person special arbitral tribunals that will hear disputes between parties to LOST. He also is responsible for convening conferences to amend the treaty.

A U.N. "on Steroids"

Hard experience argues against further empowering the United Nations and its affiliates. The United Nations has a long and sordid track-record of engaging in or endorsing behavior and policies that are antithetical to the interests of the United States and other freedom-loving nations. Such behavior and policies are generally the product of majorities of Member States, like-minded, unaccountable international bureaucrats and nongovernmental organizations. They conspire to use the General Assembly's absurd one-nation/one-vote rules to translate shared hostility to-

ward America and its fellow-developed nations into policies that vilify the West and seek to redistribute the world's power and wealth to the developing world.

A small sample of this reprehensible conduct would include: The Oil-for-Food scandal; the infamous "Zionism is Racism" resolution; the creation of the U.N. Human Rights Council on which countries such as Cuba, China, and Saudi Arabia are allowed to serve; and the convening of the 2001 World Conference against Racism in Durban, South Africa—an event that was nothing more than a forum for anti-Semitism and Israel-bashing. The United Nations is now preparing a followup to the 2001 Durban conference, with Libya chairing the planning committee, and Iran and Cuba serving on the committee as well.

LOST's Transnationalist architects have long sought to build up supranational agencies. This treaty allows them to do so in unprecedented ways by: Conferring on LOST "organs" responsibility for regulating seven-tenths of the planet (i.e., the world's oceans and the vast natural resources to be found in and below them); levying what are tantamount to international taxes; and imposing mandatory and unappealable decisions in disputes that may arise involving parties to the treaty.

To date, the full, malevolent potential of the Law of the Sea Treaty has been more in prospect than in evidence. Should the United States accede to LOST, however, it is predictable that the treaty's agencies will: Wield their powers in ways that will prove very harmful to American interests; intensify the web of sovereignty-sapping obligations and regulations being promulgated by this and other U.N. entities; and advance inexorably the emergence of supranational world government.

It may be that the only check on such undesirable outcomes is for the United States to remain a nonstate party to LOST. The latitude such an arrangement affords America to observe treaty provisions that are unobjectionable—without being bound by those that are—may not only be preferable for this country and its vital interests. It could also help spare other nations the less free, less prosperous, and more onerous international order that will emerge if the Transnationalists have their way on the Law of the Sea Treaty.

LOST's Compulsory Dispute Settlement

If, on the other hand, the United States were to become a state party of LOST, this country will find itself subject to a dramatically different situation—even with respect to navigation from that applied by the previous, 1958 convention. Specifically, in the event of disputes, America will be obliged to submit to mandatory settlement mechanisms. These apply not just to issues involving the maritime "rules of the road," but to any ocean-related disputes that state parties cannot resolve on their own.

In fact, nations are required—at the request of either of the disputing parties—to submit the dispute for resolution by one of several international tribunals: (1) The International Tribunal for the Law of the Sea (ITLOS), (2) an arbitral tribunal, or (3) a special arbitral tribunal. Another option is the International Court of Justice (ICJ). If the parties to the dispute cannot agree on a mechanism, the dispute automatically goes to an arbitral tribunal for resolution. Decisions made by any of these bodies are binding upon the disputants, and such decisions cannot be appealed.

The question is: How will mandatory dispute resolution affect U.S. interests?

Proponents of the treaty claim that in the event of disputes, the United States will avoid potential problems with international courts by choosing either arbitration or special arbitration as the dispute mechanisms. The implication is that such an arrangement thereby assures decisions amenable to U.S. interests.

LOST supporters also insist that military activities will be exempted from consideration by any of the treaty's tribunals and that it will be exclusively up to the United States to determine what constitutes such an activity.

Mr. Chairman, few aspects of this complex treaty require closer scrutiny than these contentions. If the proponents are wrong about how dispute resolution will work, the grounds for rejecting the Law of the Sea Treaty are clear-cut.

- For starters, LOST's advocates in the Bush administration are right to be worried about international courts given the track record of such panels (particularly the ICJ) in which they have proven to be highly politicized and generally very hostile to American interests.

  Unfortunately, the appointment procedures that would apply to the "swing" arbiters in both the regular and special arbitration panels are likely to assure a similar stacking of the deck against the United States. In regular arbitration, each party chooses one panelist, and the three remaining panelists are chosen by the President of the Law of the Sea Tribunal. As noted above, in "special arbitration," each party chooses two panelists, and the remaining panelist is chosen by the Secretary General of the United Nations.

Worse yet, the State Department has acknowledged that arbitration panels would likely look to decisions of the Tribunal to inform their own rulings. As a practical matter, this means that, were the United States to become a party to the treaty, it would not be able to escape the reach of the Tribunal—despite its determination to forum-shop by choosing arbitration.

- Equally flawed is the proponents' insistence that Law of the Sea Treaty tribunals will be unable to interfere with U.S. military activities. Although LOST exempts "disputes concerning military activities" from the purview of its dispute resolution mechanisms, the treaty does not define "military activities."

  Proponents of LOST argue that the United States can make a declaration that it will define "military activities" for itself. However, this amounts to a reservation to the treaty, which is expressly prohibited by LOST. LOST must be accepted or rejected in its entirety. Furthermore, if the U.S. military were allowed to make such a unilateral determination under LOST, the militaries of other nations would exercise the same option, creating an anarchic situation that would defeat the purposes of LOST altogether. LOST was clearly not intended to allow this to happen.
- These considerations, combined with the treaty's sweeping environmental obligations, give rise to circumstances in which U.S. Navy and perhaps other military services, their contractors or suppliers seem virtually certain to find themselves embroiled in one or another of LOST's dispute resolution mechanisms. For example, the Navy's use of high-powered sonars would certainly be characterized by Washington as a military activity. But the Navy could well be forced to defend the use of such sonars before an unfriendly LOST panel on the grounds that it has harmed the "marine environment," by killing whales or dolphins.
- Worse yet, in the event of any dispute over whether an activity is military in nature, the tribunals created by LOST are permitted to make that determination themselves.

The mandatory and rigged nature of the dispute resolution mechanisms are one of the most important reasons why the United States will be better served by continuing its practice over the past 25 years—namely, voluntarily observing those parts of LOST that it finds unobjectionable, but remaining unencumbered by the obligations that are.

LOST's Negative Security Implications

The Law of the Sea Treaty's compulsory dispute resolution requirements and procedures are particularly problematic when taken together with a number of obligations the accord entails that are at odds with our military practices and national interests. These include commitments that:

- Reserve the oceans exclusively for "peaceful purposes" (Article 88): The United States routinely uses the world's oceans for military purposes, including waging war against our enemies.
- Require states to refrain from "the threat or use of force against the territorial integrity or political independence of any state" (Article 301): As the world's preeminent maritime nation, America must project power from the sea and does so with some regularity. Some would describe such power projection as contrary to "the territorial integrity or political independence" of states (most recently, for example, attacks from naval forces against the Taliban's Afghanistan and Saddam Hussein's Iraq).
- Proscribe the use of territorial waters to collect intelligence and conduct other operations (Article 19): For many decades, intelligence vital for American security has been collected on, below, and above the oceans—including, in some cases, those considered to be "territorial waters."
- Oblige submarines to travel on the surface and show their flags in territorial waters (Article 20). The effectiveness and perhaps the very survival of our submarines would be compromised were they to have to operate on the surface in close-in waters where they can only go with the greatest of stealth.
- Bar any maritime research except that conducted for peaceful purposes and require the coastal state's permission for that performed in territorial waters (Article 240). Classified oceans research, including some conducted covertly, is indispensable to the U.S. Navy's mission.

In statements in support of LOST, the United States military makes clear that it has no intention of ending such activities, and insists that it will not have to do so since "military activities" are exempted from the treaty's dispute resolution mechanisms. Unfortunately, this position both defies common sense and hard experience with international accords: These articles are wholly without effect if they do not

apply to the military and it is predictable that America's foes will use every opportunity afforded by LOST to ensure they do.

LOST's proponents also note that some of these restrictions are similar to provisions of the 1958 Convention on the Territorial Sea and Contiguous Zone (1958 Treaty) to which the United States is already a party.

To make such representations, however, is to ignore the critical difference between the 1958 Convention and the Law of the Sea: As a state party to LOST, the United States will be subject to the treaty's international tribunals and their authority to interpret and enforce the treaty's obligations in connection with "any dispute concerning the interpretation or application of this Convention." It bears repeating that the outcome of such dispute settlement is binding on the parties to the dispute.

Even though LOST permits a state party to declare "disputes concerning military activities" to be exempt from dispute settlement, such a declaration would very likely be the beginning of the process, not its end.

As I have noted earlier, the treaty does not define "military activities." At the very least, therefore, were the United States freely to assume the foregoing obligations, it would set the stage for injunctions, or other adverse rulings, against the U.S. military to be sought from one LOST dispute resolution agency or another. Given the stacked-deck nature of these mechanisms, it is far from certain that our opponents will fail.

This applies in spades to things we consider to be "military activities" but that may well be depicted by our opponents in ITLOS or arbitration proceedings as environmentally harmful activities (e.g., charges that Navy sonars are responsible for killing whales and dolphins). Importantly, in the event of any disagreement over whether an activity is military in nature, the treaty grants to its dispute resolution mechanisms the right to make that determination themselves.

Even if the military's own activities were able to be exempted from the Law of the Sea Treaty's provisions, it is far from clear that exemption would also apply to all of the companies that comprise, for example, the Navy and Coast Guard's civilian technology supply chain. They would certainly not be spared exposure to dispute resolution demanded by other treaty parties or activist groups alleging violations of LOST-imposed obligations to protect the marine environment. For instance, environmental grounds could be used to object to products supplied to the U.S. military by civilian companies or perhaps the industrial and technological processes employed by private sector entities to manufacture and deliver those products to the Navy and Coast Guard.

"Lawfare"

The U.S. military has enough problems meeting its environmental compliance requirements under American statutes. It is almost unimaginable how severe the repercussions could be if it and/or its contractors are subjected to new instruments of "Lawfare"—i.e., legal initiatives carried out to achieve an adverse effect on our Armed Forces—rooted, for example, in LOST regulations' application of the "Precautionary Principle."

Reduced to its essence, this principle prohibits a given activity if it could cause harm. There need not be proof that harm will result, let alone any evaluation of the potential benefits versus the possible costs. The European Union has saddled itself with this principle and has been working for many years to impose it on competitors, notably the United States.

Regulations promulgated under LOST will afford that vehicle, to the huge detriment of American businesses, entrepreneurial innovation, and economic activity. The Precautionary Principle could also have the effect of denying the Navy and Coast Guard valuable technologies needed to maintain their military preparedness, with negative effects on mission performance.

In short, as a general rule, it is an ill-advised practice for democratic nations to make promises pursuant to international treaties that they do not intend to honor. That is especially true, however, in circumstances where Federal judges may just demand compliance on the basis of the rulings of LOST's tribunals.

LOST and Technology Transfer

The Law of the Sea Treaty requires extensive transfers of data and technology—at least some of which could be highly detrimental to America's industrial competitiveness (including in fields far removed from maritime-related activities) and to the national security. For example:

- LOST's Article 266 mandates that states "cooperate in accordance with their capabilities to promote actively the development and transfer of marine science and marine technology on fair and reasonable terms and conditions" and "en-

deavor to foster favorable economic and legal conditions for the transfer of marine technology."

- Article 268 requires states to "promote the acquisition, evaluation, and dissemination of marine technological knowledge and facilitate access to such information and data."
- Article 269 calls for parties to "establish programs of technical cooperation for the effective transfer of *all kinds* of marine technology to states which may need and request technical assistance." (Emphasis added.)
- Compulsory dispute settlement mechanisms afford further opportunities to obtain sensitive technology and information. Article 6 of Annex VII requires that parties to a dispute "facilitate the work of the arbitral tribunal and . . . provide it with all relevant documents, facilities, and information." It can therefore be expected that countries may bring the United States or its businesses before arbitral tribunals—without expectation of a favorable result, solely for the purpose of obtaining sensitive technology information.

The object of these provisions is consistent with the socialist, redistributionist, and one-world vision that animated many of LOST's negotiators: No matter what the costs may be to U.S. security and business interests, the fruits of marine research, exploration, and exploitation of "the Area"—the waters covered by the treaty—and the associated technology must be shared with developing nations, land-locked states and "geographically challenged" countries.

Some of the technologies in question are most sensitive. They include: Underwater mapping and bathymetry systems; reflection and refraction seismology; magnetic detection technology; optical imaging; remotely operated vehicles; submersible vehicles; deep salvage technology; active and passive acoustic systems; bathymetric and geophysical data; and undersea robots and manipulators. Many of these technologies are inherently "dual-use," having both military and civilian applications. Their military applications include: Antisubmarine warfare; strategic deep-sea salvage; and deep-water bastions for subsurface launching of ballistic missiles.

The effect of mandatory sharing of such technology could directly benefit not only this country's economic competitors. It could also help America's military adversaries, both actual and potential.

The so-called "fixes" with respect to technology transfer obligations contained in the 1994 Agreement do not alter this reality. As noted above, in the first place, the Agreement could not and did not amend the treaty. Second, even if it had done so, the Agreement did not purport to modify all areas in which information and technology transfers are required. For example, all relevant information about deposits and geology must still be provided to the International Seabed Authority's "Enterprise" in order to apply for a permit to develop seabed resources, together with the technology necessary to exploit such resources.

The United States is the nation with the most to lose—from an economic and national security point of view—from the sort of obligatory technology transfer provisions contained in the Law of the Sea Treaty, including those that would be binding even if the 1994 Agreement has effect.

America has long imposed unilateral export control restrictions precisely for the purpose of preventing transfers that will result in harm to this country. U.S. accession to LOST would require a substantial liberalization, if not wholesale scrapping, of such important self-defense measures.

Actual or potential competitors/adversaries like China, Russia, state-sponsors of terror and even European "allies" understand full well what a technology windfall U.S. adherence to LOST could represent. It would be irresponsible, not to say foolish in the extreme, to believe that none of these parties will take advantage of the opportunity to reap that windfall, to our very considerable detriment.

LOST Can Be Used To Limit the Proliferation Security Initiative

A particularly contentious question involves the impact the Law of the Sea Treaty could have on the Proliferation Security Initiative (PSI), a multicountry arrangement launched in 2003 for the purpose of permitting the United States and other participants to stop foreign vessels suspected of transporting weapons of mass destruction "in their internal waters, territorial seas, or contiguous zones."

PSI is one of the most effective tools the U.S. Government has employed to try to stop the transfer of WMD and their delivery systems. Proponents of the treaty point out that most of those with whom we partner in the PSI are treaty members and cite LOST as justification for their participation.

Yet, the Law of the Sea Treaty provides only a handful of exceptions to the right of "innocent passage" afforded vessels in these waters. Specifically, LOST's Article 110 only permits such intercepts in four instances: Piracy (i.e., the ship is flying no national flag), slavery, narcotics trafficking, and unauthorized radio broadcasting. In

addition, LOST provides government-owned ships operating on the high seas complete immunity from the jurisdiction of any foreign country. Since most terrorist-sponsoring nations and their totalitarian enablers have state-owned merchant marines, the treaty can thus be used to protect proliferation activities on the high seas.

PSI is not compatible with LOST, despite proponents' claims to the contrary. As a treaty, LOST is binding international law on the parties, whereas PSI is only an informal arrangement between certain nations, and carries no force as international law. The argument that PSI can be executed within the rules of LOST, even though LOST clearly prohibits boarding actions critical to PSI, ignores the fact that LOST outranks PSI in the hierarchy of international law.

As a result, unless one or more of the treaty-approved circumstances for an at-sea intercept applies, LOST Member States could be precluded from participating in such an action—even when there might be compelling evidence that nuclear or other WMD or their delivery systems were onboard. As long as the United States continues not to be a LOST state party, it can always act unilaterally. That option, however, will be foreclosed, and our security possibly endangered as a result, if the Senate consents to the treaty's ratification.

In this connection, it must be noted that the Chinese and Russians have strenuously objected to the Proliferation Security Initiative, claiming that it violates LOST. They can be expected to seek mandatory dispute resolution of the matter should the United States become a state party. Should the ruling go against us, a critical tool in the Nation's effort to prevent the spread of nuclear, chemical, and biological weapons and their delivery systems could be lost for good.

LOST as an Unsatisfactory Precedent for Other "International Commons"

The Law of the Sea Treaty's stated purpose is the establishment of a "legal order for the seas and oceans." Animating that goal is the proposition that such waters are the "common heritage of all mankind." To govern, protect, and preserve this "international commons," LOST establishes rules with respect to: Navigation of the oceans, marine research, protection of the marine environment and deep seabed mining, among other oceans-related issues.

LOST also contains provisions outlining overflight rights over various parts of the ocean. In other words, it confers—not to be confused with recognizing or acknowledging—sovereign rights to territorial waters and their seabeds. The treaty also claims to apply to the airspace above them.

As discussed previously, LOST establishes supranational agencies associated with the United Nations to manage the world's waters, seabeds, and airspace. Their role is to administer the maritime "international commons," implement the treaty's various provisions and resolve disputes between state parties as to the application of those provisions. If the disputing parties fail to reach an agreement on their own, they are required to submit to the jurisdiction of one of the LOST tribunals.

In addition, parties to LOST must make payments in various forms to one of the LOST bodies, the International Seabed Authority (ISA), in order to engage in deep seabed exploration and exploitation. These amount to a form of international taxation intended, among other things, to underwrite the operations of the ISA and the treaty's other "organs."

It is important to consider as part of the debate over U.S. accession to the Law of the Sea Treaty whether that action would have implications for other so-called "international commons" such as Antarctica, the Moon, Outer Space, more generally, and the Internet.

In fact, the logic of LOST—with its supranational order for the control of a medium used by more than one country—will inevitably be seized upon by America's foes to demand similar arrangements be instituted for Outer Space or even the Internet. And U.S. ratification of LOST will make it difficult for the United States to argue against accepting binding arrangements for other "international commons." It was for this reason that President Reagan's Ambassador to the United Nations, the late Jeane Kirkpatrick, warned the Senate in 2004 not to consent to ratification of LOST, in part on the grounds that America's interests in Outer Space could be adversely affected by the LOST precedent.

LOST and Space Control

It is of particular concern that the LOST model could be used to cripple America's use of space for national defense. America's military and intelligence communities have increasingly relied—in fact have become heavily dependent—upon space assets to gather information and support terrestrial forces. Far-sighted U.S. strategists appreciate that space can only become ever more important as a theater of operations, with control of activities (commercial as well as military) on earth being determined by control of space.

This country's adversaries recognize this reality, too, and are attempting to inhibit our use of space—in some cases through active means, in others via the imposition of international laws and regulations (another example of "Lawfare"). U.S. endorsement of LOST would establish a precedent that would undercut American efforts to stave off the latter effort.

LOST and the Internet

The same is likely to be true of the Internet—an immeasurably important engine of American technological and commercial competitiveness and, increasingly, a key component of U.S. national security. Other countries have already demanded global Internet regulation. For example, in March 2005, China's Ambassador to the United Nations called for international management of the Internet. Seven months later, the United Nations hosted a conference at which many delegates insisted on an end to this country's exclusive control over the assignment of Web addresses and e-mail accounts, in favor of having such roles performed by one or more U.N. agencies.

The problems with such an arrangement are obvious. The Washington Post pointed out that any such agencies would inevitably be caught between free societies that want low barriers to Internet access, and countries such as China and Saudi Arabia, that insist on limiting access. The Post went on to observe: "These clashes of vision would probably make multilateral regulation inefficiently political." As it happens, the same is true of LOST—and would certainly apply with devastating effect to the Internet if LOST becomes the template for multilateral management of the ether's "international commons."

LOST and Russia's Arctic Gambit

Before concluding, let me say a few words about the implications for Senate consideration of the Law of the Sea Treaty associated with Russia's August 2007 depositing of a titanium flag on the floor of the seabed of the North Pole. By so doing, the Kremlin sought to publicize its claim to the Lomonosov Ridge, an underwater ridge that Russia claims is a natural part of its Continental Shelf. If recognized, such claims would entitle Russia to natural resource and energy rights in much of the North Pole region.

Russia is asserting these rights via a mechanism of LOST. A state party can claim an extension to its Continental Shelf—and therefore extend its Exclusive Economic Zone (EEZ)—if that state can provide evidence to the Commission on the Limits of the Continental Shelf (a LOST "organ") showing a natural extension of the shelf as part of its territory.

Russia's claims are completely without technical merit. The Lomonosov Ridge is not an extension of Russia's Continental Shelf. Rather, it is a separate geological formation not connected to the Russian shelf and, therefore, providing no basis for Moscow's territorial claims. Even the Law of the Sea Treaty itself explicitly states that a country's Continental Shelf "does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

Proponents of the Law of the Sea Treaty have asserted that the United States must become a party to LOST if it is to prevent Russia from making off with the valuable resources of the Arctic seabed. This contention is contradicted by previous experience, however: Russia made a similar claim before the Commission in 2001. Although not a party to the treaty, the United States provided data to several nations who shared its interest in challenging the Russian assertions, prompting the Commission not to accept them at that time.

Given the baseless nature of the Russian bid, it is entirely possible that Moscow hopes not only to gain access to the Arctic's undersea wealth but to provoke the United States into joining LOST—a treaty that is disadvantageous to the United States. As indicated above, LOST was created by the Soviet-era Kremlin and its allies in the Third World as a means of promoting supranational government mechanisms they could control at the expense of their American and other Western adversaries. LOST's agenda of global wealth redistribution and its negative implications for American sovereignty and U.S. military and economic equities continues to serve Moscow's interests, but not those of the United States.

The Continental Shelf Commission

The extent to which LOST will prove an asset to our foes is indicated by the conduct of the Continental Shelf Commission in this instance. Given the geological realities and the treaty's own terms, the willingness of the Commission even to consider Russia's claims to the Arctic seabed is indicative of a serious problem with LOST. The Commission is blatantly ignoring a clear provision of LOST—a troubling indicator of what the United States can expect from LOST tribunals.

Since LOST explicitly declares that a country's Continental Shelf does not include underwater ridges, the Commission's readiness once again take up the Russian case

begs the question: As so often happens in U.N. agencies, will political considerations influence the outcome?

The Commission currently has only two Arctic members, Russia and Norway. A simple majority vote by non-Arctic states—perhaps engineered by Russian pressure and/or bribes—could result in decisions that would be binding on all member-nations. If the United States were a state party to LOST, it would likely still be outvoted, yet be obliged to accept the Commission's unsatisfactory dictates.

In this case, the consequences of such a decision would be preposterous—even absurd: Russia would have sole economic rights to the vast natural resources of the central Arctic Ocean. This would essentially give Russia a virtual monopoly over the North Pole region.

Acceptance of Russia's claim would, moreover, invite other countries to make similarly ludicrous claims. If Russia can assert its ownership of a submerged mid-ocean ridge, then Iceland and the Azores would have grounds to stake claims to most of the North Atlantic's seabeds, since those islands are an integral part of the Atlantic mid-ocean ridge. The same argument could be made by any one of the numerous island countries that are part of an undersea ridge complex.

The United States was able to play a role in the Commission's nonacceptance of Russia's first claim to the Arctic seabed back in 2001, even though it was not a party to LOST—and, therefore, not at risk of being bound by adverse Commission decisions. This episode demonstrates that, by remaining outside of the treaty, America can retain its freedom of action (including the use of bilateral diplomacy and more constructive multilateral mechanisms, such as the Arctic Council) and still challenge such overreaching Russian claims and win.

CONCLUSION: LOST IS A THREAT TO AMERICAN SOVEREIGNTY

Mr. Chairman, permit me to conclude this bill of particulars by underscoring one of the most troubling aspects of the Law of the Sea Treaty: The stated ambition of its architects to promote a supranational government for 70 percent of the world's surface (i.e., the oceans and their seabeds).

Prominent among such architects was the World Federalist Association (now known as Citizens for Global Solutions). In an undated white paper on their Web site, these advocates for world government declare: "An organization is already in the process of being developed to control the exploitation of ocean resources, and similar agencies could be created to govern Antarctica and the moon."

The Citizens for Global Solutions posting goes on to say: "By means of these voluntarily funded functional agencies, *national sovereignty would be gradually eroded until it is no longer an issue* . . . Eventually, a world federation can be formally adopted with little resistance." (Emphasis added.)

This strategy of garroting national sovereignty would be advanced by LOST in several ways. By way of recap, these include:

- LOST entails obligations at odds with our national security strategy and operations. These obligations may be enforced by the treaty's mandatory dispute resolution mechanisms that are stacked against the United States.
- LOST involves unprecedented environmental obligations. These can be used to interfere with the exercise of U.S. sovereignty on the grounds that what is being done on American soil or in its airspace will have negative repercussions for the oceans. Such obligations go far beyond the Kyoto accords and could entail substantial costs.

  For example, steps taken to resuscitate New Orleans in 2005 by pumping untold quantities of toxic waste out of Lake Pontchartrain into the Gulf of Mexico could have been prohibited by an edict from a LOST agency. Such a ruling could then have been enforced by U.S. courts increasingly acting under the sway of international tribunals and treaties.
- LOST empowers an unaccountable, unrepresentative international agency for the first time to collect what amount to taxes. The United Nations is already insufficiently transparent and ever more hostile to U.S. interests. Institutionalizing arrangements that would allow it and other supranational organizations to become self-financing can only exacerbate these trends. (Such a step—and the ominous precedent it sets—are, moreover, an affront to a nation whose genesis was rooted in the principle of "no taxation without representation.")
- LOST will allow interference with and the penalization of American businesses, including those that conduct research for, equip and provide logistical support to, the U.S. military. It will: Impose the "Precautionary Principle" (according to which innovations cannot be introduced unless proven free of any adverse consequences); give standing to Alien Torts claims in U.S. courts; require sharing proprietary information and technology with international bureaucrats and com-

petitors; compromise WTO rights; and give precedence to European-dominated international standards. The costs of such derogations of our sovereignty could be high, perhaps even crippling, for affected businesses—including those supporting our Armed Forces.

- Finally, this accord will establish problematic precedents for "managing" other, no less strategically important "international commons," including Outer Space. A number of America's adversaries have long sought to impose arms control or other treaty arrangements that could make it more difficult if not, as a practical matter, impossible for the United States to maintain the access to and control of space required by our national security interests. If this country joins LOST, it will invite these adversaries to adapt the treaty's International Seabed Authority as a prototype for determining permissible and impermissible activities in space—likely in ways that will prove inconsistent with the United States military and intelligence requirements.

Inevitably, American ratification will be a major step toward the oneworlders' agenda of global, supranational government. One prominent Transnationalist, Arvid Pardo, the former Maltan Ambassador to the United Nations who is credited with coining LOST's leitmotif phrase "the common heritage of mankind," has said that American acceptance of LOST "however qualified, reluctant, or defective, would validate the global democratic approach to decisionmaking." On that score, at least, Pardo is absolutely right.

Many of the rights of navigation and overflight that LOST supporters claim are "assured" by the treaty and so valuable to U.S. security are, in fact, already enjoyed thanks to existing, well-functioning international agreements to which the United States is a party.

The majority of those rights are derived from customary international law, much of which was put in place long before LOST was ever negotiated. To the extent that LOST has created any new customary international law, these are laws to which we voluntarily adhere and from which we have benefited since President Reagan rejected the treaty 25 years ago—without being subject to LOST's other high costs.

Mr. Chairman, I appreciate the opportunity to explain why I and many other national security-minded individuals strongly oppose the Law of the Sea Treaty and urge its rejection by the Senate. I pray—for the good of our country, our national security and economic interests and our sovereign, constitutional form of government—that you and your colleagues, and our countrymen, will become familiar with these concerns before you are asked to consent to this ominous and irremediably defective accord.

Should that not happen, it will be in no small measure because of a serious dereliction of duty on the part of the U.S. Senate—one that has resulted in this being the only hearing in which critics have been allowed to testify, where only two of us have been heard from and in whose course each of us has been confined to 5 minutes of oral remarks. I call on you, Mr. Chairman, the members of this committee and those of other relevant Senate panels to ensure that such a travesty does not eventuate.

COALITION TO PRESERVE
AMERICAN SOVEREIGNTY,
Washington, DC, October 4, 2007.

Senator JOSEPH BIDEN,
Chairman, Senate Foreign Relations Committee,
Russell Senate Office Building, Washington, DC.

DEAR SENATOR BIDEN: As members of the Reagan administration, we strongly supported President Reagan's 1982 decision to reject the United Nations Convention on the Law of the Sea, commonly known as the Law of the Sea Treaty (LOST). As James Malone, special representative of the President to the Law of the Sea Conference, explained in 1984:

> Let me state very emphatically that the United States cannot and will not sign the United Nations Convention of the Law of the Sea. The treaty is fatally flawed and cannot be cured. In its present form it presents a serious threat to U.S. vital national interests and, in fact, to global security. Once more, it is inimical to the fundamental principles of political liberty, private property, and free enterprise. The administration firmly believes that those very principles are the key to economic well-being for all countries—developing as well as developed.
>
> The President has offered an alternative vision of international relations built upon stability, rather than uncertainty, and voluntary cooperation.

> This dynamic course in foreign policy is designed to protect U.S. security, enhance U.S. well-being, and promote true economic development among all countries willing to commit themselves to the task. The United States is fully committed to this course and will not turn back.

Despite claims that Mr. Reagan's objections were fully addressed in an agreement subsequently negotiated in 1994, that agreement did not alter the treaty and, consequently, cannot correct its flaws. In our view LOST still seriously erodes U.S. sovereignty. Worse yet, it would in addition imperil operations critical to our conduct of the War on Terror.

With respect to the former, U.S. adherence to this treaty would entail history's biggest and most unwarranted voluntary transfer of wealth and surrender of sovereignty. LOST created the International Seabed Authority (ISA)—a supranational organization with unprecedented powers to regulate seven-tenths of the world's surface area, levy what amount to international taxes, impose production quotas (for deep-sea mining, oil production, etc.), govern ocean research and exploration, and create a multinational court to render and enforce its judgments. President Reagan was right to reject the anti-free market principles and sovereignty-sapping institutions central to the Law of the Sea Treaty.

LOST's defects take on even greater import, however, in light of the dangers inherent in the global War on Terror. The Convention clearly offers grounds for challenging the legality of the Proliferation Security Initiative (PSI) to those, like Communist China, who oppose PSI's maritime interdictions and the boarding of suspect vessels. As renowned legal scholars Jeremy Rabkin and Jack Goldsmith recently explained, "In every case, a majority of non-American judges would decide whether the U.S. Navy can seize a ship it believes is carrying terrorist operatives or supplies for terrorists."

Other LOST provisions of particular concern today are the treaty's stated prohibition of two functions vital to American security: Collecting intelligence in and submerged transit of territorial waters during peacetime. While some claim that these provisions will not apply to our "military" activities, it is unwise and irresponsible to assume formal obligations we have no intention of fulfilling. That is especially true under circumstances in which disputes over our compliance will be subjected to binding arbitration via mechanisms stacked against us.

The irremediably problematic nature and far-reaching implications of the Law of the Sea Treaty argue for rejection of this accord. We feel confident that a rigorous and comprehensive review of the Law of the Sea Treaty, including an unvarnished net assessment of its putative benefits and real risks, will affirm President Reagan's decision not to have the United States become a state party to this convention. We urge your committee and other relevant committees of jurisdiction of the House and Senate to perform such a review before any action is taken on LOST's ratification.

Sincerely,

William P. Clark—National Security Advisor to the President; Secretary of the Interior; Deputy Secretary of State*
Edwin Meese III—Counselor to the President; Attorney General
John F. Lehman, Jr.—Secretary of the Navy
J. William Middendorf—U.S. Ambassador to the Organization of American States; Secretary of the Navy (Ford Administration)
John Block—Secretary of Agriculture
Gerald Carmen—U.S. Ambassador to the United Nations, Geneva
Henry Cooper—Ambassador for the Defense and Space Negotiations; Assistant Director, Arms Control and Disarmament Agency
Becky Norton Dunlop—Deputy Assistant to the President
Frank J. Gaffney, Jr.—Assistant Secretary of Defense (Acting)
Ken de Graffenreid—Special Assistant to the President and Senior Director for Intelligence Programs, National Security Council
Joshua Gilder—White House Speech Writer
James T. Hackett—Director, Arms Control and Disarmament Agency (Acting)
Phyllis Kaminsky—Director of Public Liaison, U.S. Information Agency
Charles M. Kupperman—Special Assistant to the President; Deputy Director, White House Administration
Christopher D. Lay—Special Assistant to the Under Secretary for Policy
Vice Admiral Robert R. Monroe USN (Ret.)—Director of Navy Research, Development, Test and Evaluation
Lieutenant General Edward L. Rowny—Chief U.S. Negotiator, Arms Control and Disarmament Agency
Jose Sorzano—Special Assistant to the President; Deputy U.S. Ambassador to the United Nations

Curtin Winsor—U.S. Ambassador to Costa Rica

*Unless otherwise noted, positions were those held during President Reagan's administration.

Senator MENENDEZ. Thank you, Mr. Gaffney. I'll wait for all the questioning to respond to some of your concerns.

Mr. Oxman.

STATEMENT OF BERNARD H. OXMAN, PROFESSOR OF LAW, UNIVERSITY OF MIAMI SCHOOL OF LAW, MIAMI, FL

Mr. OXMAN. Thank you, Mr. Chairman, Senator Lugar, members of the committee. It is, indeed, a privilege for me to be here, and a special privilege to be asked to join Admiral Clark in speaking in favor of the Convention. It's also a privilege for me to be sitting next to Mr. Gaffney again. As I recall, the last time was when we appeared together in a hearing on the Law of the Sea Convention before the Committee on Environment and Public Works chaired by Senator Inhofe.

And I want to express my admiration for the formidable imagination and ingenuity of the analyses that have been presented by Mr. Gaffney over the years.

Mr. Chairman, if there were a treaty before this committee that did even a fraction of the awful things Mr. Gaffney has described, I would stand shoulder to shoulder with him in opposing it. The reality, however, is that the "LOS" Treaty that Mr. Gaffney conjures bears no relation to the Convention on the Law of the Sea that I spent well over a decade helping to draft and negotiate, as the representative of our country and as the chairman of the drafting group responsible for the English text of the Convention. It is that Convention to which my remarks are addressed this morning.

The Law of the Sea Convention is the result of a long-term and successful bipartisan effort to further American interests, as Senator Lugar has indicated. That effort engaged high-level attention in successive administrations, and among distinguished Members of both Houses of Congress. It's no accident that all living former Legal Advisors of the U.S. Department of State signed a letter in support of the Convention at the time of the hearings in 2004, and that, more recently, the letter of September 24, 2007, to which Senator Lugar adverted, comes from an extraordinary group of prominent citizens that includes former Secretaries of State Albright, Baker, Haig, Powell, and Schultz.

The Convention is now a legal and political reality. There are 155 parties, including all other major maritime states, as you, Mr. Chairman, have pointed out.

It's puzzling to me that a few commentators maintain that dire consequences would flow from Senate acceptance of a text that President Reagan publicly committed the United States to respect. President Reagan formally declared: "The United States will recognize the rights of other states in waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states."

The question before us is not whether we are obliged to respect the rules set forth in the Convention. Clearly, we are. There is no other plausible platform or principle on which to operate. Our legis-

lation has long been consistent with the Convention. No prudent manager or investor in the private sector would plan on any other basis.

And we have not been dragged into this posture kicking and screaming. Quite to the contrary, we led the way. We're obliged to respect the rules set forth in the Convention, because, as President Reagan made clear, we expect foreign countries to do the same. And we expect them to do the same because their restraint is to our benefit.

Mr. Chairman, a treaty is a reciprocal bargain in which each of the parties agrees to limit its own freedom of action in exchange for the limitations imposed on the others. That, Mr. Chairman, is an exercise of sovereignty. Indeed, entering into treaties with foreign powers is one of the most important ways in which sovereignty is exercised.

The real question, therefore, is: What is it that we want other countries to do, and not do? What we want is respect for one of the most important attributes of national sovereignty and independence; namely, our freedom to navigate around the world for security, economic, and other purposes, as we see fit, and without interference from the foreign states off whose coasts we navigate. It is that sovereignty that is essential to our security and well-being, and it is that sovereignty that is at risk if we do not act to consolidate the Law of the Sea Convention as the foundation for the future development of the International Law of the Sea.

By becoming party to the Convention, the United States will be in a much stronger position to control the evolution of the Law of the Sea, and, in particular—and I want to emphasize this point—to influence the perception and behavior of foreign nations regarding their rights and our freedoms in areas that are off their coasts.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Oxman follows:]

PREPARED STATEMENT OF BERNARD H. OXMAN, PROFESSOR OF LAW, UNIVERSITY OF MIAMI SCHOOL OF LAW, MIAMI, FL

Mr. Chairman, Senator Lugar, members of the committee, It is an honor to be asked to testify before this committee.

I was last invited to appear before this committee 4 years ago. Although I took ill as I boarded the plane to Washington at that time, my prepared statement was included in the 2004 Report of the Committee, a report that unanimously recommended Senate approval of the Convention on the Law of the Sea and the related Implementing Agreement. I presented a slightly expanded version of that statement before the Senate Committee on Environment and Public Works in March 2004. Rather than repeat all that was said there, with your permission, Mr. Chairman, I would propose to append that statement to my remarks today and, for the sake of completeness, to include my written response to followup questions posed by Senators Inhofe and Jeffords.

Mr. Chairman, permit me to begin as I did before. Whatever the utility of my remarks today, I hope the committee will bear in mind the authority, insight, and conviction with which the case for the Convention would have been presented by two extraordinary individuals with whom it was my great honor to work most closely, the late Ambassador John R. Stevenson and the late Ambassador Elliot L. Richardson. Both served at critical formative periods as Special Representative of the President for the Law of the Sea. They are unquestionably remembered throughout the world as among the small handful of individuals singularly responsible for the ultimate shape of the Convention.

I hope the committee will also bear in mind that the Law of the Sea negotiations were a long-term bipartisan effort to further American interests that engaged high level attention in successive administrations and among distinguished Members of

both Houses of Congress. President Nixon had the vision to launch the negotiations and establish our basic long-term strategy and objectives. President Ford solidified important trends in the negotiations by endorsing fisheries legislation modeled on the emerging texts of the Convention. President Carter attempted to induce the developing countries to take a more realistic approach to deep seabed mining by endorsing unilateral legislation on the subject. President Reagan determined both to insist that our problems with the deep seabed mining regime be resolved and to embrace the provisions of the Convention regarding traditional uses of the oceans as the basis of U.S. policy. President George H.W. Bush seized the right moment to launch informal negotiations designed to resolve the deep seabed mining problems identified by President Reagan. President Clinton carried that effort through to a successful conclusion and transmitted the Convention and the 1994 Implementing Agreement to the Senate. And President George W. Bush has called on the Senate to complete the job and approve the Convention and the Agreement.

It is no accident that all the living former legal advisors of the U.S. Department of State signed a letter in support of Senate approval of the Convention in 2004, and that, more recently, the letter of September 24, 2007, to Senators Reid and McConnell in support of the Convention comes from an extraordinary group of prominent citizens that includes former Secretaries of State Albright, Baker, Haig, Powell, and Shultz.

The Law of the Sea Convention is in large measure the product of American efforts. The United States succeeded in creating a firm, globally accepted basis for long-term order and predictability at sea whose provisions, in President Reagan's words, "fairly balance the interests of all states."[1] The result is a Convention that is a legal and political reality. It now has 155 parties, including all other major maritime nations.

Pursuant to an overwhelming vote of approval of the Senate, the United States is already party to the Law of the Sea Convention's Implementing Agreement on fisheries that entered into force in 2001; in that agreement we accepted much of the fisheries management and dispute settlement system set forth in the Convention.

The United States has long been party to the four 1958 Geneva Conventions on the Law of the Sea, many of whose provisions are copied and elaborated upon in the 1982 Law of the Sea Convention. It is puzzling that a few commentators maintain that dire consequences would flow from Senate acceptance of texts that are no different from those already contained in the Geneva Conventions and other treaties to which we are party.

It is also puzzling that a few commentators maintain that dire consequences would flow from Senate acceptance of texts that President Reagan publicly committed the United States to respect. President Reagan formally declared that "the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states."[2]

The Convention provides the legal framework for cooperation with other countries. Almost all of our neighbors, friends, and allies are party to the Convention. At best, they will not agree to cooperative action at sea unless it is consistent with the Convention. At worst, they will keep their distance from us because we are not party to the Convention. During his confirmation hearings for Chief of Naval Operations before the Senate Armed Services Committee on September 27, Admiral Roughead stated that he saw in the Pacific that some countries would avoid participating with us in the proliferation security initiative because we are not party to the Law of the Sea Convention.

The question before us is not whether we are obliged to respect the rules set forth in the Convention. Clearly we are. There is no other plausible platform of principle on which to operate. Our legislation has long been consistent with the Convention. No prudent manager or investor in the private sector would plan on any other basis. And we have not been dragged into this posture kicking and screaming. Quite to the contrary, we led the way: We are obliged to respect the rules set forth in the Convention because, as President Reagan made clear, we expect foreign countries to do the same. And we expect them to do the same because their restraint is to our benefit.

The real question is: What are the additional rights and opportunities that we would enjoy as a party to the Convention? In this connection, we might ask ourselves: What is it that we want other countries to do and not do?

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[1] Statement by the President, United States Oceans Policy, Mar. 10, 1983, 19 Weekly Comp. Pres. Docs. 383 (1983).

[2] Id.

The answer has long been quite simple. We want maximum freedom to navigate and operate off foreign coasts without interference.

We want that freedom for security purposes. If we mean to deter and confront threats to our security in the far corners of the globe, then we need to be able to get there and to operate there. The precise nature of the threats may change. But so long as our interests demand that we operate far from our shores, we want to minimize the cost and uncertainty of getting there and operating there.

We also want that freedom for economic purposes. Our economy is dependent on international trade. Much of that trade moves by sea. Our trading partners may change, but so long as our interests demand that we move raw materials and products to and from the far corners of the globe, we want to minimize the cost and uncertainty of the trip for any ship that carries our trade. We want security of supply and the lowest possible cost for delivering both our imports and our exports. And many sectors of our economy are increasingly dependent on the use of undersea telecommunications cables and accordingly on the freedom to lay and maintain them throughout the world.

Physical challenge by foreign states to ships and aircraft navigating off their coast is one possible source of interference that can augment costs and uncertainty dramatically. But negative political and economic reactions by foreign coastal states can also prove costly and destabilizing.

In attempting to address this problem, we must recognize that there are many reasons why a coastal state may not wish to accord maximum freedom to foreign ships and aircraft off its coast. It may prefer to control natural resource activities off its coast. It may prefer to control pollution from foreign ships off its coast. It may fear implications for its security of foreign operations off its coast. It may even hope to leverage control over offshore areas in order to extract political and economic concessions from those who need to pass through or lay and maintain cables in such areas.

Even though it is the principal global maritime power with the most to benefit from maximum freedom to use the seas off foreign coasts, the United States shares many of the interests of other coastal states in controlling activities off the coast.

The result is a contradiction. At best, many coastal states want to maximize freedom off foreign coasts while maximizing their control over foreign activities off their own coasts. At worst, a fair number of people don't even worry about global mobility, and think of interests in the sea exclusively in terms of controlling foreign activities off the coast. The real challenge in the law of the sea is to reconcile the tension in a manner that reasonably accommodates the conflicting interests both within and between states over time.

If the law of the sea is left to drift, it will drift in the direction of increasing coastal state restrictions on global freedoms. This is not idle speculation. It is precisely what happened in the 20th century. That century began with free high seas except for a narrow 3-mile band along the coast. It ended with coastal state sovereignty within liberal baselines enclosing internal and archipelagic waters, coastal state sovereignty within a 12-mile territorial sea measured from those baselines, coastal state sovereign rights and jurisdiction for many purposes within a 200-mile exclusive economic zone, and coastal state sovereign rights over resources of a continental shelf that may extend even further where the continental margin is wider than 200 miles. I traced this process in greater detail in a recent essay that, with your permission, Mr. Chairman, I propose to append to this statement for the committee's convenience.[3]

The result in this century is that the drift toward increased coastal state control has already consumed the valuable natural resources of the sea and seabed in large areas off the coast. Now the target of new assertions of coastal state control is more likely to be navigation and overflight and telecommunications.

The reality is that the areas of greatest importance to our global mobility are already subject to coastal state sovereignty or sovereign rights. Our capacity to move around the world depends on the willingness of these coastal states to respect navigation and overflight and related rights and freedoms in waters they already perceive to be theirs. The challenge is not to our capacity to make legal arguments. The challenge is to our ability, at minimum cost to ourselves, to persuade foreign coastal states to restrain their own claims and actions in the first place.

Customary international law will not work well in this situation. Customary law is the creature of state practice. The likely drift of state practice is in the direction

[3] Bernard H. Oxman, "The Territorial Temptation: A Siren Song at Sea," 100 AJIL 830 (2006). The essay proceeds on the premise that "there is no plausible alternative to the system of territorial states, a system that, for all its limitations, continues to confer significant benefits on humanity." Id., p. 831.

of increasing restraints on our global mobility that will be costly to respect and costly to resist.

The classic options we face in response to increasing coastal state assertions of control over communications rights and freedoms have been described as follows:

1. Resistance, with the potential for prejudice to other U.S. interests in that coastal state, for confrontation or violence, or for domestic discord;
2. Acquiescence, leading inevitably to a weakening of our position of principle with respect to other coastal states (verbal protests to the contrary notwithstanding) and domestic pressures to emulate the contested claims; or
3. Bilateral negotiation, in which we would be expected to offer a political, economic, or military quid pro quo in proportion to our interest in navigation and military activities that, under the Convention's rules, can be conducted free of such bilateral concessions.[4]

Beginning with the determination of basic policy by President Nixon 1970, a universally ratified Law of the Sea Convention was conceived as a more effective and less expensive option for controlling the coastal drift, for protecting our security and economic interests in global mobility, and for providing a basis for protection of the marine environment that is both effective and compatible with these interests. This is so in part because written rules are more easily ascertained and are more determinate than customary rules, and in part because parliaments, courts, and the population at large tend to take treaty commitments more seriously than elusive notions of customary law.

But the experience with other treaties suggested that this is not enough: Unilateral interpretation of treaties can lead to the same erosion of rights and freedoms as the processes of customary law. Thus from the outset in 1970, the U.S. objective was to include institutional provisions that help persuade coastal states to accept and respect the Convention in general, and the rights and freedoms on which our global mobility depends in particular. To achieve this objective, the United States proposed, and the Convention creates:

- A system for compulsory settlement of disputes that permits a state to challenge actions by another state that are believed to violate the Convention, especially violation by coastal states of navigation, overflight, and telecommunications rights and freedoms;
- An expert panel to review the scientific basis for claims over the continental margin beyond 200 miles, giving the coastal state an incentive to work with the panel by providing added legal security to investors if agreement is reached; and
- An international regime for exploitation of deep seabed hard minerals beyond the Continental Shelf that blocks further national sovereignty claims, provides the security of tenure to mine sites necessary for investment in response to market demand, and protects high seas freedoms.

That system now exists. For the foreseeable future, it is the basis for the legal and political environment in which we operate every day. It is the only plausible platform of principle for global operations.

But law, even treaty law, never stands still. The question is: How will it evolve?

In my opinion, by becoming party to the Law of the Sea Convention, the United States will be in a much stronger position to control the evolution of the law of the sea and, in particular, to influence the perceptions of foreign nations regarding their rights and our freedoms off their coasts. Let me briefly explain why.

Protecting American Interests. Because we are the main global maritime power, our interests demand that we consider the global effect of the Convention's rules and their interpretations; there are a number of issues that are of greater concern to us than to most other countries. It is not prudent for us to sit idly by on the sidelines and rely on others to protect our global interests from the inside. For example, despite our close security relationship with most of its Member States, there are disturbing signs that the European Community may try to shift the Convention's balance in a sharply coastal direction in derogation of the freedom of navigation beyond the territorial sea and free transit of international straits.

Practice of the Parties. The practice and views of the parties to the Convention regarding its meaning and application influence the perceptions and behavior of lawyers and governments as well as judges, national and international. If left unattended, that practice is likely to evolve in the same way that customary law would evolve, namely in derogation of the rights and freedoms on which we rely for global mobility. Yet other states find it odd when we criticize their actions as a violation

[4] Panel on the Law of Ocean Uses, "United States Interests in the Law of the Sea Convention," 88 AJIL 167, 171 (1994).

of a treaty to which we have yet to become party. If the underlying challenge to the maintenance of our interests in global mobility is to maximize our influence over the perception of coastal states around the world regarding their rights and our freedoms off their coasts, then it stands to reason that the enhanced credibility our interpretations would acquire as party to the Convention is an important element in protecting and advancing our interests now and in the future.

Judicial and Arbitral Bodies. Interpretations rendered by judicial and arbitral tribunals established under the Convention will also influence the perceptions and behavior of lawyers and governments around the world and the future understanding of the law. While the actual judgment may be binding only on the parties to a case, the effect of a judicial or arbitral decision on perceptions of the law is not limited to parties to a case or even to parties to the Convention. By joining the Convention the United States would have the right to nominate and participate in the election of judges to the International Tribunal for the Law of the Sea (ITLOS) that sits in Hamburg, as well the right to add names to the lists from which arbitrators are selected under the Convention. Moreover, by joining the Convention, the United States would enhance the likelihood that judges and arbitrators would pay serious attention to its views regarding the interpretation and application of the Convention, even in cases where the United States is not a party to the dispute and has not exercised its right to intervene under the Convention.

Thus, even though the United States opts for arbitration under the Convention rather than accepting the jurisdiction of ITLOS, by joining the Convention our influence will extend well beyond any arbitration to which we may be a party. Moreover, we gain the right to seek urgent temporary provisional measures from ITLOS pending the constitution of an arbitral tribunal. As the Senate recognized when it approved the existing Implementing Agreement regarding fisheries to which we are already party, this enhances our leverage over foreign fishing on the high seas adjacent to our exclusive economic zone. Becoming party to the Convention extends that leverage to fishing vessels flying the flag of any country that is party to the Law of the Sea Convention.

Amending the Convention. The parties to the Convention have the right to decide whether to try to amend the Convention. Such an effort could easily alter the balance of the Convention, whether or not we accept the amendment. This could weaken the platform of principle on which we currently operate globally, as well as our capacity to influence the perceptions and behavior of foreign coastal states. It is not easy for a nonmember to convince the members that they should or should not change their agreement. As a party to the Convention, we would have substantially greater influence over the question of whether and, if so how, to approach the question of amendments or new implementing agreements.

The Continental Shelf. There is an extensive continental margin beyond 200 miles off the coast of Alaska and elsewhere off the coast of the United States. As a party to the Convention, we will be able to submit the results of our scientific studies regarding the seaward limits of the continental margin to the Commission of experts established by the Convention. Once we are satisfied with the outcome of our exchanges with the Commission, we can exercise the right to declare limits that are final and binding on all parties to the Convention. This will increase the certainty of our control and the willingness of private capital to make the substantial investment required to explore and exploit areas as deemed suitable for development.

Moreover, as a party to the Convention, we acquire the right to nominate and participate in the election of members of the Commission, as well as the right to comment on both the procedure and the substance of the Commission's work. These rights are important because we have a major interest in influencing the review of continental margin claims around the world before they become final and binding, in order to ensure that reasonable claims are confirmed and made more secure, and that excessive claims do not limit our own access to the areas in question for economic, scientific, or other purposes. Mr. Chairman, the Canadian and Russian Governments have every right to seek to use the Commission to advance their interests. But Alaska is caught in the middle, and our capacity to protect our interests off Alaska and in the Arctic generally will be enhanced by getting on the inside and making sure our concerns are heeded.

Deep Seabed Mining. The way in which the International Seabed Authority carries out its mandate will be decided by its members. The Convention limits the role of the Authority to regulating the mining of deep seabed minerals beyond 200 miles and the continental margin, and carefully prescribes the manner in which that mandate is to be exercised. In particular, the adoption of mining regulations requires consensus on the 36-member Council. Once the United States takes its guaranteed seat on the Council, our blocking power will permit us to ensure that the Seabed Authority remains within its mandate and that the content of any regulations is

satisfactory. We will have additional influence over the budget by virtue of our membership on the Finance Committee, which also functions by consensus. In addition, the United States will acquire the ability to sponsor the mining applications of American companies and to ensure that their access and other rights are respected.

Mr. Chairman, I have outlined some of the benefits of becoming a party to the Convention. But as many of us have learned, the best things in life may be free, but the rest has a price. What exactly is that in this case?

A treaty is typically a reciprocal bargain in which each of the parties agrees to limit its own freedom of action in exchange for the limitations imposed on the others. That, Mr. Chairman, is an exercise of sovereignty. Indeed, entering into treaties with foreign powers is one of the most important ways in which sovereignty is exercised.

The most significant obligation that we undertake as a party to the Convention is to respect the same substantive rights and freedoms as every other state under the Convention. But this involves no incremental cost to us. The Convention is in fact the platform of principle on which we rely to protect our own interests at sea every day. President Reagan committed us to respect those rights and freedoms, and that commitment has been honored by all of his successors and by Congress in relevant legislation. The reason for undertaking the commitment is to promote our interests in persuading other states to do the same; thus, we would undermine our own interests if we abandoned our respect for the Convention even if we did not become party.

By becoming party to the Convention, we also acquire rights as well as duties under the institutional and dispute settlement provisions of the Convention. The institutions created by the Convention are independent organs and are not part of the United Nations.

In this regard, let me emphasize that I would expect any first-year law student to be able to conjure infinite risks of incalculable magnitude from virtually any legal text. The real question for those entrusted with policy decisions is one of assessing probable risks and probable benefits and their probable magnitude. It is that perspective that informs my own analysis; it is one that I believe would be most useful to members of the committee.

The Seabed Authority. The best known of the institutional provisions are those in Part XI of the Convention and related annexes that concern the International Seabed Authority. We rejected those provisions. Our reasons for doing so were specifically and successfully addressed in the 1994 Implementing Agreement, which supersedes inconsistent provisions of the Convention. With your permission, Mr. Chairman, I will attach for the record a copy of my published analysis of the ways in which this was achieved.

There are now 130 parties to the 1994 Implementing Agreement, which expressly provides that it prevails over the Convention. The parties include all other major industrial states. From the day the Seabed Authority opened its doors, it has functioned in accordance with the 1994 Agreement. There is no doubt whatsoever among the parties to the Convention on this score.

The Seabed Authority is a lean organization based in Kingston that employs approximately 30 people and has an annual budget of some $6 million. The primary function of the employees is to support meetings of representatives of the states parties. Those meetings may involve all or only some of the states parties depending on the organ in question, and each state party pays for its own participants.

The Deep Seabed Hard Minerals Act of the United States expressly contemplates, and indeed encourages, the creation of an international regime for deep seabed mining as part of the law of the sea negotiations. One of Congress's purposes in enacting the statute was to provide a basis for interim reciprocal cooperation among industrial states, so as to make clear to the rest of the world that the deep seabed mining interests of industrial and consumer nations would have to be accommodated in the law of the sea negotiations to a greater degree than was apparent at the time. It took some time and some serious bumps in the road, but that strategy worked.

The Commission on the Limits of the Continental Shelf. The Convention also creates another institution, the Commission on the Limits of the Continental Shelf. The Commission is comprised of experts elected by the state parties. Salaries are paid by the State that nominated the Commissioner.

Under the Convention, coastal states that have continental margins that extend beyond 200 miles may submit precise seaward limits of the continental margin and supporting data to the Commission for review. An iterative process between the Commission and the coastal state is likely to follow if there are some points of doubt or disagreement.

There is no obligation to comply with the Commission's conclusions. Once the Commission makes its recommendations to the coastal state, that state is free to ignore them. However, if the coastal state chooses to establish the seaward limits of its Continental Shelf beyond 200 miles on the basis of the Commission's recommendations, those limits will be final and binding on all parties to the Convention. The result is a high level of certainty that avoids disputes and facilitates investment in areas the coastal state deems suitable for oil and gas development.

Dispute Settlement Procedures. The parties to the Convention are given a choice regarding the procedures for binding settlement of disputes concerning the interpretation or application of the Convention that are not settled by other means. Unless they declare otherwise, the parties are deemed to accept arbitration under Annex VII. While the Convention determines which disputes are and are not subject to arbitration under the Convention, and sets forth the procedures for constituting an arbitral tribunal, the parties to the case have the right to select the arbitrators and bear the costs of arbitration.

Since 1994, there have been five arbitrations under Annex VII: The first was dismissed for lack of jurisdiction; the second was suspended pending a determination of jurisdiction by the European Court of Justice; the third was settled; the remaining two resolved maritime boundary disputes between neighboring states in the Caribbean area.

The Convention also establishes a standing tribunal, the International Tribunal for the Law of the Sea. ITLOS sits in Hamburg in an impressive facility built with German funds. Only the President of ITLOS resides in Hamburg full time, where there is a small permanent staff. The remaining judges receive a fixed stipend plus remuneration for actual days worked. The budget for 2005–2006 was $21 million.

ITLOS may hear cases between states that file declarations accepting its jurisdiction under the Convention or that submit disputes under another agreement. In addition, ITLOS may hear cases brought by any party to the Convention in three limited situations. The first two involve urgent situations: Where a state has failed to comply with its obligation under the Convention to promptly release on bond a vessel and crew that have been detained for an alleged fisheries or pollution violation, and where there is a request for temporary provisional measures pending the constitution of an arbitral panel in a dispute that has been submitted to arbitration under the Convention. The third involves certain disputes regarding deep seabed mining in the international seabed area, which are heard by a special chamber of ITLOS.

Since 1994, ITLOS has heard and decided only one full case on the merits, which was a textbook case of illegal interference with freedom of navigation off Guinea. Most of ITLOS's cases have been brought under a special procedure designed to secure prompt release on bond of detained vessels and crew awaiting trial in a national court for fishing or pollution violations. Some of these cases were dismissed on jurisdictional or similar grounds, some have determined whether the bond set by the detaining state is reasonable, and one resulted in release before the hearing was held. These decisions have been highly deferential to coastal state interests in enforcing conservation laws and regulations.

Three of the arbitrations under Annex VII of the Convention were preceded by requests to ITLOS for provisional measures pending the constitution of the arbitral tribunal. While some provisional measures were prescribed in all three cases, in two of those cases ITLOS declined to order suspension of the activities in dispute, and in one of the cases ITLOS temporarily reinstated catch limitations on fishing that had previously been agreed by the parties.

The declarations contained in the resolution of advice and consent recommended by this committee in 2004 opt for special arbitration under Annex VIII of the Convention for certain categories of disputes to which that annex applies, and arbitration under Annex VII for the remainder.

Virtually all agreements to submit future disputes to arbitration designate some neutral individual to make the remaining appointments in the event that the parties to the dispute fail to appoint the requisite number of arbitrators within a specified time. Annex VIII of the Convention designates the Secretary General of the United Nations for this purpose, and Annex VII designates the President of ITLOS. Each party to the Convention has the right to add a certain number of names to the lists of individuals eligible for selection as arbitrators where the parties have not appointed the full panel themselves.

In assessing the costs and benefits of this system, it is important to bear in mind that the objectives of the United States are served if a state that violates its obligations to respect navigation, overflight, and other communications rights and freedoms is subject to suit by any party to the Convention. The plaintiff need not be the United States.

On the other hand, the United States can also find itself in the position of a defendant. That is the risk that comes with the benefit. The United States successfully endeavored to minimize that risk by supporting both mandatory and optional exceptions to the obligation to arbitrate or adjudicate disputes. Let me highlight a few:

First, the obligation applies only to disputes concerning the interpretation and application of the Law of the Sea Convention that have not been settled by other means.

Second, the obligation does not apply to disputes that are also subject to arbitration or adjudication under some other agreement.

Third, the obligation does not apply where there is an agreement between the parties to settle the dispute by some other means, and that agreement excludes any further procedure.

Fourth, only a very limited category of cases may be brought against coastal states with regard to their exercise of sovereign rights or jurisdiction. The most important of these, central to the objectives of the United States with respect to the Convention as a whole, involves alleged violation by the coastal state of the provisions of the Convention regarding rights and freedoms of navigation, overflight, submarine cables and pipelines, and related uses.

Fifth, a state may file a declaration excluding disputes concerning maritime boundaries between neighboring coastal states, concerning military activities, and concerning matters before the U.N. Security Council. A declaration excluding all such disputes is contained in the resolution of advice and consent contained in the committee's 2004 report.

The record of dispute settlement tribunals under the Law of the Sea Convention to date is certainly reassuring. Very few cases have been brought since 1994. All have been handled with considerable caution and prudence, especially in terms of the operative provisions of the judgments and awards.

My conclusion, therefore, is that the probable costs and risks are small, that the magnitude of the probable benefits is very high, and accordingly that America's interests are best served becoming party to the Convention. To put it differently, the risks of damage to America's long-term security, economic, and environmental interests by not becoming party to the Convention are far greater than the risks of becoming a party.

The major stakeholders in our country agree that the United States would benefit substantially from becoming party to the Convention. They are supported by an extraordinary array of present and former political and military leaders of our country's foreign, defense, and economic policies. Virtually all of our friends and allies around the world are already party to the Convention, and remain puzzled by our hesitation.

Mr. Chairman, it is time for the Senate to heed President Bush's call to approve the Convention on the Law of the Sea and the 1994 Implementing Agreement as soon as possible. I urge it to do so promptly.

Senator MENENDEZ. Thank you, Mr. Oxman.

Mr. Smith.

STATEMENT OF FRED L. SMITH, JR., PRESIDENT, COMPETITIVE ENTERPRISE INSTITUTE, WASHINGTON, DC

Mr. SMITH. Thank you, Senator Menendez and members of the committee.

I am Fred Smith. I do head a free-market think tank. And we focus on regulations. And regulations, in many ways, are very similar to treaties. They are passed as hortatory language, and all of the messy, complex tradeoffs, the complicated choices, are made offstage, largely influenced by special interest groups, not by the detailed analysis of a democratic society.

I speak, today, regarding the treaty's regulatory, litigation—regulatory, litigation, and economic features, a combination of intellectually foolish, politically irresponsible, and morally wrong elements. I ask that—I've got some materials I'd like to submit for the record, that I'll give after this.

On this committee, you've heard, and will hear more, about how LOST was, indeed, an initially poorly crafted document, but that

it's been improved, it has been fixed, it's the best we can get—the train's leaving the station, we have to have a seat at the table, we must accept the bad to get the good. These points are all wrong. That they have been given any credence merely reflects the fact that a lie repeated often enough can gain acceptance. The Senate of the United States is one of the world's greatest deliberative bodies, but this hasty effort to rush through a fatally flawed treaty does you no credit. I hope the members of the committee will think through some of the issues that we'll raise here today.

You have been assured by some venerable scholars—and we respect them—who have sought, for decades, to put lipstick on this pig, and you seem eager to accept their reassurances. But the—given the fatally flaw—the archaic collectivist premises of the economic aspects of this treaty that remain at its core, it really can't be fixed. We should give our proponents our thanks for doing their best, but you would be irresponsible to allow their "Bridge on the River Kwai" attitudes to lead us into ratifying this destructive treaty.

The treaty is a weird mixture of the codification of some long-established and widely accepted navigational rules. There are reasons to consider those. But they combine that with an outdated and counterproductive collectivist scheme to basically not develop the world's resources. The treaty would create a socialist entity to develop the oceans, viewed as the common heritage of all mankind. This would open up a new regulatory and legal regime to protect the oceans, a noble goal, but it would not regard the rational cost analysis that are critical to a responsible, sustainable way to protect those oceans.

Common property—that "yours is mine" aspect of laws—will limit, not increase, mankind's ability ever to benefit from the vast—potential resources of this vast area.

Incidentally, the intellectual property aspects, that should certainly concern both Senator Lugar and Senator Menendez, have already shown some problems, as we've seen in the collapse of trips and the seizure of some of our intellectual property rights—or the threat to our intellectual property rights in those areas.

The treaty—the economic aspect—the treaty would relegate two-thirds of the world's potential resource—potential—perpetual status as common property resource, the common heritage of all mankind. Garrett Hardin alluded long ago, in his "A Tragedy of the Commons" piece, that those policies essentially assume—can only have tragic results. Some nation-states are taking a different approach. The United States, the United Kingdom, Norway, even China are making creative moves into the deep sea. Other nations, like New Zealand and Iceland, have done much to extend property rights into the fishery areas. Those pioneering efforts to extend the institutions that prove wealth production is possible, offer hope to mankind that would be short-circuited by the process of LOST.

Cutting a thing down to 5 minutes is not easy, Senator.

The regulatory aspects of this—it's a massive regulatory bill. It creates a body charged with protecting the seas, but everything eventually flows into the seas. Thus, the United Nations gains the power to look upstream and into the skies to ensure that anything that might, or could have, or might possibly have, impact on the

seas be scrutinized and disciplined. The unintended consequences of this regulatory overreach cannot be underestimated. Its potential for damage is massive. The committee has not done due diligence on this topic. And for the complacent note—for the complacent, note that the proponents of this bill—environmental alarmists, trial lawyers, rent-seeking businesses—are adept at converting hortatory language into legal prohibitions.

Did anyone expect the Endangered Species Act to become a national land-use planning act? Super Fund to become a costly green pork-barrel measure? The Clean Waters Act to allow us to seize property throughout the land to protect wetlands? And that's in the United States. When we go, globally, where antiglobalization, NGOs, antitechnology, antigrowth are far more powerful, won't they be able to block wealth-creating moves even more so? They're already blocking wealth-creating moves in many poor—in poor countries throughout the world.

The application of this is worsened by something called the "precautionary principle." I hope, like others, I'll have a second to finish my speech this morning.

The U.S. Division for Ocean Affairs boldly announced that LOST is not a static instrument, it will be expanded. And it already is being expanded. Some of you know, already, the MOCs issue, where the United Kingdom, which does have a seat at the table, is being attacked by Ireland for a nuclear power facility. Won't we expect more and more as this act—if we accede to this act?

LOST opens, not one, but myriad Pandora's boxes, exacerbating the problems of litigation. We already have an over-litigious society. When we go this route, with the Alien Tort Claims Act, trial lawyers aggressively, and other measures moving in this direction, we may expect even more lawsuit problems for the United States.

This power—this act was passed when the United States was still—when Russia was still a superpower, when the world was convinced that collectivist development was superior to free markets, when the West was viewed as a dying dream. It is vastly more foolish today, when even the most dedicated Marxist sees private property, not common property, resource and the market as the paths to prosperity. We do the world no favor by allowing this textual and legal dinosaur to stand in the path of mankind's future.

The navigational features have been said they're good. They can be handled in a much more creative way than a Law of the Seas Treaty.

Ironically, though, LOST purports to develop seaboard resources. It also protects land-based mineral interests against competition from seabed mining. That was passed by the three Z's—Zaire, Zambia, and Zimbabwe. Does anyone believe Zimbabwe is the ideal nation to lead mankind into a more prosperous future?

My concluding remarks. LOST has become a solution in search of—has become a solution in search of a problem. Weakening our access to the ocean floor's plentiful resources is costly, especially to the poor of the world. Equally significant is the cost of developing the entrepreneurial creative energies that America has done so much to do.

A quarter of a century ago, Reagan refused to sign this bill. You've heard about this already. And yet, we were told chaotic results would result from our failure to do that. There's not been one incident, to my knowledge, since the failure to do it.

Arthur Clarke, the famed author, once wrote a futurist book called, "The Deep Range," which dealt with one scenario for the development of the oceans in the 21st century. In that book, his oceans had largely been privatized with sonic underwater fences separating one pasturage from another. Imaginative, as all futurists were, but his oceans were productive.

Efforts are now underway to realize that creative extension today—the fisheries issue, the oil issues. To make sure that the oceans no longer remain barren, that two-thirds of the world does start contributing to mankind's welfare. But that admirable goal should not lead us——

Senator MENENDEZ. Mr. Smith, I've now let you go on for 7½ minutes. I'd ask you to——

Mr. SMITH [continuing]. Don't act in haste. Think about these questions. Ask—take your time. This is not something we have to do today. It's questions like this that I think should motivate you to reconsider.

Thank you.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF FRED L. SMITH, JR., PRESIDENT, COMPETITIVE ENTERPRISE INSTITUTE, WASHINGTON, DC

Thank you, Chairman Biden and members of this committee for your invitation to testify on the Law of the Sea Treaty. I am Fred Smith and head the Competitive Enterprise Institute (CEI), a free-market public policy group that has focused for the last two decades plus on regulatory issues. It is to LOST's regulatory litigation features—to intellectually foolish, politically irresponsible, and morally wrong that I speak today. I ask that my written testimony along with two recent policy papers by Doug Bandow, part of the Reagan team that rejected this treaty long ago, [The Law of the Sea Treaty: Impeding American Entrepreneurship and Investment by Doug Bandow, September 2007] and Jeremy Rabkin, now a professor at George Mason University and scholar at the American Enterprise Institute—be included in the record [The Law of the Sea Treaty: A Bad Deal for America by Jeremy Rabkin June 2006].

On this committee, you'll heard much of how LOST was indeed an initially poorly crafted document, but that over the last three decades, its been fixed, that elements of the treaty remain troublesome but it's the best we can get, that we must accept the bad to get the good, that the risks are acceptable. These points are all wrong—that they have been given any credence reflects merely the fact that repeat a lie often enough and it gains acceptance. The Senate of the United States is the world's greatest deliberative body but this hasty effort to rush through a fatally flawed treaty does you no credit.

You've been assured by some venerable scholars who've sought for decades to put lipstick on this pig—and you seem too eager to accept their reassurances. One should never be surprised that people who've worked on a project for much of their lives wish it to succeed. But, this treaty has not been fixed—indeed, given the archaic collectivist premises that remain at its core—it cannot be fixed. We should give its proponents our thanks for doing their best but you would be irresponsible to allow their Bridge on the River Kwai shortcoming to lead us into ratifying this destructive treaty.

The treaty is a weird mixture of the codification of some long established and widely accepted navigational rules for the oceans with an outdated and counterproductive collectivist scheme to make the oceans the funding source for a U.N.-organized wealth redistribution plan. The treaty would create a socialist entity to develop the oceans viewed as "the common heritage of mankind." The entity (the "Authority" and other bizarre language no longer heard even in North Korea) would gain its resources and knowledge by forcing private firms—likely U.S.—to "share"

with "all mankind." That "what's yours is mine" aspect of LOST will limit mankind's ability ever to benefit from the potential resources of this vast area.

This redistributionist, collectivist language, I've suggested, is archaic and this is not surprising. The treaty was drafted during the height of the G–77—when many saw world poverty as the result of the West's wealth. People in Africa, Asia, and South America were poor because we were rich; make us poorer and they will become richer. In that era, only foreign aid and other wealth redistribution schemes were viewed as offering any hope of alleviating world poverty. LOST was typical of the flawed policy prescriptions of that era. But the world has learned much over the last decades. Most now recognize that foreign aid, while occasionally useful in emergency relief situations, can too often stifle the entrepreneurial forces and political reforms which offer the only hope for sustainable economic growth. The work of Lord Peter Bauer, recipient of the Cato Institute Friedman Prize, showed that too often foreign aid is simply the transfer of wealth from the poor in the rich world to the rich in the poor world, that such wealth transfer programs hurt, rather than helped the poor. LOST was crafted in this era and it shows. Even the World Bank and its other international institutions increasingly recognize that the key to addressing poverty is for the affected nation-states to move toward economic freedom, private property, a predictable rule of law, a reduction in domestic violence. To enshrine collective political management of the oceans does nothing to advance this cause.

This treaty would relegate two-thirds of the world's potential resources to perpetual status as common property resources—"the common heritage of all mankind. But as Garrett Hardin noted long ago in his article, "The Tragedy of the Commons," policies that relegate resources to be managed by all, are all too likely to have tragic results. Some nation-states—the United States, the United Kingdom, and Norway, even China—have made dramatic steps in moving land-based technology down to the sea. Other nations like New Zealand and Iceland have done much to extend property rights into the fisheries area. These pioneering efforts to extend the institutions that have made so much of the earth's land productive and beneficial to mankind to this most complex and costly world have been encouraged by the hope that they will profit, that the knowledge they acquire will be theirs to make future steps more efficient, that any profits they make will be retained. These positive trends will be weakened or destroyed if LOST is ratified.

Note that the United States has long recognized that ownership of the surface can—and in fact should sometimes—be severed from ownership of subsurface resources. That creative extension and adaptation of traditional private property encouraged exploration and development of the resources beneath the earth's surface. This creative extension of property rights made possible the rapid development of oil, coal, and other mineral resources in the United States.

An analogous separation of the ocean resource into navigational rights and ocean floor rights poses no serious difficulties. This would allow us to achieve the useful, if redundant, gains promised in the navigational area, without hindering the creative and ongoing institutional innovations. Innovation is rare when resources are relegated to "common property" status. Indeed, as the materials supplied to this committee make clear, the development goals of this treaty could far more effectively be advanced—without the risks of overregulation and overlitigation—by simply creating a claims office to allow ocean floor rights to be catalogued and titled. Private property would do far more than U.N. bureaucracies to encourage the development of the ocean's resources in mankind's interest.

The Law of the Sea Treaty mandates global redistribution of resources and technology, creates a monopolistic public mining entity, and restricts competition just the sort of statist panaceas that were discredited by the collapse of Soviet communism and that have been largely abandoned everywhere.

Far from being a market-oriented system, as claimed by some conservatives who have been coopted by treaty enthusiasts on this issue, the treaty will forever discourage widespread exploration and production.

The treaty's purported benefits are illusory; the treaty's features would impose heavy costs on America and the world.

LOST is a heavily regulatory bill, creating a body charged with protecting the seas. But, everything eventually flows into the seas. Thus, the United Nations gains the power to look upstream and into the skies to ensure that everything that has—or might have—impact on the seas be scrutinized and disciplined. The unintended consequences of this regulatory overreach cannot be underestimated; its potential for damage is massive. This committee has not done "due diligence" on this topic. And, for the complacent, note that the proponents of this bill—environmental alarmists and legal enthusiasts—are adept at converting hortatory language into legal prohibitions. Did anyone expect the Endangered Species Act to become a national

land use planning act? Did anyone expect Superfund to become one of the most costly green pork barrel measures in history or that the Clean Water Act would compel the Corps of Engineers to ban development throughout any area that might have been or might become at some time a "wetland?"

The treaty's regulatory approach would be guided by the precautionary principle, the serious application of which would halt economic development, since it is impossible to prove a negative—that a new process or technology involves no risk.

Indeed, it is the precautionary principle that has burdened Europe with a regulatory yoke only a bureaucrat could love. As The Economist noted last week: "The European model rests more on the 'precautionary principle,' which underpins most environmental and health directives. This calls for preemptive action if scientists spot a credible hazard, even before the level of risk can be measured. Such a principle sparks many transatlantic disputes: Over genetically modified organisms or climate change, for example . . . Some Eurocrats suggest that the philosophical gap reflects the American constitutional tradition that everything is allowed unless it is forbidden, against the Napoleonic tradition codifying what the state allows and banning everything else."

Regulatory Bonapartism may appeal to some Europeans, but it is not a model to which America should ever subject itself.

The U.N.'s Division for Ocean Affairs and the Law of the Sea boldly announced that the LOST "is not . . . a static instrument, but rather a dynamic and evolving body of law that must be vigorously safeguarded and its implementation aggressively advanced."

The proponents of this bill know full well that it will empower their special interests to gain massive power over the economic hopes of peoples throughout the world. Development is unlikely under the clumsy management of the U.N. bureaucracy. Moreover, the treaty by empowering environmental elites to raise significant new legal objections against agriculture, manufacturing, transportation, and even technology will gain new abilities to stop or slow economic development. Ratifying LOST would be to open not one but myriad of Pandora's boxes—exacerbating the problems of an already overly litigious society, an America that already finds it difficult to site and build anything. We do not build a better future by empowering the forces of stasis. The NIMBY problems that America now faces may fade as LOST moves us toward NOPE policies.

The problems of LOST have not been fixed. And, indeed, proponents do not really believe that they have been. They simply argue that "this is the best that we can do." (Indeed, the State Department acknowledges that the 1994 "Agreement retains the institutional outlines of Part XI"—that is, only some of the details have changed. The structure and underlying principles remain the same.) Thus, to adopt this flawed and largely unchanged treaty would be foolish. It was foolish when Reagan rejected the treaty almost 25 years ago, a time when Russia was still a superpower, when the world was convinced that collectivist development was superior to free markets, when the West was viewed as a dying dream. It is vastly more foolish today when even the most dedicated Marxist sees private property and the market as the path to prosperity. We do the world no favor by allowing this textual and legal dinosaur to stand in the path of mankind's future.

Some treaty advocates argue that it would help ensure passage for American shipping. This point is moot. Irrespective of any treaty text, only the U.S. Navy can guarantee free ocean transit in situations where nations have both the incentive and ability to interfere. That remains true under the U.S.'s status as a nonparty to the treaty. Were we to ratify LOST, the Law of the Sea Tribunal might declare such action unlawful.

As noted, the treaty's best provisions—those covering navigation—largely codify existing customary international law. Its worst provisions those creating the seabed regulatory regime—would discourage future minerals production as well as punish entrepreneurship in related fields involving technology, software, and intellectual property that have an ocean application. Since technology often has multiple uses, it would also slow innovation generally.

In addition to the Tribunal's likelihood to be used against U.S. interests, the primary argument against ratification is the treaty's bizarre regulatory regime governing seabed mining of deep ocean resources like the minerals cobalt and manganese. This system is unique in its Byzantine complexity.

Some modest improvements made in 1994 have been made, but its collectivist biases remain dominant. The treaty is a disastrous throwback to the era when socialism was seen as the wave of the future. Ratifying it would be even more foolish today, in a world of exploding economic opportunities and technological possibilities.

The Law of the Sea Treaty would give governments that may not have the best interests of the United States in mind an important say over American firms' work

in the field of resource extraction, an industry that is only gaining in importance in the current world of rising commodity prices, global growth, and reliance upon unstable regions.

Seabed mining requires no international bureaucracy, but simply a system for recording seabed claims and resolving conflicts.

Unfortunately, President Ronald Reagan's successors took the treaty as a given, and have attempted to ameliorate its most onerous provisions without questioning its necessity.

Under the Law of the Sea Treaty, taxpayers in industrialized countries will pay for the privilege of being regulated by a Third World dominated body. The treaty effectively treats the ocean's unowned seabed resources as property of the United Nations.

American and other global mining firms would be targeted by misguided antitrust regulators, in ways that would cripple their growth and creativity. The EU and other developing nations would use these and other regulations to harm U.S. and other economic interests. LOST would empower an inefficient international bureaucracy and incompetent and often kleptocratic—Third World officials. Wealth that is never created cannot help the world's poor.

Western governments would be required to enforce payment of fees and royalties, subsidize the U.N.'s mining operation, and provide resources for redistribution to Third World entities and likely antiglobalization NGOs.

Ironically, although LOST purports to develop seabed resources, it also offers land-based mining interests protection against competition from seabed mining. It stipulates that fees "shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals." Because seabed mining is more expensive and riskier than land-based mining, this could force seabed producers into insolvency. This would discourage resource exploration and production. This provision historically was promoted by the three Zs—Zaire, Zambia, and Zimbabwe. Does anyone believe Zimbabwe is the ideal nation to create a more prosperous future?

If there were to be a mining treaty—a dubious proposition to begin with—then the proper "fix" would be to junk the treaty's part XI, which contains the seabed mining provisions, thus severing seabed mining from the rest of the treaty. A separate agreement among those few nations having capacity in this complex technology area might be useful. But that treaty would not resemble LOST.

The voting system hasn't been fixed, either. According to the revised treaty, the United States would be guaranteed a seat on the Council but no veto. This is not a Security Council style treaty.

Nor is there any obvious limit to America's potential fiscal liability. The United States is expected to provide the largest share of the budget for the International Seabed Authority, the governing body set up by the treaty, starting at 25 percent.

Another failed fix involves technology transfer. Section 5, paragraph 1(b) of the revised text replaces the mandatory technology transfer requirement with a duty of sponsoring states to facilitate the acquisition of mining technology "if the Enterprise or developing States are unable to obtain" equipment commercially. Mandatory transfers and licensing of costly private intellectual property is no way to encourage innovation.

CONCLUDING REMARKS

The treaty has become a solution in search of a problem.

Today, it is hard to imagine any entrepreneur investing capital sufficient to create a viable deep seabed mining operation. The underwater environment is forbidding, in ways potentially as challenging as space. The great depths, incredible pressure, and uneven seabed already make the creation of a workable, let alone an economical, mining operation extremely difficult. The Law of the Sea Treaty would only make it more so.

Losing access to the ocean floor's plentiful resources could be costly, especially in the future as land-based supplies wane. Equally significant would be the cost of discouraging the development of technologies to explore and develop the seabed.

The Law of the Sea Treaty retains its coercive, collectivist philosophical underpinnings. It will have a negative impact on entrepreneurship even if no mining ever occurs. The worst principle is the declaration that all seabed resources are mankind's "common heritage" under the control of a majority of the world's nation-states. American ratification would help validate some of these discredited collectivist principles.

Moreover, the treaty could set a bad regulatory precedent for the commercial development of space. Subjecting private space exploration and development to a similar regulatory system would discourage private ventures.

By punishing entrepreneurship directed at transforming the great "frontiers" of the oceans and space, the Law of the Sea Treaty threatens potentially enormous losses well into the future.

A quarter of a century ago, President Reagan's refusal to sign the Law of the Sea Treaty left some critics predicting chaos and combat on the high seas. Yet we have witnessed not one incident as a result of the failure to implement the treaty.

Biasing the process against economic development globally would have profound impacts on all peoples, and especially those in the poorest lands who most need the results of economic growth, international investment, and trade and globalization.

A secure economic environment would be particularly important for entrepreneurs entering high-risk investment fields, notably underwater and in space, where the viability of the very process, let alone the security of the expected profit, would be in doubt.

Contrary to the claims of treaty supporters, the 1994 revisions did not "fix" the agreement. LOST remains captive to its collectivist and redistributionist origins, it would still establish an unjust and unworkable seabed mining regime.

Arthur Clark, the famed author, once wrote a futurist book called "The Deep Range" which dealt with one scenario for the development of the oceans in the 21st century. In his book, the oceans had largely been privatized with sonic underwater fences separating one "pasturage" from another. It was a productive world. Efforts are now underway to realize that creative institutional extension today and this offers a far more effective way of realizing the hopes of LOST's proponents. It is indeed important that we no longer neglect the critical but now largely barren two-thirds of our planet. But that admirable goal should lead us to act hastily, to sacrifice a vastly superior approach simply to join a deeply flawed global consensus. America, following Reagan's lead, should once again tell LOST proponents to get lost.

Senator MENENDEZ. Thank you very much.

Before we go to questioning, I feel compelled, on behalf of Chairman Biden, to briefly respond to Mr. Gaffney's complaint about the process, and then we'll go to questions.

It's simply not true to suggest that the Senate is rubberstamping the treaty. The Convention has been pending before the Senate for 13 years. Much has been written about it by experts in and outside of the government. We have the benefit of seeing more than a decade of the Convention in practice. It hardly seems like a rush to judgment.

This is the fourth hearing that this committee will hold on the treaty—two in this Congress, and two in the 108th Congress. In 2004, hearings were held in the Committee on Armed Services, the Committee on Environmental and Public Works, and the Select Committee on Intelligence. Hundreds of questions for the record have been answered by the executive branch.

And, finally, I would note that the committee has invited written testimony from any interested party, made a public notice to that effect in the Congressional Record last week. And, of course, all of the statement—the full statements of all our witnesses will be included in the record.

With that, since we have two panels, we'll turn to 5-minute rounds. The Chair will recognize himself.

You know, Mr. Gaffney, I want to say, I have great respect for the Navy League, as well, the entity that gave you your watch that you so proudly told before the committee. And I'd ask unanimous consent to include into the record a letter from the Navy League that says, "On behalf of the Navy League of the United States, we write to urge you and your Senate colleagues to vote in favor of the ratification of the Law of the Sea Convention." It goes on to say, "The Law of the Sea Convention not only safeguards and codifies currently generally accepted principles of Freedom of Navigation

and Overflight, but it also is fully consistent with current efforts in support of the global war on terrorism and the Proliferation Security Initiative."

And, without objection, it'll be included in the record.

[EDITOR'S NOTE.—The above mentioned letter was not available at the time of printing.]

Senator MENENDEZ. I want to ask you, Mr. Gaffney—over a decade ago, you called the Chemical Weapons Convention, a treaty that the Senate approved by 75 to 25, fatally flawed. You asserted that it would create a massive new U.N.-style international bureaucracy, that it would create the most expensive, intrusive, complex, and burdensome "verification regime ever negotiated, and that the additional costs of treaty participation on the taxpayers and private companies were conservatively estimated to be in the billions of dollars." Those are your words.

But here are the facts. For fiscal year 2006, the United States contributed just under $24 million to the Organization for the Prohibition for Chemical Weapons, the entity created to administer the Convention. The United States incurred an additional cost of $14 million to accommodate inspections by the OPCW in this country. In fiscal year 2006, the total cost to accommodate OPCW inspections reported by all private companies—U.S. companies—was under $172,000.

Given how inaccurate your predictions were about the Chemical Weapons Convention, why should the committee believe your predictions about this treaty?

Mr. GAFFNEY. Well, thank you, Mr. Chairman.

I do want to note the absence of Senator Biden, and, for that matter, the other three people running for President, from this committee, what I would argue is one of the most treaties this committee will hear in the history of this country.

As to the Chemical Weapons Convention, we can quibble——

Senator MENENDEZ. I just would interrupt you. You know, I—it depends how you want to use your time.

Mr. GAFFNEY [continuing]. I'm——

Senator MENENDEZ. I think you want to use it——

Mr. GAFFNEY [continuing]. I'm trying to respond to your comments.

Senator MENENDEZ. I think you want to do—is use it in response to questions and to bolster your arguments. I would say, Senator Biden has been at various of these hearings in the past.

Mr. GAFFNEY. He's never heard——

Senator MENENDEZ. He's very——

Mr. GAFFNEY [continuing]. The opponents'——

Senator MENENDEZ [continuing]. He's very well——

Mr. GAFFNEY [continuing]. Opponents' views.

Senator MENENDEZ. He's very well versed with the treaty.

Mr. GAFFNEY. He's never heard the opponents' views in this committee.

Senator MENENDEZ. And he has been at several of these hearings. But I won't——

Mr. GAFFNEY. Senator, if I may use my time my way, I would use it to say this committee has never, before today, heard a single opposition witness to this treaty. You're confining the two that you

have heard from to about 15 minutes and a 5-minute round of your colleagues. I consider that to be inadequate. I would—if I were running for President, I would want to know whether I'm doing damage to the country by voting for this treaty.

Senator MENENDEZ. Do you want——

Mr. GAFFNEY. But it's his——

Senator MENENDEZ [continuing]. To respond to my——

Mr. GAFFNEY [continuing]. Decision as to——

Senator MENENDEZ [continuing]. Question?

Mr. GAFFNEY [continuing]. Whether he wants to be here.

Senator MENENDEZ. Would you like to——

Mr. GAFFNEY. As to the——

Senator MENENDEZ [continuing]. Answer the question?

Mr. GAFFNEY. I would be happy to respond to the other part of your question, sir.

In my estimation, the key question about the Chemical Weapons Convention was, Would it rid the world of chemical weapons? Not the issues of how much it was going to cost us. I was worried about the costs. And, frankly, I think there have been costs that are not enumerated in your numbers. But the main point is, Mr. Chairman, as I said, and as I believe has been borne out by the facts, that treaty did not rid the world of chemical weapons. It was fraud. We have gone the lengths of eliminating our chemical weapons. Unfortunately, all of the countries that are likely to use them against us continue to have them, including——

Senator MENENDEZ. None of the——

Mr. GAFFNEY [continuing]. Many that signed the treaty.

Senator MENENDEZ. None of the predictions you made, that I quoted directly from your testimony, have transpired.

Mr. GAFFNEY. I—what I'm suggesting to you, sir, is, the main prediction was that the treaty would not be in the interests of the United States.

Senator MENENDEZ. Let me ask——

Mr. GAFFNEY. I believe that to be true——

Senator MENENDEZ. Let me ask——

Mr. GAFFNEY [continuing]. Of that treaty, as well——

Senator MENENDEZ. Let me ask you this.

Mr. GAFFNEY [continuing]. As this one.

Senator MENENDEZ. In May 2007, in an op-ed that you authored in the Washington Times, you wrote, "In 2004, the Bush administration decided to embrace the Law of the Sea Treaty. The argument seemed, principally, to be that, in the aftermath of the bruising fight over Iraq, doing so would demonstrate that the United States could still play well with its allies and other nations."

Now, are you aware that the Law of the Sea Convention was designated as an urgent treaty in the administration's treaty priority list, which was issued in February 2002, over a year before the invasion of Iraq?

Mr. GAFFNEY. I was not, sir. And, to be honest with you, I don't think anybody else was, because they didn't press for its ratification until after the time I spoke——

Senator MENENDEZ. Well, certainly it wasn't about playing with other countries——

Mr. GAFFNEY. I think, clearly, that was a factor——

Senator MENENDEZ. In 2000——

Mr. GAFFNEY. Mr. Chairman.

Senator MENENDEZ [continuing]. A year before the——

Mr. GAFFNEY. Ask——

Senator MENENDEZ [continuing]. Iraq——

Mr. GAFFNEY. Ask——

Senator MENENDEZ [continuing]. Invasion?

Mr. GAFFNEY. Ask—no, I'm speaking of the 19—of the 2003. Ask those involved in the interagency process, and I think you'll find that that explanation was given.

Senator MENENDEZ. Finally, you say, in—also in the Washington Times, you say that, "The Bush administration is now under the influence of American transnational progressives." And you note a series of people within the administration who you put in that category. This committee has received testimony from the President, the Deputy Secretary of Defense, the Vice Chief of Naval Operations, letters or statements of support from the six members of the Joint Chiefs of Staff, the Secretary of Homeland Security, the Commandant of the Coast Guard, the Secretary of the Interior, the Secretary of Commerce. We've also received a resolution of support, approved in 2006 by the Western Governors Association, that include the Republican Governors of Alaska and Texas, and all the states in between. All of these people are under the influence of American transnational progressives?

Mr. GAFFNEY. Mr. Chairman, I would ask this question of everyone you've just asked—that you've just enumerated. Have any of them read this treaty? And I would ask the same of you. I can't imagine anybody who has read this treaty would conclude that it warrants the kind of support you've just listed, let alone that it reflects the kind of treaty that Bernie Oxman is talking about. It does not stack up. If you read it carefully, it is, in fact, the product of transnational progressives. And I'm afraid a lot of people are being sold a bill of goods.

Senator MENENDEZ. Senator Lugar.

Senator LUGAR. Well, thank you, Mr. Chairman.

I would just observe that, as we've already heard testimony, the treaty has been recognized and observed by our country for the last 24 years, more or less, except for the controversy over the deep seabed mining provisions that President Reagan indicated he found objection to. And this is why one can conjecture all sorts of things that may occur, but it has been of value to our country to observe that. The point is that we're not around the table with regard to issues that may come up, and the deep seabed mining issue is one of these.

Now, I'd like to ask you, Mr. Oxman, leaving aside all the controversies on the rest of the treaty, which has been observed for about a quarter of a century, we still have the problem of the deep seabed mining business, because there is at least validity to the claim that there could be mineral resources that are valuable that are offshore. And the question is, Who do they belong to? Because there has been no agreement about this, no investment has really taken place. In other words, there may be valuable resources for the world out there, but if, in fact, you assert a claim, and do so without having at last some international acceptance of that situa-

tion, you may be in jeopardy. People may say no and take action to prevent that investment. So, for people that want to put billions of dollars into oil, natural gas, and whatever else might be down there, obviously they have hesitated to do so, quite properly.

So, I'd just ask you, as a legal scholar, Is interest in the Law of the Sea Treaty now coming to the fore because the world sees some urgency, in terms of shortages of these natural resources? And, if there is not United States participation, is it possible that other nations who are sitting around the table are going to try to make some disposition of this?—to which I suppose we could say, "Well, by golly, we'll send our fleet in there, break up whatever anybody else is doing." And Admiral Clark has suggested, as a Navy veteran, that it's probably precarious to settle every dispute in that way. But can you give us some idea as to how the deep-sea mining issue might work out, and why our presence around the table, through ratification, would be important?

Mr. OXMAN. Thank you, Senator. I completely agree with that. Indeed, I'd like to go back to the beginning.

President Nixon was the one who laid out our basic strategy with respect to the Law of the Sea, including deep seabed mining. And he proposed a new deep seabed mining regime, for three basic reasons: One, to stop sovereignty claims; two, to protect the Freedom of the Seas; and, three, your point, Senator, to provide a secure basis to acquire recognized title to mine sites so that private investors will be able to invest.

Now, it took us a long time to get there, but we have gotten there. And I do want to make it clear that, while part 11, which President Reagan rightly rejected, did reflect collectivist views of economic organization that were not in our interest, and not consistent with our philosophy—those objectionable provisions were rejected, point by point, in the 1994 Implementing Agreement; and, not only that, the ideology was expressly rejected. The Implementing Agreement says it responds to market approaches to economic activity.

We now have an organization that is going to adopt mining regulations. All of the other major industrial states are sitting there. They are going to adopt those regulations. They have mining companies that, naturally enough under market approaches, are in competition with each other, and with our own potential investors. We have a guaranteed seat on the council which determines all of the regulations, and we have not yet filled it. What will happen is that, over time, more and more regulations will be adopted, and that will be the real system.

I cannot imagine that the billion or so dollars that would be required to invest in a mine site is going to be regarded by conservative bankers as a prudent investment if it has to be made in direct defiance of the system that 155 countries, including all the other major industrial countries, regard as the appropriate system for acquiring mine sites. The only possibility for mining the minerals of the deep seabed is to do it under the Convention. And the best possibility for making sure that that system is consistent with our belief in the free market and in making minerals available in response to market demand, is for us to get on the council and

refuse to approve any regulations that are inconsistent with those interests.

Thank you, Senator.

Mr. GAFFNEY. Mr. Chairman, would it be possible to respond?

Senator MENENDEZ. Sure, if you can do briefly.

Mr. GAFFNEY. I'll do so very briefly.

I'm heartened by the emphasis that Mr. Oxman has applied to the 1994 agreement, correcting dramatically flawed pieces of this treaty. The only problem, I believe, is, he's wrong that it fixed anything, for the following reasons. It was not done during the window that the treaty specifies for amendments. It was not done in the manner the treaty specifies for amendments. It does not explicitly amend any part of the treaty. And not all of the parties to the 1994 agreement—excuse me—not all of the parties to the underlying treaty are parties to the 1994 agreement. It is unimaginable to me on what basis people persist in saying the 1994 agreement fixed what are at least acknowledged to be fatal flaws in this treaty. And, indeed, President Reagan's negotiator called the treaty—Jim Malone, before he passed away—fatally flawed, and said it cannot be cured.

So, these are the sorts of things that we ought to be wrestling through, not simply taking the word of a lot of people who, as I say, have not read the treaty, let alone this agreement. Even some who you would have thought had, like Mr. Bellinger, last week, and Mr. Negroponte, here, who testified inaccurately before this committee as to whether land-based pollution would be considered a problem, something that the Law of the Sea Treaty mechanisms could go after and, indeed, enforce. And, thank goodness for Senator Vitter, of your team here, who pointed out they were wrong.

Now, that's the sort of thing, with the greatest of respect, I believe argues for much more close investigation of this treaty, rather than taking everybody's word for it.

Senator MENENDEZ. Thank you, Mr. Gaffney. Since your comments were impugned, Mr. Oxman, do you want to respond to them?

Mr. OXMAN. Thank you, Mr. Chairman. Two quick points.

First, as the practice of this committee over, I suspect, more than a century demonstrates, nothing in international law prevents states from entering into new agreements that modify earlier agreements. It's done all the time, and that's exactly what happened in the 1994 agreement. It was a subsequent agreement that modified, quite substantially, the provisions of part 11 of the Convention.

There is no doubt whatsoever on this point. There are 130 parties to the Implementing Agreement. From the day it opened its doors, the Seabed Authority has functioned in accordance with the 1994 Implementing Agreement. There is no question on this point whatsoever.

As for satisfying President Reagan's points, as Senator Lugar pointed out, President Reagan said, explicitly, that if his six objections on deep seabed mining were accommodated, his administration would support Senate approval of the Law of the Sea Convention. The President said that. And he said that publicly.

I have included in the record, Mr. Chairman, an essay that I wrote pointing out how each one of the points made by President Reagan was accommodated.

Thank you, Mr. Chairman.

Senator MENENDEZ. Thank you.

Senator Corker.

Senator CORKER. Thank you, Mr. Chairman.

And, for the panel, I would be one of those, in political terms, independents, who's here just to learn about this treaty and to try to make—utilize, you know, my ability on the Senate to make a good decision. I appreciate all of you being here. Obviously, there are some different points of view.

I am a little concerned, due to testimony that we had in this last—panel last week regarding the issue of the pollutions—global warming issues, you know, carbon issues. And since that has been brought up, if you will, Mr. Oxman, I wonder if you could address that, briefly. I have a number of questions.

Mr. OXMAN. Absolutely, Senator. Not only do I share your concern, that concern has been shared since the beginning of the Law of the Sea negotiations.

This is a Convention on the Law of the Sea. The delegates who attended the negotiations were experts in activities at sea. They were not experts on land activities. And it's, therefore, not surprising at all that, although land activities are a major source of marine pollution, very little is said about them in the Convention; and what is said about them is very tentative. The substance is in article 207, and article 207 is a hortatory, best-efforts provision designed to encourage states to do something about land-based sources of marine pollution. It contains no hard legal obligations. Article 207 says there should be national legislation, Senator, and it says there should be international and regional efforts to develop international standards and recommendations. But it doesn't specify particular means and outcomes, and it does not prescribe any binding standards.

For that reason, there are no applicable international standards for the coastal state to enforce under article 213. And, for that reason, there is no dispute settlement obligation under 297, paragraph 1, because there are no land-based standards binding on the United States for purposes of this Convention.

So that I want to emphasize again, Senator, that the concern that you raise is absolutely valid. It was shared all along, and it was shared not only by the United States, but by a large number of countries around the world who were not prepared to negotiate hard obligations with respect to activities on land in a negotiation concerning the sea.

Thank you, sir.

Mr. GAFFNEY. Could I——

Senator CORKER. And I——

Mr. GAFFNEY. Could I follow up on that, sir?

Senator CORKER. Well, no. But, thank you. I'd like to use my time. Thank you. We will want to follow up a little bit more with that after this, and our staff, I'm sure, will follow up with you. And just back to the contrary of that. If there are, Mr. Gaffney—for instance, if there are bad actors that are doing really bad things as

it relates to the environment, and are polluting the oceans, what recourse do—would we have as a country against people like that without a treaty like this being in place?

Mr. GAFFNEY. Senator, I would really like to have my colleague, who is a specialist on these matters, speak to that. I would prefer to have the opportunity to also answer your question. I would just say that it is, on the face of it, preposterous to say that this is hortatory language in article 207. It dictates that states' parties shall adopt legislation. And people who tell you that there's no implementing legislation associated with this obviously are not reading the text, either. There are going to be implications—I believe they will extend on our sovereign soil—from adopting this treaty, if you do.

Senator CORKER. All right, let—well, again, you all are not—I'd like to ask the questions, if it's OK.

Mr. SMITH. You asked the question, Senator.

Senator CORKER. I asked——

Mr. GAFFNEY. May I ask the expert—the duty expert to answer your question?

Senator CORKER. Well——

Mr. SMITH. This is the area that, actually, I do spend a fair amount of time on. If you don't want the answer, it's fine.

Senator CORKER. I will say that—can I have a 30-second reprieve here, Mr. Chairman?

Senator MENENDEZ. Absolutely.

Senator CORKER. I'm sort of one of those guys that truly is here to learn, and I would just say that, candidly, I want to get the facts. The tactics are not exactly building a lot of amicability. So, just for what it's worth——

Mr. GAFFNEY. Senator, if that's my fault, I apologize. I wanted to make a—an important point in connection with what you were just told, by way of rebuttal. But I really would recommend, if you want the facts, that you hear from somebody who really knows the answer, and I would defer to Fred on it.

Senator CORKER. OK. And I will certainly meet with him. I'm sure we'll want to meet with you all after this.

I want to ask you another question, though. On the oil-company piece, for people to make large investments in the deep-sea area, without a mechanism like this—and I ask all these questions, truly, in purity; I just want to know—what would cause people to want to go ahead and explore those areas without some kind of legal knowledge that, if they were investing large sums of money, they would actually be able to generate a return without being hurt in any way, legally? OK. So, you're just a—sort of, the——

Mr. GAFFNEY. I work on——

Senator CORKER. That's fine.

Mr. GAFFNEY [continuing]. National security, Senator, and I'd be delighted to answer any questions that touch on that. And I think there are a lot of them here. I'm happy to meet with you——

Senator CORKER. We'll let——

Mr. GAFFNEY [continuing]. All afterward, but——

Senator CORKER. Thank you.

Mr. GAFFNEY [continuing]. To the extent we can educate the Senate, as a whole, and the public, through these hearings, I hope we

could respond fully to your questions. But I would, again, defer to my colleague, who——

Senator CORKER. Just briefly——

Mr. GAFFNEY [continuing]. Really knows about the environment and——

Mr. SMITH. And I'm sorry, too. I shouldn't have been so hasty. Look, I think the argument you're making is a very important one. How do we go about bringing the surety needed to have economic development? You don't do it by making everything the common heritage of mankind; you create property rights. That's why fisheries are beginning to develop creative rules for ensuring sustainable fisheries around the world. It's why we have seen the development of the offshore oil fields, not just in the United States, but in Norway and elsewhere around the world. We do that by creating surety of property rights, not by becoming the common heritage of all mankind. The United Nations elements that believe that the way you increase the interests of people of developing resources for mankind is to turn them into a common property resource is counteracted by everything economic history tells us. There's—and there's a lot of literature. I could go into that.

We're already seeing the unintended consequences of being careless about this. Hortatory language may not mean much in much of the world, but, in America, the hortatory language of the Clean Air Act, the Endangered Species Act, and so forth, has had profound consequences, because we take laws and treaties—treaties or, and laws very seriously, and we have a very aggressive environmental movement, and a very aggressive trial-lawyer group who can translate vague provisions into binding constraints on people's ability to use property. And we've already seen it in the Law of the Sea Treaty with the ability of the Irish Government to raise charges against a domestic operation in the United Kingdom.

The acidification of the oceans is a big issue to a lot of people in the world, and every use of energy throughout the world potentially affects the acidification of the oceans. All energy use is now prone to be brought into this issue, as are—I'm from Louisiana—I'm raised in Louisiana. My—one of my families was horribly destroyed by Katrina. We had to pump out New Orleans. We had to discharge polluted waters into the Mississippi, and the Mississippi flows into the gulf, which flows into the seas. Would that action—it was extremely slow already—would that action been slowed even further if we had to get the ability of an approval from another organization?

Senator MENENDEZ. Thank you. Thank you.

Mr. SMITH. I think these are important questions.

Senator MENENDEZ. Thank you. The Chair is trying to have some degree of flexibility, but there is only a degree.

Senator DeMint.

Senator DEMINT. Thank you, Mr. Chairman.

I appreciate just hearing from both sides here today. It at least can inform us that there are reasons to consider the possibility that there may be some problems with the treaty.

A treaty assumes that others will follow the rules and that there's an enforcement authority that will act forcefully and quickly and fairly. I think, in this time, with our experience with

international bodies, that this is terribly naive. And to suggest this creates a predictable framework for us to operate in, as a nation, concerns me deeply.

I mean, our experience with the United Nations and the WTO, and we see the world courts and other international bodies—there's absolutely no indication that there will be predictability and that the signatories to these agreements are actually going to follow the resolutions of the authority.

We can look at the signatories to the Law of the Sea Treaty, and look at their voting record with us in the United Nations. Well over 90 percent have voted against the United States over half of the time. And if—as I look at the language, this idea that the United States has a veto—a vote—is not carried out by the facts of the agreement. We don't have an individual veto vote, by what's in the language. And to suggest that we can stop things and conform things with a veto—the language appears to say that the individual chambers can veto if they have two-thirds vote. And we will be in a chamber with China, Italy, Japan, and Russia, all of whom have voted with us less than 50 percent of the time, and some down at the 20-percent level. And we have to get two-thirds of that council in order for there to be a veto. Now, if I'm wrong, technically, obviously I'd like to hear it.

Reagan's name is used often in this. And if you read what his Ambassador, Jim Malone, has said, even after 1994, he did not think this agreement was fixed. And Reagan didn't—Reagan had an approach that I think we need to think about today. He supported the treaty and tried to comply with it. But he did not submit our country to it. In other words, we left room to act in our own best interest.

Clinton, as he—in his letter of submission—when he submitted the document here, or the whole agreement, he saw it as a far-reaching environmental accord addressing vessel-source pollution, pollution from seabed activities, ocean dumping, and land-based sources of marine pollution.

So, it seems like everyone we hear from is telling us something a little different. Our military is saying this is vital to military interests, that it has something to do with the ownership of seabed properties. It also is a major environmental treaty. And there's vague language in all of these areas, as it's not complete.

And, just, my one question to this—and I'll just direct it to you, Admiral, because the testimony does appear to say that, while there's no current problem, there could be a problem in the future. But we've been operating under customary law for a long time. How is the United States military currently encumbered by not being a party to this treaty?

Admiral CLARK. I think that the answer to that is we have embraced the principles. The Commander in Chief—when President Reagan said we were going to operate in accordance with the principles that were related to national security, we absolutely embraced those principles.

The manner in which we are impacted today are in areas—for example, the Proliferation Security Initiative is a very important vehicle that is aiding us in the execution of the global war on terrorism. When you talk to our commanders today—and I've been re-

tired 2 years, but I spoke to the people that were part of this as late as last night—I am hearing from senior commanders that our nonparticipation in this Convention are causing people—other countries, today—not to become part of PSI, because it is a public proclamation that we do not want to be part of the community of nations that have defined rights that are important to us.

Let me emphasize that the most important—and I have called it the "crown jewel of rights" that I believe that we need to nail down—is this idea of transit passage. It didn't—when I—in my earlier testimony, I said, "I was there when we didn't have these rights." So that every time we passed through an archipelagic situation or a strait, the issue was on the table about what particular range this particular—excessive range claims, territorial claims, that a particular nation is making.

Senator DEMINT. Do we not have those rights now, right?

Admiral CLARK. What I'm suggesting is that it is the view of the U.S. military—and that's why you've got the Joint Chiefs of Staff and the U.S. Coast Guard and all the parties that have spoken up in support of this—is that it is important for us to proclaim our support for this set of standards and rights that are essential for us to avoid a confrontation every time we pass within a particular range of——

Senator DEMINT. Is it your belief that Iran and other signatories will follow the directive of the Law of the Sea Treaty?

Admiral CLARK. I'm not responsible for what Iran—the position Iran decides to take.

Senator DEMINT. But they are signatories of this——

Admiral CLARK. I——

Senator DEMINT [continuing]. Treaty. Your——

Admiral CLARK [continuing]. I very——

Senator DEMINT [continuing]. Suggestion is——

Admiral CLARK. What I am responsible——

Senator DEMINT [continuing]. Is that we will submit to a treaty, assuming that all the other countries will submit to it, as well, so that we will have a predictable—predictable courses that we can follow without—and you are assuming that our enemies are going to do the same.

Admiral CLARK. Well, what I am—would suggest to you this morning is that we would certainly hope that they would honor the rights that they've signed up to. Senator, if they don't, believe me, we know what to do.

Mr. GAFFNEY. Senator, may I take a minute to respond?

I'm very concerned about the Proliferation Security Initiative, too. I agree with Admiral Clark that it is very important. I think all of us believe it's a very important tool.

Were we to be party to this treaty, there are exactly four circumstances under which we could engage in the interception and boarding of ships. That is not the case today. We have the right to do that where we think that the need exists, and we have, currently, happily, still got the naval power to do it. But, under this treaty, unless a vessel is engaged in drug trafficking, piracy, offshore broadcasting, or slave trafficking, we cannot intercept that ship. And I submit to you that we shouldn't be hamstringing this

Proliferation Security Initiative, and it is going to be hamstrung, I think.

And, to the question that the Admiral pointed out about what importance this has for our services, I understand the importance they attach to these navigation rights. I also believe that part of what is animating them is a concern that these navigation rights are going to be mutated in the future. The problem is our participation in the treaty is not going to prevent that from happening. The seat at a table is, as my colleague has pointed out, not going to give us a veto over those kinds of changes. And I think that they will work to our disadvantage, because we'll be bound to honor them.

Senator DEMINT. Well, thank you. I'm over time.

And thank you for indulging us, Mr. Chairman.

Senator MENENDEZ. Mr. Oxman, I see you looked pained. Do you want to briefly—since everybody seems to be buying their own time here in the process——

[Laughter.]

Senator MENENDEZ [continuing]. Would you like to——

Mr. OXMAN. Thank you, Mr. Chairman.

Senator MENENDEZ [continuing]. Quickly——

Mr. OXMAN. Very, very quickly. Senator DeMint—and, I think, totally correctly, because the way in which these provisions are organized makes them almost opaque—raised the point that he didn't see the reference to veto which would flow from a consensus decisionmaking system, and I just wanted to point out that it can be found in article 161(8)(d), which, in effect, gives us a veto, when we take our seat, over the adoption of amendments and over the adoption of regulations.

The other is on the Proliferation Security Initiative. What Mr. Gaffney is complaining about is the limitations on boarding that are contained in the existing Convention on the High Seas that the United States is a party to. The new Law of the Sea Convention gives us greater rights to board than we have under the existing treaty to which we are a party. The new Law of the Sea Convention—I come from Florida—gives us greater rights to rescue our citizens who may get into trouble in the Cuban territorial sea than we have under the existing Territorial Sea Convention to which we are also a party. So that, in fact, we are in a stronger position under PSI if we adopt the new Convention than if we stick with the existing treaties that are the law of the land.

Thank you, sir.

Senator MENENDEZ. Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman. I apologize that I was not here for the testimony, although I did have an opportunity to hear testimony from several on the panel. This was back in—a couple of years ago, when you were before the Environment and Public Works Committee. And welcome you back again, and appreciate your perspectives.

Mr. Gaffney, I want to ask you about the Arctic—a little interest of mine. You argue that Russia's claims to the Arctic are without merit, but, at the same time, other Arctic nations are looking to stake their own claim. You have been suggesting, or arguing, that the United States can't trust other countries to look after our own interests when it comes to the Law of the Sea, but, on this par-

ticular issue, you seem to suggest that the United States doesn't need to have a seat at the table, because we can provide data to other nations that will challenge Russia's claim.

That seems a little contradictory to me. Walk me through that.

Mr. GAFFNEY. If that were the case, it would be. I may have confused you, and I apologize if I did.

My view is this, that the Arctic is, indeed, an interest of high—an area of high interest to us, as well as to other nations. What is current going on there, fundamentally, is a border dispute between the Russians and ourselves, with other interested parties; notably, the Canadians, the Danes, and a few others. To the extent that one believes that multilateral solutions are the best way to handle border disputes, I've submitted that there are other mechanisms available to us, including the Arctic Council, in which a small number of countries, most of whom are basically friendly to us, will resolve the matter. Another alternative is simply to do it bilaterally. The worst of the possible solutions, it seems to me, is to ask this gaggle of countries, the vast majority of whom are not all that friendly to us, whether it's through the Commission on the Continental Shelf or through other Law of the Sea Treaty mechanisms, to resolve this for us.

And this goes back to something that we've touched on several different times, if I may. And, since you weren't here, I think it's important, especially, to emphasize for you. There is a difference between the decision to observe this treaty and to be bound by it. And I'm here, with my colleague, Fred Smith, to talk about the costs of being bound by this treaty. And, to the extent we don't understand those, to the extent we don't talk about those, to the extent that witnesses aren't allowed to explore them with you, it does a disservice, I think, to those of you who have to evaluate the upsides and the downsides of this.

I believe the costs of having the worst kind of multinational adjudication of the Arctic resources—namely, under this Law of the Sea Treaty—vastly exceed the benefits of being a party to this treaty. And this is one of those hard things. You're being told, incessantly, that we will have more influence if only we can appoint a scientific advisor to the decisionmaking—informing bodies, not even the decisionmaking bodies; and then we will have a vote at the table. Sadly, as this committee knows, probably better than any in the Congress, we get overruled all the time when it's one country, one vote. And we can have the best scientific advisor on the planet, and it still isn't going to matter, when the ultimate votes are taken.

Senator MURKOWSKI. I want to ask a question, and I'm not sure who to address it, so I'll throw it out to the panel. We have learned that isolationism is not an effective strategy when it comes to combating terrorism. To what extent has our nonparticipation in the treaty impacted or could impact, our efforts in the global war on terror? Who wants to take that?

Mr. Oxman.

Mr. OXMAN. Senator, I think it has a major impact. My point of departure would be President Bush's statement, with which I don't think anyone could disagree, that if we wait until the terrorists deliver weapons of mass destruction to our territory, we have waited

too long. And, therefore, it is absolutely critical that we be able to operate around the world.

The question is whether those missions, in effect, become two missions, which is another way of expressing what Admiral Clark said, and that is, one mission is to go after the terrorists, and another mission is to deal with the coastal states that may try to interrupt us.

The trend in the Law of the Sea is against our global mobility. We started the 20th century with free high seas and 3-mile territorial sea. We ended the 20th century with 12-mile territorial sea, 200-mile zones, and so on and so forth. We have to operate, in order to deal with terrorism, in areas that foreign states already regard as subject to their jurisdiction. And, in order do so, we have to—we have to—convince them that we have a right to be there, even if they don't like it. I agree, many of them may not like it. And that is going to be absolutely critical if we're going to carry out the kind of mission that has been described.

Thank you, Senator.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Senator MENENDEZ. Thank you.

Senator Isakson.

Senator ISAKSON. And I assume, Mr. Oxman, on that point, the Strait of Hormuz would be a good example of where it's critical to have that international right, because that is—Iran is on one side of the Strait of Hormuz, and its 60 miles wide, which is far shorter than the 200-mile——

Mr. OXMAN. Absolutely. It's absolutely critical that we have the right of transit passage through the strait. We relied, in fact, on the Convention. And, while Iran is not party to the Convention, so many states are that it, in effect, felt compelled to acquiesce and, sort of, say it wasn't interfering, for the moment.

Senator ISAKSON. There have been a couple of statements. One, I read. Mr. Gaffney's testimony, on page 5, talks about all the relevant documents, facilities and information which has to be submitted in a dispute. And it didn't say "intellectual rights." It implies "intellectual property." And I think it implies national security interests.

And then the chairman, Senator Menendez, in his opening statement, referred to article 203, which prohibits any—allows the integrity of any intellectual property and national security interest to be withheld by a country.

Which statement is right?

Mr. GAFFNEY. Well, Senator——

Senator ISAKSON. Does article 203 actually give us protection, or does it not?

Mr. GAFFNEY. What you will doubtless be told is that, not only are those protections built in, but, also, the 1994 agreement fixed all of the technology transfer obligations.

Senator ISAKSON. Well, I'm just——

Mr. GAFFNEY. I don't believe either is true. And let me just—let me just to suggest to you, as a way of thinking your way through this, if there is any uncertainty, you can bet it's going to be litigated. And it will be litigated in courts that are stacked against us. That's part of the problem with this treaty. As opposed to the pre-

vious conventions, where we have chosen to honor navigation rights and so on, this one has a mandatory dispute resolution mechanism that can be very problematic.

Senator ISAKSON. Would you answer the question regarding article 203?

Mr. OXMAN. Yes, Senator.

Mr. Gaffney and I went through this before Senator Inhofe, and I will do what I did with Senator Inhofe, and that is read the text, "Nothing in this Convention shall be deemed to require a State Party, in the fulfillment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security." We are not the only country in the world that has an interest in protecting its secrets.

Second, we are not subject to standing international tribunals that are allegedly stacked against us. The resolution of advice and consent contained in the 2004 report of the committee opted for arbitration; and, under arbitration, the parties choose the arbitrators. And that has been the pattern.

Thank you.

Mr. GAFFNEY. Mr. Chairman, that is a factual error of——

Senator ISAKSON. OK, just——

Mr. GAFFNEY [continuing]. The first order.

Senator ISAKSON. Let—I've got one other——

Mr. GAFFNEY. It needs to be——

Senator ISAKSON [continuing]. Question.

Mr. GAFFNEY [continuing]. Corrected.

Senator ISAKSON. I would like for both of you to submit to me, and to the committee in writing, your rather brief and succinct reasons as to why you disagree on that point.

[The written responses from Mr. Oxman and Mr. Gaffney follows:]

RESPONSE OF MR. GAFFNEY

Background: LOST departs dramatically from the previous, 1958 convention governing navigation by obligating member states, in the event of disputes, to submit to mandatory settlement mechanisms. These apply not just to issues involving the maritime "rules of the road," but to any ocean-related disputes that state parties cannot resolve on their own.

Nations are required—at the request of either of the disputing parties—to submit the dispute for resolution by one of several international tribunals: (1) The International Tribunal for the Law of the Sea (ITLOS), (2) an arbitral tribunal or (3) a special arbitral tribunal. Another option is the International Court of Justice (ICJ). If the parties to the dispute cannot agree on a mechanism, the dispute automatically goes to an arbitral tribunal for resolution. Decisions made by any of these bodies are binding upon the disputants, and such decisions cannot be appealed.

The question is: How will mandatory dispute resolution affect U.S. interests?

- LOST proponents in the Bush administration are right to be worried about international courts given the record of such panels, particularly of the ICJ, to be highly politicized and generally very hostile to American interests.
- Unfortunately, the appointment procedures that would apply to the "swing" arbiters in both the regular and special arbitration panels are likely to assure a similar stacking of the deck against the United States. In regular arbitration, each party chooses one panelist, and the three remaining panelists are chosen by the President of the Law of the Sea Tribunal. In special arbitration, each party chooses two panelists, and the remaining panelist is chosen by the Secretary General of the United Nations.
- Worse yet, the State Department has acknowledged that arbitration panels would likely look to decisions of the Tribunal to inform their own rulings. As a practical matter, this means that, were the United States to become a party

to the treaty, it would not be able to escape the reach of the Tribunal—despite its determination to forum-shop by choosing arbitration.

- Equally untenable is the proponents' insistence that Law of the Sea Treaty Tribunals will be unable to interfere with U.S. military activities. Although LOST exempts "disputes concerning military activities" from the purview of its dispute resolution mechanisms, the treaty does not define "military activities."
- Proponents of LOST argue that the United States can make a declaration that it will define "military activities" for itself. However, this amounts to a reservation to the treaty, which is expressly prohibited by LOST. LOST must be accepted or rejected in its entirety. Furthermore, if the U.S. military were allowed to make such a unilateral determination under LOST, the militaries of other nations would exercise the same option, creating an anarchic situation that would defeat the purposes of LOST altogether. LOST was clearly not intended to allow this to happen.
- These considerations, combined with the treaty's sweeping environmental obligations, give rise to circumstances in which U.S. Navy and perhaps other military services, their contractors or suppliers seem virtually certain to find themselves embroiled in one or another of LOST's dispute resolution mechanisms. For example, the Navy's use of high-powered sonars would certainly be characterized by Washington as a military activity. But the Navy could well be forced to defend the use of such sonars before an unfriendly LOST panel on the grounds that it has harmed the "marine environment," by killing whales or dolphins.
- Worse yet, in the event of any dispute over whether an activity is military in nature, the tribunals created by LOST are permitted to make that determination themselves.
- The mandatory and rigged nature of the dispute resolution mechanisms are one of the most important reasons why the United States will be better served by continuing its practice over the past 25 years—namely, voluntarily observing those parts of LOST that it finds unobjectionable, but remaining unencumbered by the obligations that are.

RESPONSE OF MR. OXMAN

The other industrial countries, the competent agencies of the United States Government, and the mining companies and sponsoring states that are already dealing with the Seabed Authority do not share Mr. Gaffney's concerns. Neither should the committee.

No State Party to the Convention may be required to reveal classified national security information to anyone, whether it concerns technology or any other matter.[1] United States domestic discovery and evidence rules do not apply to international tribunals. They cannot compel states to produce information against their will. The Convention does not give private parties the right to sue states in those tribunals. States are cautious about bringing suit against each other, and are careful to avoid taking positions that could prejudice their own interests in other circumstances. All states have security secrets that they do not wish to reveal.

Annex III, article 5, of the original Convention imposed technology transfer obligations on companies engaged in mining the deep seabeds beyond the Continental Shelf. That was one of the reasons the United States and other industrial states objected to the regime for mining the deep seabeds, and did not become party to the original Convention.

Section 5 of the Annex to the 1994 Implementing Agreement states clearly and succinctly, "The provisions of Annex III, Article 5, of the Convention shall not apply."

There is no plausible basis for questioning the fact that the 1994 Agreement modified the deep seabed mining regime set forth in the Convention. The United States would be joining the Convention only as modified by the Agreement, not the original Convention. The Agreement is in force and is legally binding. Of the 155 parties to the Convention, 130 are party to the 1994 Agreement, including all major industrial states party. Of the few remaining parties, some signed the Agreement, most participated actively in its application for a dozen years now, and none has challenged and all have acquiesced in its application. The Seabed Authority has elected its organs and operated under the 1994 Agreement since the day it opened for business.

The 1994 Agreement states explicitly that developing countries are to look to the open market and freely negotiated contracts to obtain technology with respect to deep seabed mining. If for some reason that does not work, the new text calls for cooperation with the Seabed Authority by those engaged in deep seabed mining beyond the Continental Shelf and their sponsors in facilitating the acquisition of such

technology "on fair and reasonable commercial terms and conditions, consistent with the effective protection of intellectual property rights." This is not an obligation to transfer technology.

The data provisions of Annex III, article 14, are not technology transfer provisions. They deal only with data necessary to carry out the Seabed Authority's administrative functions with respect to deep seabed mining beyond the Continental Shelf, relate only to the particular mine site, and expressly protect proprietary data (as does art. 181(2)). Determination of what data is necessary for carrying out administrative functions and related matters is to be made by rules, regulations and procedures of the Authority. The miner's obligation to submit data applies only "in accordance with [the] rules, regulations and procedures" of the Authority, the adoption of which requires a consensus on the Council (art. 161, para. 8(d); see Ann. III, art. 17, para. 1(b)). Consensus "means the absence of any formal objection" (art. 161, para. 8(e)). The power of the Council in this respect cannot be questioned by a tribunal under the Convention, which "shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures" (art. 189).

There is, in short, no plausible risk that China or anyone else can go to a tribunal under the Convention and get access to state secrets or proprietary data.

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[1]See Convention, art. 302. In response to a question by Senator Vitter during the hearing, I noted that the Department of Defense and the CIA have stated that their intelligence activities at sea are military activities, and I concluded that as such they would be excluded from dispute settlement obligations by the declaration under article 298(1)(b). It is pertinent to add here that the United States is not required to divulge information regarding its classified intelligence activities at sea.

Senator ISAKSON. Second, there's one other point on which you disagree, which I'd like to receive an answer regarding. Mr. Oxman—Mr. Gaffney cited the limitations on PSI—limitations of the U.S. Navy on boarding ships, and referenced PSI—and referenced only four ways to board. And then, Mr. Oxman disagreed with that categorically by saying the current—the new law—the new Law of the Seas expands the old Law of the Seas rights to board. And one of you's right, and one of you's wrong. Who's right?

Mr. Oxman.

Mr. OXMAN. Thank you, Senator. It's a question of comparing the two texts. The existing High Seas Convention, to which we are a party, talks about right to board, and gives a list. That list is repeated in the new Convention, but items are added—for example, an important item on the right to board ships without nationality. In addition, there is a clear——

Senator ISAKSON. Without a flag?

Mr. OXMAN. Without a flag, that's right. Or if they try to use two flags, they can now be boarded. And this is very useful, because, very frequently, countries can easily dissociate themselves by saying, "Oh, it's not our ship at all," and that has happened, and we acquire a right to board because we can reasonably believe that it's without nationality. So, the rights have been expanded.

But, on top of that—that's not the only basis. The basis of PSI is our agreements with other countries in advance. In addition, if we discover a ship where we don't have an agreement in advance, we can ask that country; and, when we present evidence, they may well be persuaded to grant us consent; indeed, it would be serious if they didn't. Further, we can follow the ship into port, and have the ship inspected in port, which we have done. Finally, if it is so urgent that we really can't wait to even follow the ship into port, then I have little doubt that those are circumstances in which we

can board, not under the Law of the Sea, but under our right of self-defense under the U.N. Charter.

Thank you, sir.

Mr. GAFFNEY. I have great respect for Mr. Oxman, particularly his legal skills, but, I think, in this case, this is a prime example of why this treaty warrants much more rigorous examination, including, by the way, by the Armed Services Committee.

I think you will find that, whatever the relative strength of these provisions is, were we to become party to this one, which identifies, explicitly, four provisions, you would find it constraining, not expanding, our powers.

And, most especially, I have to tell you, if you're going to use the right of self-defense, then you don't need the Law of the Sea Treaty. And I submit to you that what you'll find is the mandatory dispute resolution mechanisms will be used to interfere with the assertion of our right of self-defense, not enhance it.

Senator ISAKSON. OK.

Admiral Clark, I would appreciate your submitting to me in writing your response to that specific point with regard to the rights under the new, versus the old Law of the Sea.

Admiral CLARK. I do so, gladly. And I would wish that we had the time to do it here today.

[The written response of Admiral Clark to Senator Isakson's request follows:]

The 1982 Law of the Sea (LOS) Convention provides more extensive authority to conduct maritime boardings compared to the 1958 Conventions and thus will enhance the effectiveness of the Proliferation Security Initiative (PSI). Article 110 of the LOS Convention provides that a vessel suspected of being without nationality—a "stateless" vessel—may be boarded. This right is not included in the 1958 Conventions and is a key authority for our naval forces to conduct maritime boardings.

In addition to expanded authority under Article 110, PSI boardings may be conducted under the following bases:

Port State Control: All States exercise jurisdiction within their ports and inland waters and may enforce their national laws over foreign commercial ships. States may also place conditions upon ship entry into their ports and territory such as an inspection on the high seas prior to entry into national waters. 1982 LOS Convention Articles 2(1), 25, 29–32.

Flag State Consent: The flag State has the exclusive right to exercise legislative and enforcement jurisdiction over its ships on the high seas. The United States has entered into bilateral PSI boarding agreements with seven countries. 1982 LOS Convention Articles 92, 94.

Self Defense: Under Article 51 of the U.N. Charter, all states retain the right to take appropriate action in self defense; the LOS Convention does not impair that right.

Additionally, almost all PSI partners are parties to the LOS Convention and joining it is likely to strengthen PSI across the globe by attracting new cooperative partners.

Senator ISAKSON. I wish we did, too, sir.

Thank you, Mr. Chairman.

Senator MENENDEZ. Thank you.

Senator Vitter.

Senator VITTER. Thank you, Mr. Chairman.

Thanks to all of you for being here today, and for all of your past and present service.

I have some real concerns about the treaty, and almost all of them revolve around the fact that it does have a binding—or several binding dispute-resolution mechanisms by which, if we enter into the treaty, we would be bound. I believe that, in the current

international environment, these tribunals and arbitration panels are very likely to be stacked against us. And also in the current international environment, there is very much a trend toward internationalizing what I would consider domestic issues, and litigating them in an international forum. I'm very concerned about all of those related trends.

In that context, Professor Oxman, I wanted to ask you a question about a previous statement. You mentioned, a few minutes ago, in regard to the arbitration panels, the parties choose the arbitrators. As I read it, they try to choose the arbitrators, and, if they can't all agree on the choices, somebody else—the "king," of the Law of the Sea Land—chooses three of the five arbitrators. Isn't that the case?

Mr. OXMAN. Absolutely, Senator. First, I want to say that the concerns that you've expressed about compulsory dispute settlement procedures are concerns we always have to look very, very carefully at, and the glass in the Law of the Sea Convention is not all full, and it's not all empty. We tried to be very careful on that.

As to the arbitration, what you describe is correct. When lawyers draft arbitration clauses, not just in treaties, the question is, What happens if the parties don't appoint——

Senator VITTER. Right.

Mr. OXMAN [continuing]. Their arbitrators? And the answer is to try to find a neutral appointing authority. In the case—under the resolution of advice and consent in the 2004 report, we would opt for arbitration under Annex 8, with respect to the subjects covered there. And there, the appointing authority, if agreement couldn't be reached, would be the Secretary General of the United Nations, currently from South Korea.

Senator VITTER. Professor——

Mr. OXMAN. The remainder——

Senator VITTER [continuing]. I don't want to cut you off, but——

Mr. OXMAN. OK.

Senator VITTER [continuing]. I want to preserve my time.

The bottom line is, if the opposing party to us in a dispute wants to make it so, they can ensure that a majority of arbitrators is chosen by either the head of the United Nations or the head of this new Law of the Sea entity, correct?

Mr. OXMAN. If agreement cannot be reached, that's right. But they're running a risk.

Mr. GAFFNEY. That's——

Senator VITTER. OK. Well, I——

Mr. GAFFNEY. It is correct. And it is a problem.

Senator VITTER. I think that is a recipe for disaster for us.

In line with that, is there any clear provision of the treaty that exempts intelligence matters from the binding dispute resolution process?

Mr. OXMAN. Yes, Senator. My understanding is that the Departments of Defense and the Central Intelligence Agency and related agencies have taken the position that their intelligence activities at sea are military activities. I'm obviously not an expert on this, but there would be no reason for me, or anyone else, to question that determination; and, of course, there would be a declaration excluding military activities from compulsory settlement.

Senator VITTER. So, in other words, excluding our intelligence activities from binding dispute resolution depends on whether or not the parties to the treaty consider them to be military activities.

Mr. OXMAN. And being activities at sea; otherwise, they're not covered at all.

Senator VITTER. Right. And I would just point out, here on Capitol Hill, we have a committee that deals with military issues, and there is a completely separate committee that deals with intelligence matters.

But let's go on to the military issue. Is there anything in the treaty that clearly says who will decide what is a military activity and what is not a military activity?

Mr. OXMAN. The treaty gives any state the right to exclude military activities. I don't think it went any further, because I think if one tries to follow through how you would make that determination, it is extremely difficult to imagine a situation in which you could second-guess a determination by any state that its activity is military, because it's the one that understands the purpose for which it undertook the activity.

Senator VITTER. Well, I have no doubt that there are plenty of countries around the world who will second-guess that determination of ours. And so, my concern is that there is nothing in the treaty that says who decides that threshold jurisdiction issue. When you're in a court in the United States—and I realize there are differences between domestic law and international law—but when you're in a court in the United States, and you go before a court, and one side says, "This court has jurisdiction," and the other side says, "This court doesn't have jurisdiction," do you know who decides whether the court has jurisdiction? The court. Not the party that says, "You don't have jurisdiction."

So, I think that's a very serious issue.

Mr. GAFFNEY. And that would be——

Senator VITTER. A final——

Mr. GAFFNEY [continuing]. The case here, too.

Senator VITTER [continuing]. Final issue, on environmental issues. Professor, in terms of land-based pollution sources, you point to section 207. As you know, there is a separate article, article 213, which is entitled "Enforcement With Respect to Pollution From Land-Based Sources." If everything about land-based pollution is purely feel-good hortatory, would there be reason to include an article entitled "Enforcement With Respect to Pollution From Land-Based Sources"?

Mr. OXMAN. Senator, article 207 does require a state to adopt laws to control land-based sources. We have extensive State and Federal laws on that subject. There's no doubt that we have done so.

Article 213 requires us to enforce those laws—which we do. That's all it does. It is not possible, as I see it, for us to violate that provision.

Senator VITTER. If it's not possible for an individual state to violate the provision, why is it in the treaty?

Mr. OXMAN. Many of the pollution provisions of the Convention are what we call framework provisions. It's what I mean when I call the Convention a "Constitution for the Oceans." It, sort of, lays

out what the objective should be in other negotiations, but it doesn't tell you the bottom line. And that's what's happening here. The purpose is to encourage states to deal with the question, nationally and internationally, but it does not tell them precisely what they have to do.

Senator VITTER. But, again, it seems odd that a simple feel-good provision would have the title "Enforcement With Respect to Pollution From Land-Based Sources," possibly because this treaty does have enforcement mechanisms. And finally, in conjunction with the same point, I'd highlight that this isn't wild speculation. I have an article here by William Burns, another law professor, about the upcoming litigation onslaught of environmental issues under this treaty. It's titled, "Potential Causes of Action for Climate-Change Damages in International Fora: The Law of the Sea Convention." He says: "The United Nations Convention on the Law of the Sea is a promising instrument through which such action might be taken, given its broad definition of pollution to the marine environment and the dispute resolution mechanisms contained within its provisions."

So, I'd just use this one article to point out, this isn't wild speculation. They're a team of——

Senator MENENDEZ. Senator?

Senator VITTER [continuing]. International lawyer types chomping at the bit.

[Additional written material submitted by Mr. Oxman regarding his preceding oral testimony follows:]

Article 213 forms part of section 6. That section does not deal with settlement of disputes or enforcement by international tribunals. It deals with enforcement by states of their own laws and regulations. It obliges states to enforce their own laws and regulations that are adopted, in accordance with the substantive provisions of section 5, with respect to particular sources of marine pollution. The relevant provision of section 5 with respect to land-based sources of marine pollution is article 207. That article does not bind a state to implement international standards in its laws and regulations, but merely to take them into account. Since no international standards are binding on a state by virtue of article 207, article 213 requires a state to adopt laws and regulations to implement international standards only if those standards are binding on it by virtue of its acceptance of another treaty that contains such standards.

The United States, on both the Federal and State level, has among the strictest laws and regulations in the world governing land-based sources of marine pollution, including those regarding the release of toxic, harmful or noxious substances. Both Federal and State authorities enforce those laws and regulations. The only obligation under article 207 is to adopt such laws and regulations, and the only obligation under article 213 is to enforce them. Neither provision specifies the content of such laws and regulations or the particular means of enforcement. Accordingly, there would be no basis for finding the United States in violation of these articles. Moreover, there would not be jurisdiction to do so since article 297, paragraph 1, limits jurisdiction to compliance with international standards that are binding on the coastal state by virtue of its acceptance of another treaty, and articles 281 and 282 further restrict jurisdiction in that situation.

The *MOX Plant* case does not address article 297, paragraph 1. The United Kingdom did not invoke the jurisdictional limitations of that provision. Rather, it focused its jurisdictional objections on article 282. While I am not privy to the reasons, it is possible that the United Kingdom's lawyers felt they had a stronger case under article 282, and were concerned that their case under article 297 (that there were no standards binding on the U.K.) was not only weaker on the facts of that case because of other binding treaty commitments of the U.K. but, worse still, that even making the argument would prejudice the strength of the United Kingdom's case under article 282 (that the dispute was subject to the jurisdiction of another court or tribunal by virtue of another treaty dealing with the same matter). Be that as

it may, the *MOX Plant* case says nothing about the effect of article 297, paragraph 1, because the question was not raised.

The Law of the Sea Convention does not permit private parties to sue states in an international tribunal. *MOX Plant* was a classic case of overreaching by a few environmental activists, even where they do manage—which is difficult to persuade a state to bring a case against another state. In this regard, I find the ambitions of Professor Burns implausible and unpersuasive, and believe the record already shows that international tribunals would react in the same way. Indeed, despite being asked to do so on more than one occasion, neither the International Tribunal for the Law of the Sea nor any arbitral tribunal appointed under the Convention on the Law of the Sea has given Mr. Burns' colleagues even the purely rhetorical satisfaction of invoking the so-called precautionary principle. There is no instance in which these tribunals have applied a treaty that is not binding on the parties. In environmental cases the tribunals have been content to call on the parties to engage in consultation and study and, in one instance, ITLOS temporarily reinstated tuna catch limitations that had previously been agreed by the parties in order to allow time for the pending arbitration to proceed.

The record of the *MOX Plant* dispute between Ireland and the United Kingdom is cause for reassurance, not concern, in this regard. In that dispute, Ireland challenged the operation of a nuclear reprocessing facility by the United Kingdom on grounds that the operation, including maritime transport of radioactive materials, endangered the Irish Sea. Ireland was persistent. But it lost. Four times. Ireland lost in the arbitration it brought under a separate European environmental treaty (the so-called OSPAR Convention). The International Tribunal for the Law of the Sea denied Ireland's requests for intrusive provisional measures pending the constitution of an arbitral under the Convention on the Law of the Sea, limiting itself to requiring consultation between the parties and periodic reporting back. The arbitral tribunal suspended proceedings on the merits pending a determination of jurisdiction by the European Court of Justice under the European Union treaties binding on Ireland and the U.K., and has since lifted even the reporting back requirements. And the European Court of Justice ruled that Ireland violated its obligations under the applicable EU treaties by instituting arbitral proceedings against the U.K. under the Law of the Sea Convention.

The record amply supports the conclusion that international tribunals, including arbitral tribunals, to which cases may be submitted under the Law of the Sea Convention will act in a prudent and cautious manner.

The United States is party to many treaties conferring jurisdiction on standing international tribunals as well as arbitral tribunals. The provisions of the Law of the Sea Convention regarding the manner of appointment of arbitrators are quite standard; similar provisions appear in many other treaties. There is no indication whatsoever that the United States has ever been the victim of political bias by the appointing authority in the application of the standard, ubiquitous, and obviously necessary clause permitting a neutral individual to appoint arbitrators if the states party to the dispute do not do so. The reality is that parties ordinarily agree on the arbitrators because they have an incentive to do so, and that even if they cannot agree, the appointing authority can be expected to consult with the parties and be sensitive to their concerns.

Compulsory dispute settlement is one of the important benefits to the United States of the Law of the Sea Convention. It is central to achieving the objective of the United States of finding means other than direct confrontation for discouraging further expansion of coastal state jurisdictional claims around the world that prejudice global mobility for security and economic purposes. If there is to be compulsory jurisdiction, then the only options are a standing tribunal or an ad hoc arbitral tribunal that can be constituted by someone else if the defendant is recalcitrant. The risks this entails with respect to the constitution of an arbitral panel are hypothetical and, at the very worst, would affect only one case with one state.

The risk of continuing erosion of our global mobility throughout the world is real, and that erosion will be very costly to us in political, military, and economic terms. Whether we like it or not, that erosion will reduce the realistic options available to the President to protect this country from threats to its security and economic interests. And the risk of such erosion is the one on which we must focus in reaching a decision on the Convention.

Mr. GAFFNEY. Could I just add one point to that, sir?

Senator MENENDEZ. I'm sorry, we've gone——

Mr. GAFFNEY. May I submit something for the record——

Senator MENENDEZ. It——

Mr. GAFFNEY [continuing]. On the——

Senator MENENDEZ. Absolutely.

Mr. GAFFNEY [continuing]. Message?

Senator MENENDEZ. Absolutely.

Mr. GAFFNEY. I also have a letter from 30 groups that have opposed this treaty, which, if I may have your permission to insert in the record, as well——

Senator MENENDEZ. Without——

Mr. GAFFNEY [continuing]. I would appreciate it.

Senator MENENDEZ. Without objection.

Mr. GAFFNEY. Thank you, sir.

[The written information submitted by Mr. Gaffney follows:]

Background: Law of the Sea Treaty contains numerous provisions that involve obligations to share information and technology. The treaty's architects had in mind not only the importance of technology transfers to the viability of its various maritime research, environmental, and industrial goals. They also saw such transfers as tangible examples of LOST's agenda more equitably to distribute the world's wealth, both physical and intellectual.

LOST requires transfers of information, know-how and hardware in such areas as: Underwater mapping and bathymetry systems; reflection and refraction seismology; magnetic detection technology; optical imaging; remotely operated vehicles; submersible vehicles; deep salvage technology; active and passive acoustic systems; bathymetric and geophysical data; and undersea robots and manipulators. Many of these technologies are inherently "dual-use," having both military and civilian applications. Their military applications include: Antisubmarine warfare capabilities; strategic deep-sea salvage abilities; and deep-water bastions for subsurface launching of ballistic missiles.

- The Law of the Sea Treaty requires extensive transfers of data and technology—at least some of which could be highly detrimental to America's industrial competitiveness (including in fields far removed from maritime-related activities) and to the national security. For example:
  - LOST's Article 266 mandates that states "cooperate in accordance with their capabilities to promote actively the development and transfer of marine science and marine technology on fair and reasonable terms and conditions" and "endeavor to foster favorable economic and legal conditions for the transfer of marine technology."
  - Article 268 requires states to "promote the acquisition, evaluation, and dissemination of marine technological knowledge and facilitate access to such information and data."
  - Article 269 calls for parties to "establish programs of technical cooperation for the effective transfer of *all kinds* of marine technology to States which may need and request technical assistance." (Emphasis added.)
  - Compulsory dispute settlement mechanisms afford further opportunities to obtain sensitive technology and information. Article 6 of Annex VII requires that parties to a dispute "facilitate the work of the arbitral tribunal and . . . provide it with all relevant documents, facilities and information." It can therefore be expected that countries may bring the United States or its businesses before arbitral tribunals—without expectation of a favorable result, solely for the purpose of obtaining sensitive technology information.
- The 1994 Agreement ostensibly made certain modifications to technology transfer obligations contained in LOST's part XI, which governs administration of the deep seabed. It is misleading, however, to suggest that the United States would, as a result, have no difficulties with technology transfer should it become a party to LOST.
  - For one thing, the 1994 accord could not have amended LOST since the treaty was not open to amendment until 8 years after the Agreement entered into force. For another, there are specific arrangements for amending the treaty, and the Agreement did not conform to them. Finally, not all of LOST's state parties have endorsed the Agreement. At the very least, this would allow the nonsignatories to insist on the application of the original provisions, including those requiring technology transfers.
  - Even to the extent the 1994 Agreement can be said to have modified the Law of the Sea Treaty, it did not do so with respect to all of the treaty's numerous

technology transfer provisions. For example, just the requirements for information-sharing contained in the mandatory dispute-resolution obligations—which are unaddressed by the Agreement—could be sufficient to compel problematic transfers of sensitive data, technology, and know-how.

- The United States is the nation with the most to lose—from an economic and national security point of view—from the sort of obligatory technology transfer provisions contained in the Law of the Sea Treaty, including those that would be binding even if the 1994 Agreement has effect.
- America has long imposed unilateral export control restrictions precisely for the purpose of preventing transfers that will result in harm to this country. U.S. accession to LOST would require a substantial liberalization, if not wholesale scrapping, of such important self-defense measures.
- Actual or potential competitors/adversaries like China, Russia, state-sponsors of terror and even European "allies" understand full well what a technology windfall U.S. adherence to LOST could represent. It would be irresponsible, not to say foolish in the extreme, to believe that none of these parties will take advantage of the opportunity to reap that windfall to our very considerable detriment.

LETTER SUBMITTED FOR THE RECORD BY MR. GAFFNEY

COALITION TO PRESERVE
AMERICAN SOVEREIGNTY,
Washington, DC, October 15, 2007.

Hon. Joseph Biden,
Chairman, Senate Foreign Relations Committee,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As you know, the Foreign Relations Committee previously considered and approved a resolution of accession for the U.N. Convention on the Law of the Sea. Regrettably, the Committee did not take testimony from any witnesses opposed to this convention, also known as the Law of the Sea Treaty (LOST)—a fact that almost certainly contributed to the unanimous support LOST enjoyed when the vote was taken to report out the resolution.

The failure of the full Senate to act on the committee's resolution during its penultimate session means that before such action can be taken in the 110th Congress, a new resolution of accession will have to be introduced and passed by the Foreign Relations Committee.

We understand that you intend to hold hearings on LOST for this purpose later this month and perhaps to move a new resolution of accession shortly thereafter. If so, we are writing to express our strong opposition to the U.S. ratification of the Law of the Sea Treaty. We call upon you to ensure that critics of this accord, as well as proponents, will be afforded an opportunity to testify.

In particular, we would hope that such hearings would address the following matters of concern to us and our members:

- We agree with President Ronald Reagan, who wisely refused to sign the LOST in 1982, on the grounds that it was the product of an unfriendly international 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 nonaligned 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 many 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 fully 25 of the states parties to the treaty have not ratified the 1994 accord.
- Other aspects of the Law of the Sea Treaty have implications for U.S. sovereignty and national security interests and 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 United States would be committed to transfer potentially militarily relevant technology to possibly unfriendly hands.
- American business interests will likely be adversely affected by the imposition of sweeping new environmental obligations—including some contained in treaties to which the United States is not a party—and by LOST's application of the Luddite "Precautionary Principle." The latter invites regulations and legal actions in the event there is any uncertainty about a given initiative's downstream implications. Shareholders are surely unaware of these risks to their equities and will be surprised to discover that corporate executives (many of whom publicly support LOST) are, too.
- LOST will give legal grounds to those who wish to prevent us from performing vital intelligence-collection activities over, on, and under the seas, and from interdicting maritime WMD proliferation activity. We believe that LOST will act as a brake on vital U.S. activity such as President Bush's Proliferation Security Initiative, not a lubricant to it.
- We believe that the U.S. Navy's support of LOST is particularly misplaced, since the treaty will afford fresh opportunities for what has come to be called "lawfare"—the use of such legal instruments to interfere with our military, its operations and logistical support (much of which is provided by commercial vessels and civilian personnel).

In light of the foregoing concerns, we believe that—in addition to renewed deliberations in the Foreign Relations Committee—other panels of the Senate (including, but not limited to, the armed services, intelligence, government affairs, finance, energy and environment and public works committees) should hold their own hearings on the implications of this accord for matters within their jurisdiction. So, too, should their counterparts on the House side given the considerable body of far-reaching implementing legislation likely to be made necessary should LOST be ratified.

Sincerely,

David Keene, American Conservative Union; Phyllis Schlafly, Eagle Forum; Dr. Alan Keyes, Declaration Alliance; Paul M. Weyrich, Coalitions for America; Frank J. Gaffney, Jr., Center for Security Policy; Fred Smith, Competitive Enterprise Institute; Cliff Kincaid, America's Survival; Wendy Wright, Concerned Women for America; Jim Martin, 60 Plus Association; Jim Boulet, Jr., English First; Tom McClusky, Family Research Council; Jack Wheeler, Freedom Research Foundation; C. Preston Noel III, Tradition, Family, Property; David Ridenour, National Center for Public Policy Research; Richard Falknor, Maryland Taxpayers Association; Mark Williamson, Federal Intercessors; Jim Backlin, Christian Coalition of America; Steve Baldwin, Council for National Policy Action Inc.; Ron Pearson, Council for America; Jeffrey Gayner, Americans for Sovereignty; Colin A. Hanna, Let Freedom Ring; Thomas P. Kilgannon, Freedom Alliance; Gabrielle Reilly, GabrielleReillyWeekly.com; Doug Bandow, American Conservative Defense Alliance; Richard Viguerie, ConservativeHQ.com;

Amy Ridenour, Americans for the Preservation of Liberty; John Fonte, Center for American Common Culture; Dean Mathew Staver, Liberty University School of Law; John C. Willke, Life Issues Institute; Kelly Shackelford, Esq., Free Market Foundation; Chris Perkins, Coalition for a Conservative Majority; Kevin L. Kearns, U.S. Business & Industry Council (USBIC); Forest Thigpen, Mississippi Center for Public Policy; Jonathan DuHamel, People for the West, Tucson; Paula Easley, Alaska Land Rights Coalition; Mike Dail, American Land Foundation; Chris Derry, Bluegrass Institute; Dan Byfield, Liberty Matters; Joyce Morrison, Citizens for Agricultural Property Rights; Joe Eldred, Constitution Party of New York; Harold Stephens, Citizens to Protect the Confluence; Fred V. Grau, Jr., Take Back Pennsylvania; Sharon Votaw, Homestead Land and Water Alliance; Katherine Lehman, People for the USA Grange; Candace Oathout, Citizens Against Recreation Eviction–USA; C.J. Williams, U.P. Patriots—Upper Peninsula of Michigan; Henry F. Cooper, High Frontier; Dane vonBreichenruchardt, U.S. Bill of Rights Foundation; Ellen Verell, Coalition of Concerned Citizens; Timothy L. Ravndal, Mon-

tana Multiple Use Association; Lew Uhler, The National Tax Limitation Committee;

Thomas Schatz, Council for Citizens Against Government Waste; Eugene Delgaudio, Public Advocate; Craig Rucker, Committee for a Constructive Tomorrow; Michael Coffman, Sovereignty International; Mychal Massie, Project 21; Carol W. LaGrasse, Property Rights Foundation of America; Paul Driessen, Center for the Defense of Free Enterprise; Wanda Benton, The Property Rights Congress, Ozarks Chapter; L.M. Schwartz, The Virginia Land Rights Coalition; Robert R. Galbreath, Jr., Citizens for a Constitutional Republic; Malcom Wallop, Frontiers for Freedom; Linda Runbeck, American Property Coalition; Jim Chmelik, Idaho County Farm Bureau; J. Michael Smith, Home School Legal Defense Association; LeRoy Watson, National Grange; Jim Vogt, Taxpayers for Accountable Government; Andrew F. Quinlan, Center for Freedom and Prosperity; Howard Phillips, The Conservative Caucus; Rev. Louis Sheldon, Traditional Values Coalition; William Greene, RightMarch.com; Leon E. Donahue, Washingtonians for Immigration Reform; John J. Karch, Slovak American Information Council; Sean Carr, Golden Gate Minutemen; Tom DeWeese, American Policy Center; R. Peter Weaver, Independent Liquid Terminals Association; and Elaine Donnelly, Center for Military Readiness.

Senator MENENDEZ. Also, I'd ask unanimous consent to include a letter in the record written to Senator Biden and Senator Lugar by Senator Rockefeller and Senator Bond, the chair and the vice-chair of the Senate Intelligence Committee, in which—it goes on to say, "On June 8, 2004, the Select Committee on Intelligence held a closed hearing on the intelligence implications of United States accession to the Law of the Sea Convention. In that hearing, the Director of Naval Intelligence, the Assistant Director of Central Intelligence for Collection, the legal advisor to the Department of State, expressed their support for accession to the Law of the Sea Convention, and stated the Convention does not affect the conduct of intelligence activities." And it goes on to say, "Based on our considerations of these matters, we concur in the assessment of the intelligence community and the Department of Defense and the Department of State that the Law of the Sea Convention neither regulates intelligence activities, nor subjects disputes over intelligence activities to settlement procedures under the Convention. It is, therefore, our judgment that accession to the Convention will not adversely affect U.S. intelligence collection or other intelligence activities."

Mr. GAFFNEY. Senator, again, there have been——

Senator MENENDEZ. Without objection——

Mr. GAFFNEY [continuing]. Opposition witnesses heard.

Senator MENENDEZ. Mr. Gaffney, I've given you a lot of flexibility——

Mr. GAFFNEY. I'm very grateful——

Senator MENENDEZ [continuing]. But, with all due respect——

Mr. GAFFNEY [continuing]. For your courtesy, sir.

Senator MENENDEZ [continuing]. We run the committee hearing, not you, sir.

Mr. GAFFNEY. Just on your point?

Senator MENENDEZ. With——

Mr. GAFFNEY. It——

Senator MENENDEZ [continuing]. That——

Mr. GAFFNEY. There were no opposition witnesses heard.

Senator MENENDEZ [continuing]. The gentleman's——

Mr. GAFFNEY. How could they arrive at an informed decision——

Senator MENENDEZ [continuing]. The gentleman——

Mr. GAFFNEY [continuing]. If none were heard?

Senator MENENDEZ. The gentleman is out of order.

Mr. GAFFNEY. I appreciate it, sir.

Senator MENENDEZ. You can ask Senator Rockefeller and Senator Bond how they did that.

Without objection, the letter is entered into the record.

[EDITOR'S NOTE.—The above mentioned letter can be found on page 49 of the preceding November 27 hearing.]

Senator MENENDEZ. We thank all the witnesses. There will be other questions for the witnesses submitted for the record. We would appreciate your expeditious answers.

And we thank you for your testimony.

Senator VITTER. Mr. Chairman.

Senator MENENDEZ. And, with that—Senator Vitter.

Senator VITTER. Just a final question. This treaty has been around a long time. I understand that. I've been a member of this committee a relatively short time. In that tenure, we've had two hearings, about 11 witnesses—two witnesses against the treaty, nine witnesses in support of it. In that context, I don't consider the hearings held in this committee to have been balanced enough. And I would request that we have at least one additional hearing to invite other witnesses, including additional opponents of the treaty.

Senator MENENDEZ. The Chair will bring your desires to Senator Biden's attention. And I'm sure you may do so, as well.

With that, the witnesses are excused. We appreciate your testimony.

Let me call up the second panel: Mr. Paul Kelly, the president of the Gulf of Mexico Foundation, who also previously served on the U.S. Commission on Ocean Policy; Joseph Cox, the president of the Chamber of Shipping of America; and Mr. Douglas Burnett, the partner at the law firm of Holland & Knight—he is also an international law advisor to the International Cable Protection Committee.

Thank you, gentlemen, for appearing before the committee for your testimony. In the interest of time, we ask that you keep your opening statement to 5 minutes, summarize your written testimony. And, of course, we will include your full written testimony for the record.

With that, let me recognize Mr. Kelly.

STATEMENT OF PAUL C. KELLY, PRESIDENT, GULF OF MEXICO FOUNDATION, HOUSTON, TX

Mr. KELLY. Thank you, Mr. Chairman. Thank you for giving me this opportunity to testify today to express the U.S. oil and natural-gas industry's support for U.S. accession to the Law of the Sea Convention.

Taken together, the six associations I am speaking on behalf of here today—the American Petroleum Institute, the International Association of Drilling Contractors, the National Ocean Industries Association, the American Exploration and Production Council, and the Independent Petroleum Association of America, as well as the United States Oil and Gas Association—represent the full spectrum of American companies involved in all phases of oil and nat-

ural-gas exploration and production in the oceans of the world, as well as the marine transportation of petroleum and petroleum products.

Although I am currently a consultant for Rowan Companies, which I retired from 2 years ago, I have worked in the oil and natural gas industry for 35 years, and I'm also president of the Gulf of Mexico Foundation, as well as former Commissioner on the U.S. Ocean—on the U.S. Commission on Ocean Policy. And, as you're probably aware, there is a follow-on organization to the U.S. Commission, named the Joint Ocean Commission Initiative, cochaired by ADM James D. Watkins and Leon Panetta. And they have asked me to submit, for the record, which I did yesterday, a letter signed by 101 distinguished Americans, including former Secretaries of State, Governors of the States, academic and legal authorities, former naval officers, and leaders in industry and the conservation communities.

The offshore oil and natural gas industry spends billions of dollars annually in the search for, and production of, oil and natural gas in the world's oceans. U.S. offshore production accounts for more than 27 percent of the country's oil production, and 15 percent of its natural gas production. Each year, offshore energy development contributes between $4 and $6 billion in revenues to the Federal treasury. Millions are also paid to states and local communities.

The Federal offshore produced approximately 500 barrels of oil and about 3 trillion feet of natural gas in 2006. In addition to activities in the areas under U.S. jurisdiction, such as Alaska and the Gulf of Mexico, our Nation has substantial interest in offshore oil and gas development activities globally, given our significant reliance on imported oil.

U.S. oil and natural gas production companies, as well as oilfield drilling, equipment, and service companies, are important players in the competition to locate and develop offshore natural gas and oil resources.

The pace of technological advancement, which drove the need to define the outer limits of the continental margin, has not abated. Advances in technology and increased efficiencies are taking us to greater and greater water depths and rekindling interest in areas that was once considered out of reach or uneconomic.

The Convention is important to our efforts to develop domestic offshore oil and natural gas resources. The Convention secures each coastal nation's exclusive rights to the living and nonliving resources of the 200-mile exclusive economic zone, the EEZ. In the case of the United States, this brings an additional 4.1 million square miles of ocean under U.S. jurisdiction. This is over 3 billion acres. The EEZ, as we know, is an area larger than the U.S. land area.

The Convention also broadens the definition of "continental shelf" in a way that favors the United States with its broad continental margins, particularly in the North Atlantic, the Gulf of Mexico, the Bering Sea, and the Arctic Ocean.

Offshore petroleum production is a major technological triumph. New technologies are allowing oil explorers to extend their search for new resources for oil and gas out to and beyond 200 miles for

the first time, thus creating a more pressing need for certainty and stability in the delineation of the extended Continental Shelf. In addition, those technologies also allow that the largest discoveries in a generation can be made in field sizes not even imagined before.

Before the LOS Convention, there were no clear, objective means of determining the outer limit of the shelf, leaving a good deal of uncertainty, and creating significant potential for jurisdictional conflicts between coastal states.

Under the Convention, the Continental Shelf extends seaward to the outer edge of the continental margin, or to the 200-nautical-mile limit of the EEZ, which is—whichever is greater, to a maximum of 350 nautical miles in certain situations.

The United States understands that such features as the Chukchi Plateau, and component elevations situated in the north of Alaska, could be claimed by the United States under the provisions stated in the treaty, which, in turn, would substantially extend U.S. jurisdiction well beyond 350 miles.

U.S. companies are interested in setting international precedents by being the first to operate in areas beyond 200 miles, and to continue demonstrating environmentally sound drilling, development, and production technologies.

It is in the best interests of the United States to follow the Convention's procedure for establishing the outer limits of our continental margin beyond 200 miles, where appropriate. In so doing, the United States could expand its areas for mineral exploration and development by more than 291,383 square miles. We need to get on with the mapping work and other analyses and measurements required to substantiate the extent of our shelf.

Some of the best technology for accomplishing this resides in the United States. Establishing the continental margin beyond 200 miles is particularly important in the Arctic, where there a number of countries vying to expand their offshore jurisdictional claims. In fact, Russia and Norway, as we've discussed earlier today, have made submissions with respect to the outer limit of their Continental Shelf in the Arctic. Also, many states that were parties to the Convention in 1999 are finally waking up to a 2009 deadline for filing offshore jurisdictional expansion claim submissions on a massive amount of maritime territory, as provided under the 1982 Convention.

Senator MENENDEZ. Mr. Kelly——

Mr. KELLY. Only eight claims——

Senator MENENDEZ [continuing]. If you could sum up for us, I'd appreciate it.

Mr. KELLY. Yes.

Senator MENENDEZ. If you could sum up for us, I'd appreciate it.

Mr. KELLY. I'm sorry?

Senator MENENDEZ. If you could sum up for us, I'd appreciate it.

Mr. KELLY. OK.

If—so, these countries are finally waking up to a 2009 deadline for filing offshore expansion claim submissions, and only eight claims have been made, to date, although about 50 coastal states are bound by the 2009 deadline. So, the Continental Shelf Commis-

sion is going to be very busy, in the next 20 months, taking on new submissions.

And I just—to sum up, I just want to say that, by some estimates, in the years ahead we could see a historic dividing up of many millions of square kilometers of offshore territory with management rights that accrue. An advisor to some of the coastal states developing their own submissions said, recently, "This will probably be the last big shift in ownership of territory in the history of the earth. Many countries do not realize how serious this is."

So, our question is, How much longer can we be a laggard in joining this process? Asked recently about the competitive aspect of claims on the Arctic, Liv Monica Stubholt, Norway's Deputy Minister for Foreign Affairs, said that, rather than pointing the fears—the fingers at Russia, Norway would prefer to see the U.S. Senate ratify the Convention, which would give the United States a seat on the Commission and a stake in a nonbelligerent resolution of competing claims.

So, that's—for all these reasons, members of the committee, our industry supports your giving advice and consent to the treaty.

Thank you.

[The prepared statement of Mr. Kelly follows:]

PREPARED STATEMENT OF PAUL L. KELLY, CONSULTANT, ROWAN COMPANIES, INC.; PRESIDENT, GULF OF MEXICO FOUNDATION, HOUSTON, TX

Mr. Chairman and members of the committee, thank you for inviting me before you today to express the U.S. oil and natural gas industry's support for United States accession to the Law of the Sea (LOS) Convention.

INTRODUCTION AND BACKGROUND

Taken together, the six associations I am speaking on behalf of here today, the American Petroleum Institute (API), the International Association of Drilling Contractors (IADC), the National Ocean Industries Association (NOIA), the American Exploration and Production Council (AXPC), the Independent Petroleum Association of America (IPAA) and the United States Oil and Gas Association (USOGA), represent the full spectrum of American companies involved in all phases of oil and natural gas exploration and production in the oceans of the world, as well as the marine transportation of petroleum and petroleum products. Although I am currently a consultant for Rowan Companies, I worked in the oil and natural gas industry for 35 years. I am also the president of the Gulf of Mexico Foundation as well as a former Commissioner on the U.S. Commission on Ocean Policy.

The offshore oil and natural gas industry spends billions of dollars annually in the search for and production of oil and natural gas in the world's oceans. U.S. offshore production accounts for more than 27 percent of the country's oil production, and 15 percent of its natural gas production. Each year, offshore energy development contributes between $4 and $6 billion in revenues to the Federal Treasury. Millions are also paid to States and local communities. The Federal offshore produced approximately 500 million barrels of oil and about 3 trillion cubic feet of natural gas in 2006. In addition to activities in areas under U.S. jurisdiction such as Alaska and the Gulf of Mexico, our Nation has substantial interests in offshore oil and natural gas development activities globally, given our significant reliance upon imported oil. U.S. oil and natural gas production companies, as well as oilfield drilling, equipment and service companies, are important players in the competition to locate and develop offshore natural gas and oil resources. The pace of technological advancement, which drove the need to define the outer limits of the continental margin, has not abated. Advances in technology and increased efficiencies are taking us to greater and greater water depths and rekindling interest in areas that once were considered out of reach or uneconomic.

Recognizing the importance of the LOS Convention to the energy sector, the National Petroleum Council, an advisory body to the U.S. Secretary of Energy, in 1973 published an assessment of industry needs in an effort to influence the negotiations.

Entitled "Law of the Sea: Particular Aspects Affecting the Petroleum Industry," it contained conclusions and recommendations in five key areas including freedom of navigation, stable investment conditions, protection of the marine environment, accommodation of multiple uses, and dispute settlement. The views reflected in this study had a substantial impact on the negotiations, and most of its recommendations found their way into the Convention in one form or another. Having been satisfied with the terms of the Convention, the U.S. oil and natural gas industry's major trade associations, including those I am representing today, have for many years supported ratification of the Convention by the U.S. Senate. Also, the Outer Continental Shelf Policy Committee, an advisory body to the U.S. Secretary of the Interior on matters relating to our offshore oil and natural gas leasing program, has adopted resolutions supporting the United States acceding to the Convention.

OFFSHORE OIL AND NATURAL GAS RESOURCES

The Convention is important to our efforts to develop domestic offshore oil and natural gas resources. The Convention secures each coastal nation's exclusive rights to the living and nonliving resources of the 200-mile exclusive economic zone (EEZ). In the case of the United States, this brings an additional 4.1 million square miles of ocean under U.S. jurisdiction. This is over 3 billion acres. This EEZ is an area larger than the U.S. land area. The Convention also broadens the definition of the Continental Shelf in a way that favors the United States with its broad continental margins, particularly in the North Atlantic, Gulf of Mexico, the Bering Sea, and the Arctic Ocean.

EXPLORATION MOVING FARTHER FROM SHORE INTO DEEPER WATERS

Offshore petroleum production is a major technological triumph. We now have world record complex development projects located in 8,000 feet of water depth in the Gulf of Mexico (In June 2007, gas production started on Independence Hub, a semisubmersible platform located in 8,000 feet of water and operated by Anadarko) which were thought unimaginable a generation ago. Even more eye-opening, a number of exploration wells have been drilled in the past 3 years in over 8,000 feet of water and a world record well has been drilled in over 10,000 feet of water. New technologies are allowing oil explorers to extend their search for new resources of oil and gas out to and beyond 200 miles for the first time, thus creating a more pressing need for certainty and stability in delineation of the extended shelf boundary. In addition, those technologies also allow that the largest discoveries in a generation can be made in field sizes not even imagined before.

Before the LOS Convention there were no clear, objective means of determining the outer limit of the shelf, leaving a good deal of uncertainty and creating significant potential for jurisdictional conflicts between coastal states. Under the Convention, the Continental Shelf extends seaward to the outer edge of the continental margin or to the 200 nautical mile limit of the EEZ, whichever is greater, to maximum of 350 nautical miles in certain situations, The United States understands that such features as the Chukchi Plateau and component elevations, situated to the north of Alaska, could be claimed by the United States under the provisions stated in the law of the Sea Treaty which in turn could substantially extend U.S. jurisdiction well beyond 350 nautical miles. U.S. companies are interested in setting international precedents by being the first to operate in areas beyond 200 miles and to continue demonstrating environmentally sound drilling development and production technologies.

IMPORTANCE OF DELINEATING THE EXTENDED CONTINENTAL SHELF

The Convention established the Limits on Continental Shelf Commission ("the Continental Shelf Commission"), a body of experts through which nations may establish universally binding outer limits for their Continental Shelves under article 76. The objective criteria for delineating the outer limit of the Continental Shelf, plus the presence of the Continental Shelf Commission, should substantially reduce potential conflicts offsetting states and provide a means to ensure the security of tenure crucial to those investing in capital-intensive deepwater oil and natural gas development projects.

It is in the best interest of the United States to follow the convention's procedure for establishing the outer limits of our continental margin beyond 200 miles where appropriate—in so doing the United States could expand its areas for mineral exploration and development by more than 291,383 square miles. We need to get on with the mapping work and other analyses and measurements required to substantiate the extent of our shelf. Some of the best technology for accomplishing this resides in the United States. Establishing the continental margin beyond 200 miles is par-

ticularly important in the Arctic, where there are a number of countries vying to expand their offshore jurisdictional claims. In fact, Russia and Norway have made submissions with respect to the outer limit of their Continental Shelf in the Arctic. Also, many states that were parties to the convention in 1999 are finally waking up to a 2009 deadline for filing offshore jurisdictional expansion claim submissions on a massive amount of maritime territory as provided under the 1982 Convention. Only eight claims have been made to date, although about 50 coastal states are bound by a May 13, 2009, deadline for submissions 10 years from their date of acceding to the Convention. Russia was first to make a submission in 2001. Since then, Brazil, Australia, Ireland, New Zealand, France, Spain, the United Kingdom, and Norway have filed claims in whole or in part.

ARCTIC

The world was startled this summer when the Russian Federation symbolically planted a Russian flag on the seabed beneath the ice of the North Pole emphasizing its claim of the region to be an extension of the Russian Continental Shelf in waters 4,261 meters deep. Soon thereafter, Canadian Prime Minister Harper made headlines when he toured Canada's Arctic region, emphasizing that Canada's claims include sovereignty over the Northwest Passage.

In the Arctic, a key dispute is whether the Lornonosov Ridge, a vast underwater mountain range stretching across the North Pole is an estension of Russia's Continental Shelf, or part of Greenland, which belongs to Denmark, or neither one or both.

Such political moves should not have come as a surprise. One reason is no secret. The U.S. Geological Survey estimates that about one quarter of the world's undiscovered oil and natural gas lies beneath Arctic waters; and modern technology now makes it possible to harvest some of these resources: Securing access to these resources would not only help the United States meet its own growing energy needs, but could eventually contribute significant royalty payments to the Federal Treasury.

HISTORIC SIGNIFICANCE

The Continental Shelf Commission is expected to have a very heavy workload reviewing coastal state submissions over the next 20 months. By some estimates, in the years ahead we could see a historic dividing up of many millions of square kilometers of offshore territory with management rights to all its living and nonliving marine resources on or under the seabed. An advisor to developing states preparing their own submissions said recently, "This will probably be the last big shift in ownership of territory in the history of the Earth. Many countries don't realize how serious it is."

How much longer can the United States afford to be a laggard in joining this process? An American geoscientist would make a welcome addition to the Commission on the Limits of the Continental Shelf and would have much to contribute. Asked recently about the competitive aspect of claims on Arctic territory, Liv Monica Stubholt, Norway's Deputy Minister for Foreign Affairs, said that rather than point fingers at Russia, "Norway would prefer to see the U.S. Senate ratify the 13-year-old U.N. Convention on the Law of the Sea, which would give the United States a seat on the Commission and a stake in a nonbelligerent resolution of competing claims."

MARINE TRANSPORTATION OF PETROLEUM

Oil is traded in a global market with U.S. companies as leading participants. The LOS Convention's protection of navigational rights and freedoms advances the interests of energy security in the United States, particularly in view of the dangerous world conditions we have faced since the tragic events of September 11, 2001. About 44 percent of U.S. maritime commerce consists of petroleum and petroleum products. Trading routes are secured by provisions in the Convention combining customary rules of international law, such as the right of innocent passage through territorial seas, with new rights of passage through straits and archipelagoes. U.S. accession to the Convention would put us in a much better position to invoke such rules and rights.

U.S. OIL IMPORTS AT ALL-TIME HIGH

The outlook for United States energy supply in the first 30 years of the new millennium truly brings home the importance of securing the sea routes through which imported oil and natural gas is transported.

According to API's Petroleum Facts at a Glance for September 2007, total imports of domestic petroleum were 66 percent or 13,759,000 barrels per day. This is an extraordinary volume of petroleum liquids being transported to our shores in ships every day.

The Department of Energy's Energy Information Administration (EIA), in its 2007 Annual Energy Outlook, projects that by 2030, net imports of crude oil on the basis of bands per day, are expected to account for 71 percent of crude supply up from 66 percent in 2005. Looking at the September numbers from API makes one wonder whether 2030 is fast approaching.

GROWING NATURAL GAS IMPORT

EIA's 2007 Outlook also states that, despite the projected increase in domestic natural gas production, over the next 25 years an increasing share of U.S. gas demand will also be met by imports. A substantial portion of these imports will come in the form of liquefied natural gas (LNG). All four existing LNG import facilities in the United States are now open, and three of the four have announced capacity expansion plans. Meanwhile, several additional U.S. LNG terminals are under study by potential investors, and orders for sophisticated new LNG ships are being placed. This means even more ships following transit lanes from the Middle East, West Africa, Latin America, Indonesia, Australia, and possibly Russia, to name the prominent regions seeking to participate in the U.S. natural gas market.

RISING WORLD OIL DEMAND

According to the EIA, world petroleum consumption in 2004 was 82.3 million barrels per day. Up to 1985 oil demand in North America was twice as large as Asia. As developing countries improve their economic conditions and transportation infrastructure we could soon see Asian oil demand surpass North American demand. By 2030 world demand is expected to reach nearly 118 million barrels per day. Steady growth in the demand for petroleum throughout the world means increases in crude oil and product shipments in all directions throughout the globe. The Convention can provide protection of navigational rights and freedoms in all these areas through which tankers will be transporting larger volumes of oil and natural gas.

CONCLUSION

Following my work on the U.S. Commission on Ocean Policy, I am currently serving on the Joint Ocean Commission Initiative, which is a collaboration of the U.S. Commission on Ocean Policy, chaired by ADM James Watkins (Ret.) and the independent Pew Oceans Commission, which was chaired by the Honorable Leon Panetta. Both Commissions strongly endorsed U.S. accession to the Convention on Law of the Sea, and this remains one of the highest priorities of the Joint Initiative. Recently, the Joint Initiative reiterated its support for accession to the treaty in a letter to the Senate Majority and Minority leaders and chairman and ranking member of this committee, signed by 101 prominent U.S. leaders. I would like to reinforce this call for action by submitting, on behalf of the Joint Initiative with the approval of the committee, a copy of this letter, accompanied by a supporting statement for the record, reiterating the importance of U.S. accession to the Convention.

In conclusion, from an energy perspective we see potential future pressures building in terms of both marine boundary and Continental Shelf delineations and in marine transportation. We believe the LOS Convention offers the United States the chance to exercise needed leadership in addressing these pressures and protecting the many vital U.S. ocean interests. 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, and negatively affect any opportunity to lay claim to vitally needed natural resources. At present there is no U.S. participation, even as an observer, in the Continental Shelf Commission—the body that decides claims of extended Continental Shelf areas beyond 200 miles—during its important development phase. The United States lost an opportunity to elect a U.S. Commissioner in June 2007, and we will not have another opportunity to elect a Commissioner until 2012. By failing to ratify the treaty, the United States is now watching from the outside as the guidelines and protocols for conduct on the World's oceans are developed and as certain provisions of the Convention are implemented.

It is for all these reasons that the U.S. oil and natural gas industry supports Senate approval of the Convention at the earliest possible time.

Senator MENENDEZ. Thank you.

Mr. Cox.

STATEMENT OF JOSEPH J. COX, PRESIDENT, CHAMBER OF SHIPPING OF AMERICA, WASHINGTON, DC

Mr. COX. Thank you, Mr. Chairman.

Senator MENENDEZ. You want to put your microphone on, please.

Mr. COX. Thank you, Mr. Chairman, Senator Lugar, Senator Murkowski, Senator Vitter. I must say, from my training at the U.S. Merchant Marine Academy, I'm rather intimidated by these numbers flipping in front of me down to the zero marks. I'll try to stay within it.

I appreciate being able to submit my testimony for the record. I'll summarize a few things.

The Chamber of Shipping of America is representative of the American maritime commercial industry. I'm extremely pleased to be the president for the past 10 years, and I'm pleased to be here representing the American community.

CSA started as an organization in 1914, so we've been around a little bit in this business. Having been around, we should note that there have been major changes in the commercial maritime industry—how it's composed, how our ships are operated—where our ships are built, where our ships are flagged, who's crewing those ships, who is classing those ships. It's much different today. It's a much more complex world.

With respect to the Freedom of Navigation and Innocent Passage, I think Admiral Clark was who made some very cogent points about the Navy's abilities to operate around the world, to go through straits, et cetera. I'm not going to repeat those. I'm only going to say that the commercial maritime industry is also a beneficiary of those exact same rights, and we rely on those rights to be able to conduct our business. And our business is that of carrying goods on behalf of shippers, and their customers are the people around the world who buy and trade products. So, certainly, to the extent that our trade has increased and developed to the point it is, much of it can be based on the fact that we exercise our maritime rights.

However, the commercial maritime industry does not have sovereign immunity. We have to operate under a given set of rules around the world. And, Mr. Chairman and Senators, we appreciate the opportunity to look at a written set of rules that we can point to, that we can have input into what they say, and that we can have input into how others interpret them, rather than an unwritten set of rules which can shift with vagaries of those who are proposing an interpretation.

In our comments, we referred to an issue that had come up, where we were able to point to the Law of the Sea Convention to say to the major Western European nations, "You are wrong. Your idea is incorrect. It's in violation of the Law of the Sea Treaty." We did so, because that idea, Mr. Chairman and Senators, was an environmentally based one which would have placed controls on commercial shipping which were untenable and illegal. We certainly appreciated the opportunity to do that. We would like to have the United States in a position where it could make the most vociferous arguments on our behalf that we are capable of making.

The next area, Mr. Chairman and Senators, is the one of security. I know you've heard testimony relative to the movement of oil

in the world, and the importance of that movement. I refer back to my comments relative to the movement of ships, and the freedom of those movements.

Certainly, the import of oil into the United States is critical. It's based on the fact that we do have those rights of passage. I would only point out that all other maritime commercial ships have the exact same rights, and all of our imported goods, all of our exported goods, go through those very same straits. So, it's not only just oil that we are security conscious about, it's all of our trade. And, in fact, our way of life depends on that trade.

In closing, Mr. Chairman, I'll point out that the United States, while I'm the first one to tell you that I would wish that our flag could be one of the largest in the world, that's not the situation today. If there were things we could do and suggest to you for a change to make that happen, I'd certainly appreciate coming before the appropriate committees of Congress. However, we're not the largest flag in the world, but we are the sixth largest ship-owning nation in the world, which is reflective of how the maritime industry operates today throughout the world.

American seafarers are the best-trained in the world, and they have taken steps, through both their unions and through other individual circumstances, to go to the world and say, "We are now able to sail on your ships." And, I think, in the very near future, we will see Americans who are going to be sailing on foreign-flagged ships.

Thank you, Mr. Chairman. I certainly look forward to any questions. And I just want to close by saying that the Chamber of Shipping of America, as representative of the American commercial maritime industry, are in strong support of accession to the Law of the Sea Treaty.

Thank you.

[The prepared statement of Mr. Cox follows:]

PREPARED STATEMENT OF JOSEPH J. COX, PRESIDENT AND CEO, CHAMBER OF SHIPPING OF AMERICA, WASHINGTON, DC

Thank you, Mr. Chairman and committee members. The Chamber of Shipping of America is very pleased to testify before your committee today concerning U.S. accession to the Law of the Sea Convention. The Chamber of Shipping of America has long supported accession to this very important treaty and have testified a number of times, the latest being before this committee on October 21, 2003. We are very pleased to testify today that the Chamber of Shipping of America (CSA) should be continued to be listed in the strong support column.

CHAMBER OF SHIPPING OF AMERICA

The Chamber of Shipping of America represents 30 American companies that own, operate, or charter ocean-going vessels or are in closely allied businesses. Our members operate both U.S.- and foreign-flag ships in the domestic and international trades of the United States. Our members operate/own container ships, crude tankers, product tankers, LNG carriers, bulk ships, integrated tug/barge units, roll-on/roll-off vessels and breakbulk ships. At any given time, CSA members have hundreds of ships and vessels operating in the U.S. trades. CSA traces its founding to 1914 when we were known as the National Federation of American Shipowners. At that time, the British Government invited a group of nations to develop a treaty regarding safety at sea. The American shipowners were involved in that first maritime treaty. It was prompted by a legendary incident—the sinking of the steamship *Titanic* which was American owned and British flagged. While that treaty did not come to fruition due to the start of World War I, it plotted the course for future maritime treaties. Today, the safety, security, and protection of the environment are all subjects of maritime treaties.

INTEREST IN THE LAW OF THE SEA TREATY

Mr. Chairman, Senators, today we consider the Law of the Sea Convention. It has been referred to by many 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. The United States has been and continues to be a critical part of that interest in the maritime world. From 1914 through today, we do not know of any maritime treaties including those concerning safety, environmental protection, liability, labor conditions and security, developed in any fora that did not have the active involvement of the United States. Indeed, many of the conventions, particularly those addressing security and environmental concerns, were undertaken at the urging of and subsequent leadership by the United States. CSA has attended hundreds of international meetings over the years where these conventions were debated and we are pleased to note the positive contributions of our great nation to the development of these treaties including the Law of the Sea Convention.

CHANGES IN THE MARITIME INDUSTRY

The Law of the Sea Convention establishes a legal framework that has direct impact on the American shipowning community and all Americans. In 1914, the maritime world was a comparatively simple one; ships flying a particular flag were manned by nationals from that nation, were insured there and classed by the national class society. They were most likely built there and had equipment manufactured there. The traditional law of the sea was also simple to apply. Today, the situation is more complex. Ships owned by one company can fly the flags of several different nations, employ crew from various nations with mixed crews being more prevalent than single-national ships, be classed by any one of a number of societies, be insured in any number of venues and have a multiple of other international mixes involving equipment and building. This situation has evolved in response to the needs of the industry to increase efficiency. As we have increased our efficiency, we have provided lower cost service to our customers. Our customers are the shippers of the world and their customers are the consumers. Over 95 percent of the goods shipped into and out of the United States go by sea. On average, 400 ships a day, from literally all flag nations of the world, arrive in U.S. ports. The people of the United States have benefited from the actions of the maritime industry and we in the industry have benefited from a uniform legal framework. One consistent comment we make to the Congress, and the various legislative bodies around the world is that we need to have a uniform set of rules to follow. If each nation develops their own rules or interprets existing regulations in a manner substantially different from others, chaos exists for the maritime community. The United States has consistently responded to creative interpretations and has taken the lead in developing rules that meet U.S. needs and the needs of other nations. The world looks to our leadership in these matters and we have responded vigorously and positively to that expectation. The credibility of the United States in international fora where these agreements are made depends on it.

FREEDOM OF NAVIGATION AND INNOCENT PASSAGE

The United States should continue to be a major player in ensuring the rights embodied in the treaty and should be seen as a leading voice in developments affecting maritime shipping including freedom of navigation and innocent passage. We understand that the origination of the process leading to the treaty was occasioned by states exercising sovereignty or sovereign rights in waters where the legal basis was questionable. We in the maritime industry are concerned with freedom of navigation. A few years ago, Western European nations developed the idea that they should establish a controlled area covering the 200-mile zone off their coasts. We accept that their motivation was to protect their coasts from environmental damage and we understand the need to respond to public demand for environmental protection, but we objected to creation of new rights of coastal states. The idea was that by establishing the controlled area, a nation could forbid certain types of ships from transiting. The United States and other countries objected to the controls proposed for the area as inconsistent with the Law of the Sea Convention, because they would have unilaterally imposed construction requirements on transiting ships.

Rather than continue with the flawed rationale, the nations in question accepted creation of a Particularly Sensitive Sea Area which is a concept contained in the International Maritime Pollution Prevention Convention to which the United States is party. The Western European PSSA currently exists although there are no control measures except for a reporting requirement associated with its creation. This is

viewed by some as a toothless tiger although our industry is concerned that tigers can grow teeth. Is it fantasy to believe that the next marine casualty will reinstitute a process of unilateral control? Mr. Chairman, Senators, we feel very strongly that a written set of rules controlling our industry—rules contained in a treaty that we are party to—is preferable to an unwritten set of requirements that can shift over time.

In further support of our contention that the concerns by the world's public with the maritime industry have shifted, we have seen general agreement by the public with steps taken by their governments to remove or exclude ships from their exclusive economic zones under extremely dangerous conditions. Our Government would be in a much stronger position to protest such actions if the United States were a party to the Law of the Sea Convention.

SECURITY

Mr. Chairman and Senators, you have heard testimony about the vital movement of oil into our Nation. There is an additional concern as we shift to LNG from other sources of energy as we will have to import increasing amounts of LNG as well as other energy products into our country. Yes, virtually all ships carrying our energy supply transit areas that are protected by the Law of the Sea provisions. While energy supply is of obvious critical importance, we note that other types of ships, container ships, bulk ships and others also enjoy the same freedom of navigation afforded the energy carriers. Our way of life depends on the freedom of the seas and the rights of innocent passage.

Mr. Chairman and members of the committee, freedom of the seas and rights of innocent passage are not theoretical concepts. These are critical aspects of the Law of the Sea Convention and ones that we rely on for the effective operation of our industry. We are very concerned with protection of those rights. Both U.S.-flag ships and ships owned or operated by American companies are impacted by international events. We rely on our Nation to be actively involved. The United States should place itself in the most effective position to be a force for adherence to treaty obligations by all. We can do this by acceding to the treaty.

My members operate in the international maritime world. We benefit from a consistent application of the rules that we have to follow. There are certainly fewer ships flying our flag than in years past although that does not mean we are less involved as a nation. The latest figures we have seen place the United States as the sixth largest shipowning nation in the world. In recent months, we have seen actions by companies that will lead to more American seafarers serving on ships that fly the flags of other nations. Clearly we have a lot at stake.

LETTER FROM MR. COX SUPPLYING ADDITIONAL TESTIMONY IN REPLY TO QUESTIONS POSED TO HIM DURING THIS HEARING

CHAMBER OF SHIPPING OF AMERICA,
Washington, DC, October 9, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Senate Foreign Relations Committee, U.S. Senate,
Russell Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: Last week, it was my pleasure as President of the Chamber of Shipping of America (CSA) to testify before your committee in support of United States accession to the Law of the Sea Convention. During testimony, I was surprised to hear comments about the potential impact of environmental requirements. I requested an opportunity to provide the committee with further written comments concerning environmental impacts noting that the maritime industry is well regulated regarding prevention of pollution.

Here are some examples of environmental protection legislation that is currently applicable to the maritime industry:

- Act to Prevent Pollution from Ships
- Oil Pollution Act of 1990
- International Convention on Prevention of Pollution
- National Invasive Species Act
- Clean Air Act
- Clean Water Act (CWA)

The last law is currently the subject of litigation. When the Clean Water Act (CWA) was passed in 1973, there was little control in domestic law and regulation or international conventions that regulated the maritime community. At the time, in crafting the initial regulations, the Environmental Protection Agency (EPA) chose

to exempt the ships and vessels from coverage under CWA with the expectation that international requirements were being set by the International Maritime Organization. In fact, that has taken place and continues to evolve. EPA was sued two years ago for allowing that exemption. CSA supports the EPA in contending that they have acted correctly under the CWA. CSA makes the point here that we recognize that we are subject to the CWA and we were properly exempted from coverage with the expectation that we would be covered by international conventions. We contend that the international requirements now being enforced by EPA and the U.S. Coast Guard provide adequate protection of our marine environment from pollution from ships and vessels.

CSA is very active in discussions about further protections of the marine environment and are dedicated to finding solutions to environmental problems. If we are part of the problem, we must be part of the solution.

Thank you again for allowing us to testify on behalf of accession to the Law of the Sea Convention.

Sincerely,

JOSEPH J. COX,
President.

Senator MENENDEZ. Thank you, Mr. Cox.

Mr. Burnett.

STATEMENT OF DOUGLAS R. BURNETT, PARTNER, HOLLAND & KNIGHT, LLP, NEW YORK, NY

Mr. BURNETT. Mr. Chairman, Senator Lugar, members of the committee, thank you for the invitation to testify on the 1982 Law of the Sea Convention.

Submarine cables are critical infrastructure of our country. They carry over 90 percent of the United States international voice, data, video, and Internet communications. Think about it—"just-in-time logistics," international bank and finance, shipping, airlines, research, export, import—virtually the foundation of United States commanding stake and leadership in the global economy and political system rides on submarine cables.

About 30 cables, each about the diameter of a garden hose, connect the United States to the rest of the world. They land in Rhode Island, Massachusetts, New York, New Jersey, Florida, California, Oregon, Washington, Hawaii, and Alaska. Since the American entrepreneur Cyrus Field laid the first transatlantic cable in 1866, U.S. companies have been leaders in international communication. Their modern counterparts are seen in the membership of the North American Submarine Cable Association, whose views I represent today. But their participation and their leadership in this highly competitive business is held back by the fact that the United States is not a party to the Convention. Here's why:

The 1982 Convention is a quantum improvement over earlier treaties in the critical freedoms to lay and maintain modern cables. It expressly provides these freedoms include the operations associated with them, such as marine route surveys, burial, and repair within the Exclusive Economic Zone and upon the Continental Shelf. The legal certainty of having these rights and obligations expressly provided by treaty is exactly what U.S. telecommunication companies need to achieve their business goals using the oceans.

This is no accident. U.S. telecommunication companies worked closely with U.S. diplomats to achieve this highly advantageous result. The industry is under no illusion that it will ever get a better deal than it has in the 1982 Convention. Foreign nations and other seabed users would never allow the present rights to keep the pri-

ority status of cables under any future theoretical convention which some opponents now offer as a solution.

U.S. companies are very concerned that the hard-won rights and benefits conferred by the Convention will be eroded, or even lost, if the United States does not become a party. Every day, the industry sees greater threats and actions by coastal nations which encroach upon the critical freedoms to lay, maintain, and repair cables outside of territorial seas. In contrast to the express plain language in 10 Articles of the Convention, customary international law is hard to find, and harder to apply. Customer international is unpredictable, shifting, and not suited to the practical needs of business.

The billions of dollars required by private companies to maintain and expand their submarine cable networks requires the legal certainty the Convention provides to submarine cables. U.S. companies will invest and lead with greater confidence with the knowledge that their own government can, if it chooses, take full advantage of all of the protections and rights for cables in the convention.

A recent example highlights the disadvantage U.S. companies face when the United States is not a party to the Convention. Earlier this year, depredations were carried out by pirates from commercial vessels from Vietnam against two cable systems co-owned by U.S. companies. Of the 11 countries impacted, only the United States is not a party to the Convention. Three U.S. companies who suffered losses—AT&T, Verizon, and Sprint—are left out from the solutions expressly provided for in the Convention.

After a quarter of a century of observed state practice with the Convention, any delay for more study and unrealistic and hypothetical discussions must end. U.S. telecommunication companies request with urgency that the U.S. Senate act to all an up-or-down vote this year on the Convention upon which global communications so heavily rely.

Thank you.

[The prepared statement of Mr. Burnett follows:]

PREPARED STATEMENT OF DOUGLAS R. BURNETT [1], PARTNER, HOLLAND & KNIGHT, LLP, NEW YORK, NY

Mr. Chairman and members of the committee, it is an honor to appear before you today to testify on the United Nations Convention on the Law of the Sea and the 1994 Implementation Agreement Regarding Part XI of the Convention.

My views are based on my 26 years as an admiralty attorney working with U.S. telecommunications and shipping companies with respect to submarine cables and marine operations around the world. I am confident that these views are consistent with those in the telecom industry who work with submarine cables on a daily basis. In particular, I have been authorized and requested to present this testimony on behalf of the North American Submarine Cable Association, or "NASCA." NASCA is a nonprofit association of submarine cable owners, submarine cable maintenance authorities, and prime contractors for submarine cable systems.[2] NASCA and its members have a strong interest in being able to maintain and protect their cables that link the United States to the rest of the world.

These reliable and secure cables absorb the exponentially increasing international communication growth relentlessly fueled by the Internet. There are about 30 international cables landing in this country in 10 coastal states.[3] Two new Pacific Ocean systems, each costing about half a billion dollars, are planned to enter service in 2008 to better connect the United States to Asia.[4]

Over 70 percent of our country's international telecom traffic, which includes voice, data, and video, is carried on these cables, each of which is only about the diameter of a garden hose. Not counting Canada and Mexico, over 90 percent of the country's international voice, video, Internet, and data communications are carried

on these cables. The disproportionate importance of these cables to the Nation's communication infrastructure can be seen by the fact that if all of these cables were suddenly cut, only 7 percent of the United States traffic could be restored using every single satellite in the sky. Modern fiber optic cables are the lifeblood of the world's economy, carrying almost 100 percent of global Internet communication. This underscores the revolutionary capacity[5] of modern fiber optic submarine cables. By any standard, they constitute critical infrastructure to the United States, and indeed the world.

This critical infrastructure, by its very nature, depends upon international cooperation and law. The promise of continued advances in international communications hinges on international legal standards providing a compass whereby nations and private companies may steer a course that efficiently allows international communications networks to be seamlessly planned, built, maintained, and operated.

The 1982 Convention provides this modern legal compass. In 10 specific articles,[6] the Convention provides a comprehensive international legal regime for submarine cables and pipelines in territorial seas, archipelagic waters, the Exclusive Economic Zones ("EEZ"), upon the continental shelves, and on the high seas.

Critics of the 1982 Convention argue that existing customary international law should suffice. For cables this is simply not the case for several reasons. Foremost among these reasons is that the Convention explicitly goes beyond preexisting international law in crucial areas of submarine cable installation, maintenance, and operations and provides binding dispute resolution to ensure proper enforcement of these new obligations, but only for countries that are parties to the Convention.

At present for the United States, the operative international treaties for international cables are the 1884 International Conventions for Protection of Submarine Cables and the 1958 Geneva Convention on the High Seas, which largely incorporates the earlier treaty in general terms. While these treaties deal with the laying and repair of cables on the high seas, they do not provide for the freedom of cable owners to exercise in the new zone of the EEZ and upon the Continental Shelf the full range of uses and operations desirable and required to build and maintain modern fiber optic systems.

This express language in the 1982 Convention reflects the effort of dedicated visionaries in the telecommunication industry who urged Ambassador Richardson and the U.S. Delegation negotiating the Convention to include language that would (1) include within the freedom to lay and repair cables the operational requirements for modern fiber optic systems, including marine route surveys,[7] burial,[8] and maintenance, and (2) at the same time prevent coastal nations in their EEZ or upon their Continental Shelf from restricting these vital activities.[9]

Directly stated, U.S. telecom companies are hurt and their leadership in this vital sector is diminished without the Convention. The Convention is the key to the global international telecommunication policy and legal system; it unlocks the door for the fullest participation and makes leadership possible by U.S. telecom companies; it protects existing investments and fosters additional investments.

But if the United States is not a party these valuable, carefully negotiated rights can be diluted or even removed through amendments or encroachment by nations that wish to expand their jurisdiction over cables in the EEZ and upon the Continental Shelf. Having the United States a party allows it to fully protect the existing rights from nations seeking to restrict these vital freedoms of the sea.

The U.S. telecom industry is deeply concerned about the attempts emerging by nations attempting to create new protectionist trends in customary international law. Having the United States as a party is the optimum protection against changes to the 1982 Convention, whether by future amendment attempts or by novel new arguments based on the unpredictable shifting sands of customary international law.

The urgency with which U.S. telecommunication companies need the Convention's specific protections for cables' increases with each passing year. The Russian Federation since 1995 is claiming the right to delineate cable routes on its Continental Shelf in the Arctic. These actions are violations of the Convention which does not allow a coastal nation to delineate or require permits for the routes of international cables or cable repairs outside territorial seas within the EEZ or upon the Continental Shelf. Without the United States being a party, U.S. telecommunication companies are on weaker grounds to question these actions, because the United States itself is held back from being able to enforce the Convention's freedoms to lay, maintain, and repair cables in the EEZ and upon the Continental Shelf.

Under the 1884 treaty, nations are required to provide criminal and civil sanctions for negligent or intentional actions by third parties which damage a cable. But under the 1884 treaty, the cable owner must wait until the damage is done before these sanctions are triggered. In welcome contrast, under the 1982 Convention,

third party conduct which is likely to result in damage is sanctioned in addition to actual damage cases. So the cable owner has a remedy to prevent the injury to critical infrastructure in the first place.[14] When one considers the average $1M-plus cost repair a single cable and the disruption a cable break can cause to essential economic and strategic interests, it is easy to see why U.S. telecommunications companies need the United States to accede to the Convention.

Another more recent event underscores how U.S. telecommunication companies suffer because the United States is not a party. On March 27, 2007, two active international cable systems were heavily damaged on the high seas and taken out of service for about 3 months as a result of piratical depredations for private ends by commercial vessels from Vietnam; they stole a total of over 106 miles of cable, including optical amplifiers from these active systems.[11] Repair costs are estimated in excess of $7.2M with the national economic costs of the disruptions still being ascertained. The cable systems are owned by consortiums, common in the industry,[12] and the ownership and landing points involve 11 countries. United States co-owners who sustained losses and had their networks disrupted were AT&T, Verizon, and Sprint. With the exception of the United States, all of the nations impacted have tangible preventative and compensatory options as well as obligations to protect their nationals under the 1982 Convention.

The Convention expressly proscribes depredations against property on the high seas and the EEZs and classifies them as piracy with recourse to all of the Convention's robust remedies to put pirates out of action.[13] Expressly classifying depredations against property such as cables is an example of how the Convention protects cables from new emerging threats.

With the security which arises from the knowledge that their own government is a party, United States telecom companies will make more confident business investments when protected by reliable and discernable international law. The Convention instills credence that their government can defend against future amendments and customary law encroachments.

Besides telecommunication cables, power cables are protected under the Convention. The Juan de Fuca cable, an international electrical cable that will bring power from Canada to Washington State in 2007, is an example of this international submarine cable use,[14] and there are plans for a power cable from Canada to Boston and New York.[15]

The scientific Neptune cable system, funded by the National Science Foundation, is another example of a cable use recognized by the Convention. When completed in 2011, along with a joint system now being laid by Canada, this scientific research cable system will form the world's most advanced undersea network of scientific observatories with hundreds of 24/7 monitoring sites off the west coasts of Canada and the United States. These cables will bring the global Internet to the ocean depths and yield new insights into the environment ranging from forecasting volcanic and seismic events to maximizing living marine resource benefits and environmental protection.

Military cables with sensors vital to national defense and homeland security depend on the Convention to allow their placement. Coastal nation encroachment or amendments to restrict this cable use can be best opposed when the United States is an active party.

The BP Gulf of Mexico system, a domestic submarine cable system, will connect in 2008 seven of that company's offshore production platforms, and possibly others in the future, and will enable energy companies to monitor and operate these platforms continuously from remote control centers ashore, impervious to hurricanes. This cable provides greater energy reliability and environmental safeguards.

Cables for all of these uses benefit from the Convention. Fundamentally, the ability to carry out marine surveys, to lay, maintain, and repair cables outside of territorial seas on an international basis rests on the Convention's protections. In a world where the competition for use of the oceans is accelerating, disputes by competing coastal nations and seabed users will occur with increasing frequency. By providing express protections to cables over other nonspecified uses in the EEZ, the Convention assures that the critical importance of international cable infrastructure is given the priority protection it requires to serve our country.[16]

Arguments that the United States already obtains sufficient benefits from the Convention itself as customary international law fail to recognize that the Convention is a practical, but powerful tool to overcome unreasonable coastal nation encroachments on the freedom to lay and maintain cables and to prevent these rights from being taken away in the future. If the United States is a party, then U.S. telecom and power companies, the U.S. Navy, and scientists can seek the assistance of the U.S. Government to enforce the rights of cable owners to lay, repair, and

maintain cables outside of territorial seas and to prevent these rights from being diminished without United States involvement.

If asked, virtually all telecommunication companies that own or operate international cables would confirm that the Convention is essential for their growth and success. They can ill afford to be left in a situation in the future whereby their rights can be lost because the United States is not a party. Strong support exists in the industry for action by the Senate this year for an up or down vote on the Convention.

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[1] International Cable Law Advisor (1999–2007), International Cable Protection Committee (ICPC), www.iscpc.org, Chairman, Admiralty & Maritime Committee (2004–2007), New York County Lawyers Association; Chairman, Committee on International Law of the Sea (1994–2000), Maritime Law Association of the United States, Lecturer, Rhodes Academy of Oceans Law and Policy, 2006, 2007; Partner, Holland & Knight LLP, Captain, U.S.N. (ret.); University of Denver, J.D. (1980); U.S. Naval Academy, B.S. (1972).

[2] NASCA's members include: Alaska United Fiber System Partnership; Alcatel-Lucent Submarine Networks; Apollo Submarine Cable System Ltd.; AT&T Corp.; Brasil Telecom of America, Inc./GlobeNet; Global Crossing Ltd.; Columbia Ventures Corporation; Columbus Networks, Inc.; Global Marine Systems Ltd.; Hibernia Atlantic; Level (3) Communications, LLC; New World Network, USA, Inc.; Southern Cross Cable Network; Sprint Nextel Corp.; Tyco Telecommunications (US) Inc; Verizon Communications, Inc.; and VSNL International, Inc.

[3] Rhode Island, Massachusetts, New York, New Jersey, Florida, California, Oregon, Alaska, Washington, and Hawaii. Eleven cables land in the Northeast, eleven in Florida or Puerto Rico, and eight on the West coast.

[4] The 10,800 mile Transpacific Express cable system ("TPE") will connect the United States from Oregon to China, Korea, and Taiwan. The 12,000 mile Asia-America Gateway cable system ("AAG") from California, Hawaii, and Guam will connect the United States with Guam, Hong Kong, Malaysia, Thailand, Singapore, Vietnam, the Philippines, and Brunei.

[5] In 1958, Transatlantic Telephone ("TAT") 1, the first transoceanic undersea telephone cable, had 32 circuits. In 1979, TAT–7, the last analogue cable, had 4,200 circuits. TPE, a fiber optic undersea cable described supra. at n.4 has capacity equivalent to 62,000,000 circuits or simultaneous telephone conversations.

[6] Articles 21, 51, 58, 79, 87, 112–115, and 297.1(a).

[7] Marine surveys, usually conducted by side scan sonar and sampling, are used to determine, prior to laying the cable, the best route for a cable system which minimizes conflicts between the cable and other seabed users and undersea geological features.

[8] In order to avoid injury by bottom trawling or dredging, where the seabed and regulations allow, the beer bottle cap diameter fiber optic cables are buried up to one meter in heavily trafficked areas of the Continental Shelf. Otherwise, cables are simply laid along the seabed surface with a benign environmental footprint. Information on this process and cables in the environment exists in the video "About Submarine Cables," at www.iscpc.com.

[9] January 31, 1980 letter from F.M. Tuttle, Jr., AT&T Long Lines, to Hon. Elliot Richardson and Ambassador Richardson's reply, dated April 10, 1980.

[10] Article 113.

[11] M. Green, D. Burnett, "Security of International Submarine Cable Infrastructure-Time to Rethink?", Ocean Conference on Legal Challenges in Maritime Security-Heidelberg, Germany, May 2007. (Mr. Mick Green is the Chairman of the International Cable Protection Committee.)

[12] For example, AT&T owns interests in over 80 international submarine cable systems covering more than 457,000 fiber route miles, and Verizon has ownership interests in more than 65 international submarine cable systems covering more than 446,000 fiber route miles.

[13] Article 101(a)(ii) and (c).

[14] http://www.jdfcable.com/.

[15] "Groups Propose Jules Verne-esque Idea to Import Cheap Canadian Power," Wall Street Journal, May 23, 2001.

[16] The preamble of the 1982 Convention states, in part: "Recognizing the desirability of establishing through this Convention, with due regard to the sovereignty of all States, a legal order for the seas and oceans which will facilitate *international communications* . . ." (Emphasis added.) Nowhere is this statement truer with respect to international communication carried by modern fiber optic cables.

Senator MENENDEZ. Thank you all for your testimony.

We'll start 5-minute rounds. And the Chair will recognize itself.

Mr. Kelly, opponents have argued that this Convention actually discourages future minerals production, as well as oil and gas drilling beyond 200 miles on our Outer Continental Shelf. Seems to me you represent many of the businesses that are going to be involved in that exploration and exploitation. What do you—why do you think opponents are wrong?

Mr. KELLY. I think that——

Senator MENENDEZ. If you would put your microphone on, please, sir.

Mr. KELLY. I think that American business, since the 1970s, was involved in deliberations over the Convention, and the petroleum industry was satisfied, early, by the provisions of the treaty by which steps can be taken for a nation to improve the extension of its Continental Shelf. Now, the industry has wells in the Gulf of Mexico today in 8,000 feet of water. The technology is absolutely incredible. We—and a world-record well has been drilled in the gulf in 10,000 feet of water—we are getting closer and closer to the 200-mile nautical limit. There are a number of wells; in fact, one, I understand, is about 200 miles from the 200-mile limit. And we've proven that there are definitely hydrocarbons at these water depths. So, all around the country, we think that there are probably resources beyond 200 miles, and the industry is at a point where it can—we think we can recover those. And, in view of our growing oil imports, and now natural-gas imports, we think this would be a help to U.S. energy supply.

With respect to deep-sea mining—a lot of people confuse the two, because, with respect to the interests of the petroleum industry, what we're looking at is the features of the Convention that would allow U.S. extension of its Continental Shelf limit—with respect to deep-sea mining, I was involved in some of the—as an advisor—to some of the negotiations relating to the treaty many years ago, and I recall associates who were in deep mining—in deep minerals mining there, as well. And in 1994, they seemed to be satisfied with the changes that were made, and they thought it would give them the security of tenure that was needed.

The problem is that the market changed with respect to minerals mining. There were discoveries made on land, in places like Africa, where additional supplies of some of the exotic minerals, such as molybdenum and others, were discovered. So, the market fell. The prices fell to the point where that industry didn't feel it was economic to explore. But, since that time, as we know, we're finding supply-and-demand imbalances not only with respect to oil and gas, but with respect to a lot of minerals, and I would think that we're probably seeing the day when U.S. companies will probably become involved in deep-sea minerals management.

Senator MENENDEZ. So, is it your view that the Convention discourages such future production, or encourages it?

Mr. KELLY. It encourages it.

Senator MENENDEZ. All right, thank you.

Mr. KELLY. Yes.

Senator MENENDEZ. Mr. Cox, let me ask you this. We've heard a great deal of testimony from the military, including the Navy and the Coast Guard, about the advantages of the Convention, it providing for the mobility of our Armed Forces. You represent companies that travel across the seas. In what specific respects do you think the Convention assists your member companies with regard to commercial navigation?

Mr. COX. Senator, in my comments initially, I pointed out that we benefit from the same rights of passage that Admiral Clark referred to for the Navy. And certainly, the example that I had given in my comments was that there were some nations who were attempting to restrict commercial operators' passage rights based on

an environmental rationale, but that does not mean that it was not contravening the law.

We call these well-deserved and well-understood rights. But, Mr. Chairman, this is the book that has them written down. And this was the book that we are able to point to, to say, "Here's the starting point for all deliberations which would control the commercial industry."

And, while I do have the mike, Mr. Chairman, I know that some issues came up. You mentioned environment. I know there were some questions from some of the Senators today regarding the environment. I'd like to be able to have the opportunity to submit further comments to the committee relative to the environmental issues, because I know of no larger issue we are handling today in the maritime world than environmental impact from our ships. We are dealing with air pollution issues, we're dealing with ballast water invasive species issues, we're dealing, if I may suggest, the green water—the greenhouse gas issue. I almost said "green water," we appreciate green water. But——

[Laughter.]

Mr. COX [continuing]. Thank you, Mr. Chairman. I think that we are—we would benefit from being able to point to this book. And, as a U.S. citizen, I would like to point to the book, saying, "My Government says this."

Senator MENENDEZ. And, to "the book," you're referring to the treaty?

Mr. COX. The Law of the Sea Treaty.

Senator MENENDEZ. Yes. And we're happy to accept the rest of your comments for the record.

Mr. COX. Thank you.

Senator MENENDEZ. We appreciate green water, too, when we're swimming in it, not when we're drinking it, but——

[Laughter.]

Senator MENENDEZ [continuing]. I'm sure that's how you meant it.

Senator Lugar.

Senator LUGAR. Well, thank you, Mr. Chairman.

I'd like to take a part of my time to cite a letter that was written to me recently by Dirk Kempthorne, Secretary of the Interior, and Carlos Gutierrez, Secretary of Commerce, that is appropriate with this panel.

They say, "Since the earliest days of the Republic, this Nation has been committed to the underlying tenets of Freedom of the Seas to guarantee the economic and national security of the United States and the freedom of our people. The Convention creates a comprehensive and balanced legal framework designed to protect ocean resources while preserving the navigational rights. It affirms the exclusive U.S. right to manage fisheries and oil, gas, and mineral resources out to 200 miles from shore, allows us to maximize our sovereign rights over the valuable resources of the Continental Shelf beyond 200 miles, guarantees the right to lay telecommunications cables and pipelines, protects and promotes access on the high seas and in coastal areas throughout the world from marine scientific research, and ensures navigational rights for merchant

vessels upon which the vast majority of our international trade depends.

"The Department of Commerce and Interior, along with other Federal agencies work to manage our ocean resources and the commerce they support. Department of Commerce, responsible for promoting our Nation's economic development, expanding international trade and commerce, and protecting and understanding our oceans, and the Department of the Interior, which is responsible for managing Outer Continental Shelf mineral and energy resources, believe it is imperative that the United States accede to the Convention on the Law of the Sea. Our two Departments work together to map coastal lands and the oceans, and to manage and protect an integrated coastal cosystems, and, together as stewards of our Nation's oceans, coasts, and the Continental Shelf, we urge favorable Senate action on U.S. accession during this session of Congress."

I ask that the full letter be made a part of the record.

Senator MENENDEZ. Without objection.

Senator LUGAR. Mr. Chairman, this panel, it seems to me, is very important, because—we've had a good discussion with our first panel about issues of national defense, of sovereignty, of the imperative need of our country to be able to exercise defense of our principles. And you and I have cited the fact that starting with the President of the United States, then pressing through the Secretaries of Defense and State, the Joint Chiefs of Staff, specific admirals who have responsibility, there appears to be, if not unanimity with regard to those who have our national security as a part of their vested responsibilities, a feeling that this is important for our Nation's security.

The panel we've just heard is important, because many persons, in this committee and outside, often consider jobs important, the economy of our country, our gross national product, the fact that somehow we might be able to be competitive in the world. And I hope that those thoughts are not simply cast out into the hallway as we discuss whether sovereignty is ours or being infringed upon or so forth. Sovereignty is very important to you gentlemen, because you have to deal with this, as do the companies involved and the employees that you have.

So, I take your testimony very seriously. It has been given consistently, for years. But, nevertheless, it's current, because there are current problems.

I cite, specifically, the mention of cables by you, Mr. Burnett. We've had a great deal of discussion recently with regard to our intelligence situation, this extraordinary situation in which conversations in the Middle East, conceivably with Osama bin Laden himself, are coming through our cables into our country, and thus, present us with an opportunity to listen in. This is not simply a commercial question, although it's an important one for all of our communications. If we are going to create a sanction against a bank, say—with regard to North Korea, recently—to stop deposits by that government, that happens by cable. That has turned around, in many persons' feelings, our negotiations with North Korea over nuclear weapons, which is very serious for us.

I just want to underline that. These are not trivial pursuits. And when our President says, "This is very important," I take that to be an important objective to try to forward with our committee and with the Senate.

So, I thank you very much for your explicit testimony. And I would invite you to add more—as you have suggested you might, Mr. Cox—as you have heard arguments today. Certainly, the Chair has been very liberal in inviting all sorts of comment to come in, and to be a complete record, so that those on this committee, who have to cast a vote in the Senate, will have the full benefit of this.

I thank the witnesses, and I thank the Chair.

Senator MENENDEZ. Thank you, Senator Lugar.

We appreciate all of your testimony. It's an important dimension to the ratification of this treaty, all the economic impacts, which allows us, not only to prosper, but also to create jobs here at home and to also have the revenue sources to fuel America's security. So, we appreciate your testimony.

The record will remain open for 2 days so that committee members may submit additional questions to the witnesses. And we certainly would ask the witnesses to respond expeditiously to those questions.

Senator MENENDEZ. The Chair would recognize that the first panel lasted for 2 hours, between direct testimony and questions. It was a very ample vetting of many of the issues to be presented.

And, having no one else before the committee, and no additional comments, the hearing is adjourned.

[Whereupon, at 11:57 a.m., the hearing was adjourned.]

MATERIAL SUBMITTED FOR THE RECORD

LETTERS EXCHANGED BETWEEN SENATOR JOSEPH R. BIDEN, JR., AND SECRETARY OF STATE CONDOLEEZZA RICE

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC, October 29, 2007.

Hon. CONDOLEEZZA RICE,
Secretary of State, Department of State,
Washington, DC.

DEAR SECRETARY RICE: The Committee held two hearings in the last month on the 1982 Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the Convention on the Law of the Sea, which was adopted in 1994 (the "1994 Implementing Agreement"). As you know, this treaty has been pending in the Senate for over a dozen years; in this period, hundreds of questions for the record have been asked and answered by the Department. The Committee is scheduled to vote on the Convention on October 31, 2007.

One of the topics on which the Department has answered questions is the relationship between the 1982 Convention and the 1994 Implementing Agreement. Since this issue has been raised again in recent days, I would be grateful if you could respond to the following questions:

1. What is the relationship between the 1982 Convention and the 1994 Implementing Agreement?
2. Have all of the current Parties to the 1982 Convention indicated their acceptance of the 1994 Implementing Agreement?
3. Does the 1994 Implementing Agreement actually change the 1982 Convention—or does it simply add to and clarify the 1982 Convention?

Thank you for your attention to this matter.

Sincerely,

JOSEPH R. BIDEN, Jr.,
Chairman.

U.S. DEPARTMENT OF STATE,
Washington, DC, October 30, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of October 29 regarding the relationship between the 1982 Convention on the Law of the Sea and the related 1994 Implementing Agreement. We are pleased to answer your questions as follows:

1. What is the relationship between the Convention and the 1994 Implementing Agreement?

The 1994 Agreement, which contains legally binding changes to the 1982 Convention, fundamentally overhauls the deep seabed mining provisions in a way that satisfies each of the objections of the United States (expressed by President Reagan) and of other industrialized countries. Specifically, the Agreement:

- Deletes the objectionable provisions on mandatory technology transfer;
- Ensures that market-oriented approaches are taken to the management of deep seabed minerals (e.g., by eliminating production controls), replacing the original Convention's centralized economic planning approach;
- Scales back the deep seabed mining institutions and links their activation/operation to actual development of interest in deep seabed mining;
- Guarantees the United States a seat on the Council, where substantive decisions are made—the effect of which is that any decision that would result in a substantive obligation on the United States, or that would have financial or budgetary implications, would require U.S. consent;
- Ensures that the United States would need to approve the adoption of any amendment to the deep seabed mining provisions and any distribution of deep seabed mining revenues accumulated under the Convention; and
- Recognizes the seabed mine claims established on the basis of the exploration already conducted by U.S. companies and provides assured access for any future qualified U.S. miners.

It is important to note that, as provided in Article 2 of the 1994 Agreement, "[t]he provisions of this Agreement and Part XI [the Part of the Convention that deals with the deep seabed mining regime] 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."

2. Have all of the current Parties to the 1982 Convention indicated their acceptance of the 1994 Implementing Agreement?

Of the 155 parties to the Convention, 130 have formally indicated their acceptance of the 1994 Agreement (including Russia), and four others have signed it. Those that have not formally indicated acceptance of the Agreement have indicated acceptance through participation in the modified deep seabed mining institutions. In any event, the United States would be joining the Convention as modified by the 1994 and would not be a party to the original Convention.

3. Does the 1994 Implementing Agreement actually change the 1982 Convention—or does it simply add to and clarify the 1982 Convention?

As explained above, the 1994 Agreement makes changes to the 1982 Convention; it does not simply "add to" and "clarify" the 1982 Convention.

The State Department appreciates your Committee's leadership in holding hearings on the 1982 Convention and the 1994 Implementing Agreement. Immediate accession to the Law of the Sea Convention is a high priority for the Bush administration. We look forward to a very favorable vote in the Committee on October 31.

We hope this information has been useful. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

JEFFREY T. BERGNER,
Assistant Secretary,
Legislative Affairs.

PREPARED STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Mr. Chairman, thank you for holding this hearing and the opportunity to comment on a treaty that is of particular importance to Alaska.

Some of my colleagues may not be aware, but over half of the United States coastline is in Alaska. Likewise, the Arctic Ocean covers only 3 percent of the earth's surface, yet it accounts for over 25 percent of the world's Continental Shelf area. So when we are considering a treaty that governs the planet's oceans and the ocean floor, the people of Alaska have a very strong interest.

There are some who do not see the point in joining the rest of the world in ratifying the Convention on the Law of the Sea. They say that the United States already enjoys the benefits of the treaty even though we are not a member—that by not becoming a party to the treaty we can pick and choose which sections of the treaty we abide by while not subjecting our actions to international review.

But I would point out, while the situation is favorable now, that may not always be the case. The treaty opened to amendment in 2004. Do we want a seat at the table to ensure our voice is heard, or do we place our interests in the hands of other nations?

I will give one example. When the United States declined to sign the Law of the Sea Treaty in 1982 out of concern over deep sea-bed mining provisions in Part XI, one of the objections was that the United States was not guaranteed a seat on the executive council of the international seabed authority. With the renegotiation in the 1994 agreement, the United States is essentially assured a seat on the 36-member State Council by virtue of the "largest economy" provision within the Implementation Agreement.

And I would note that while some decisions by the Council are subject to majority vote if a consensus cannot be formed, there are circumstances where decisions must be made by consensus—including the adoption of rules concerning sea-bed mining, and the adoption of amendments to Part XI of the treaty. As a party to the Law of the Sea, the United States can promote rules and regulations based on market principles and investment protection. But if we do not ratify this treaty, the Senate will have capitulated the United States ability to block unfavorable rules and amendments—including potential amendments that could revoke the United States guarantee of a seat in the Council.

The United States waged a global campaign in the developed world to hold off ratifying the treaty until the sea-bed mining provisions were changed. We got what we wanted, but still we have declined to ratify the Law of the Sea. How can we expect parties in the future to take the United States seriously when we negotiate treaties or agreements if we are not willing to follow through in this instance? I believe it is very important for the United States to be a party to this treaty and be a player in the process, rather than an outsider hoping our interests are not damaged.

Now, there are several topics I would like to comment on relating to the treaty and its potential impact on Alaska. The first being claims over the Continental Shelf.

In the 1958 Convention on the Continental Shelf, which the United States is a party to, the issue of limitations on the Continental Shelf was not resolved due to lack of information about the Continental Shelf. With technological advances and greater knowledge the Law of the Sea provides that a coastal state's Continental Shelf can extend for 200 nautical miles, with the potential to extend that claim even further.

Russia has submitted a number of claims to the Commission on the Limits of the Continental Shelf that would grant them 45 percent of the Arctic Ocean's bottom resources—first in 2002 and of course the most recent when Russia placed a flag on the ocean bottom earlier this year. We are fortunate that the Commission so far has withheld its approval of Russia's claim.

According to the U.S. Arctic Research Commission, if we were to become a party to the treaty, the United States stands to lay claim to an area in the Arctic of about 450,000 square kilometers—or approximately the size of California.

But if we do not become a party to the treaty our opportunity to make this claim, and have the international community respect it, diminishes considerably—as does our ability to prevent claims like Russia's from coming to fruition.

Not only is that a negligent forfeiture of valuable oil, gas, and mineral deposits, but also the ability to perform critical scientific research. The Arctic Ocean is the most poorly understood ocean on the planet. Now is the time to be studying the thinning of the polar cap and its potential impact on the global climate, as well as potential economic activity in the area—not the least of which is the opening of polar routes for maritime commerce.

Also in relation to the Arctic Ocean—and the potential thinning of the polar cap—is the opening of polar routes for maritime commerce. There are predictions that the Arctic Ocean will be ice free for 90 days or more in the summer by the year 2050—which in turn translates into greater access, and greater utilization.

By utilizing a polar route, the distance between Asia and Europe is 40 percent shorter than current routes via the Suez or Panama Canals—and is in a much more stable part of the world.

But with greater usage comes greater responsibility. A number of nations have Arctic research programs. Alaska's coastline on the Arctic Ocean is over 1,000 nautical miles. The United States can either exercise sea control and protection in this area of the world, or cede that role to whichever nation is willing to assume it. As a party to the Law of the Sea, the United States ability to enforce our territorial waters and our Exclusive Economic Zone (EEZ) in the Arctic Ocean is strengthened even further.

Mr. Chairman, the Convention on the Law of the Sea also provides a basis for several international treaties with great relevance to our Nation's most productive fisheries, which occur off the coast of Alaska and are of significant value to the economies of Alaska and other Pacific Northwest States.

The Convention on Straddling and Highly Migratory stocks provides both access to, and protections for fish stocks which migrate through the high seas and the jurisdictions of other countries. Among the stocks for which this agreement is of paramount significance is the Bering Sea stock of Alaska pollock, which is the basis for this country's largest single fishery.

The Convention on Fisheries in the Central Bering Sea is another critical piece, which allows us an unprecedented degree of control over the activities of other fishing nations in the central portion of the Bering Sea, beyond both the United States and the Russian Exclusive Economic Zones. Without the influence of the Law of the Sea, neither of these important fishing agreements would likely have come into being.

Also, Mr. Chairman, let me note the importance—and the somewhat fragile status of—our maritime boundary agreement with Russia. As you may know, this agreement delineates a specific boundary between our two countries. It is necessary because the agreement under which the United States acquired what is now the State of Alaska was interpreted differently by the two parties.

Both the boundary agreement, and the fisheries enforcement mechanisms that stem from it, are critical to the conduct of fisheries policy in the U.S. and Russian EEZs in the Bering Sea. Although the United States ratified the maritime boundary agreement shortly after it was presented to the Senate, the Russian Government has yet to do so, under pressure both from nationalist political interests and Russian Far East economic interests. While observing the provisions of the boundary treaty, the Russian Government also has attempted to persuade the United States to make a number of significant concessions regarding Russian access to U.S. fishery resources, suggesting meanwhile that such concessions would improve the atmosphere for Russian ratification.

The terms of the boundary treaty are widely regarded as highly favorable to the United States, and are themselves consistent with the Law of the Sea. However, rejection of the latter by the United States could trigger similar rejection by the Russian Duma of the boundary treaty. If that were to occur, it would be extremely difficult to renegotiate the boundary agreement with similar positive results for the United States.

The United States and Alaska have tremendous interests in the Arctic Ocean. Our technological capabilities in calculating the extent of the Continental Shelf are welcomed by other nations. As a party to the Law of the Sea Treaty, we have the opportunity to stake our claim to a significant chunk of real estate that has the potential for impact on our economy and our national security.

We also have the opportunity to further U.S. leadership in the international community on maritime issues and ensure the continuation of those provisions in the Convention that are so vital to the United States fisheries industries.

The Convention on the Law of the Sea has my strong support and I look forward to its consideration on the Senate floor.

PREPARED STATEMENT OF DON KRAUS, EXECUTIVE VICE PRESIDENT, CITIZENS FOR GLOBAL SOLUTIONS, WASHINGTON, DC

Mr. Chairman, I appreciate the opportunity to add to the committee's deliberations and express the support of Citizens for Global Solutions for United States accession to the United Nations Convention on the Law of the Sea. This treaty defines

maritime zones, protects the environment, preserves freedom of navigation, and establishes clear guidelines for businesses that depend on the sea for resources. Until the United States ratifies the treaty, its rights at sea will lack international recognition. It is our firm belief that joining this treaty will significantly advance U.S. goals and restore our international leadership role.

Mr. Chairman, my organization's 30,000-plus members, supporters, and activists have long waited for the Senate to consider the Law of the Sea Convention. Some of our members were engaged with this process at its inception in the early 1970s. Throughout, the reasons behind our desire for the United States to join with the 155 nations who have ratified have remained consistent—security, economic opportunity, and responsible stewardship.

Mr. Chairman, the United States has a unique role in the world. The fact that our Navy is globally deployed and that we can and will operate anywhere and any time means that having a clear set of rules to guide conduct on the seas promotes our interests. It is because we are exceptional that we need to be part of this treaty. Its rules function as a force multiplier for us, and to walk away from the table, to not play a leadership role in maintaining these rules would be nothing short of negligence. Joining the Convention will ensure that other countries recognize the navigational and overflight rights that our Armed Forces depend on. These rights will help to keep us safe, defend our interests at sea, and enhance collaboration with our allies.

Our absence from the Convention handicaps our ability to exploit (or conserve) precious marine resources and protect our investments. The United States is already far behind in the race to stake claims in the resource-rich Arctic seabed. Joining would expand our control over an area larger than the continental United States and give our businesses access to resources in the deep seabed, where no nation can set the rules by itself.

Joining the Convention would put us in a position to further global efforts to protect marine life, conduct research, and prevent marine pollution. U.S. laws are already strong in these areas; if we join, we can better urge other countries to fulfill their obligations to keep the seas clean and safe for future generations.

The Law of the Sea has been described as the most comprehensive and progressive protection for the oceans of any modern international accord. It essentially protects the economic, environmental, and national security concerns of coastal states, as well as establishing international cooperative mechanisms for resolving disputes on these issues. The Convention also safeguards imperiled marine habitats by strengthening state sovereignty over the enforcement of environmental regulations in each state's Exclusive Economic Zone (EEZ) up to 200 miles offshore. These internationally accepted regulations empower states to stop harmful pollution and ocean dumping caused by previously unregulated ships. The Convention also contains special measures to save endangered whales, salmon, and other marine mammals. It helps the fisheries of coastal states by allowing them to set limits within their EEZ. It also protects valuable migratory fish stocks such as tuna and billfish on the high seas, beyond the 200-mile limit.

In addition to protection of the marine environment, the Law of the Sea promotes the maintenance of international peace and security by replacing a plethora of conflicting claims among coastal states with a 12-mile territorial limit and the aforementioned 200-mile EEZ. These regulations set a definitive limit on the oceanic area over which a nation may claim jurisdiction. However, the Convention also protects the freedom of navigation on the high seas as well as the right of innocent passage, including nonwartime activities of military ships.

It is noteworthy that nations can claim mineral rights to the end of the Continental Shelf up to 350 nautical miles (and further in some special circumstances). This favors the United States, one of the few nations with broad continental margins, particularly in the North Atlantic, the Gulf of Mexico, the Bering Sea, and the Arctic Ocean. However, countries must ratify the treaty for their claims to be internationally recognized. In so doing, the United States could expand its areas for mineral exploration and production by more than 291,383 square miles.

Beyond this zone the Law of the Sea has established the International Seabed Authority, an autonomous intergovernmental body based in Kingston, Jamaica, which was created to organize and control all mineral-related activities in the international seabed area beyond the limits of national jurisdiction.

When nations disagree on boundaries, mineral claims, or other aspect of the Convention, the Law of the Sea contains a unique dispute resolution mechanism that obligates nations to peacefully settle their difference through one of four methods: The International Tribunal for the Law of the Sea, adjudication by the International Court of Justice, binding international arbitration procedures, or special arbitration tribunals with expertise in specific types of disputes. Binding arbitration, the pre-

ferred U.S. approach, is the default mechanism if parties don't agree to another. All of these procedures involve binding third-party settlement, except for sensitive cases involving national sovereignty. In such circumstances, the parties are obliged to submit their dispute to a conciliation commission, but they will not be bound by the commission's decision. This system will ensure that any nonmilitary disputes that must be settled by a third party will be settled fairly and with due consideration to U.S. interests.

There is no overt role for NGO participation in the dispute resolution process, as there is in more recently negotiated treaties and agreements (such as NAFTA). However, environmental organizations see the various intergovernmental bodies established by the Convention as forums where they can focus attention on the obligation of governments to "protect and preserve the marine environment" that the treaty establishes.

Negotiations to create the Law of the Sea began during the Nixon administration but didn't finish until the Reagan administration. Mr. Chairman, I would like to call attention to President Reagan's unambiguous support for the vast majority of the treaty. President Reagan even issued an executive order for the United States to abide by most of its rules. But ultimately, the United States was one of only four nations that voted against adoption of the treaty. The Reagan White House could not accept the portion of the treaty that established the International Seabed Authority (ISA). President Reagan felt that the decisionmaking process of the ISA Council and Assembly would not give the United States or other Western industrialized countries influence commensurate with their interests. The administration was concerned that a provision on a Review Conference would allow Convention amendments to enter into force without U.S. approval and that the Convention required the mandatory transfer of private technology. The administration also feared that some provisions would deter rather than promote future development of deep seabed mineral resources by incorporating economic principles inconsistent with free market philosophy, which included the possibility that the ISA would ultimately transfer wealth to developing nations.

During the administration of George H.W. Bush, the United States negotiated an annex to the treaty that addressed all of these concerns. The United States finalized and signed the treaty during the Clinton administration. Too many years have passed since President Clinton signed the treaty. I appreciate the time and effort that you, Mr. Chairman, the members of the Senate Foreign Relations Committee and the committee staff have put into holding hearings and gathering testimony. I look forward to this issue quickly coming before the committee for a vote and with success rapidly to the Senate floor for advice and consent. It is long past time to resolve this very old and important piece of business and for the United States to finally join the rest of the world in ratifying the Law of the Sea.

Thank you.

LETTER SUBMITTED FOR THE RECORD BY PAUL KELLY ON BEHALF OF ADM JAMES WATKINS AND LEON PANETTA

JOINT OCEAN COMMISSION INITIATIVE,
SEPTEMBER 24, 2007.

Hon. Harry Reid,
Majority Leader, U.S. Senate,
Washington, DC.

Hon. MITCH MCCONNELL,
Minority Leader, U.S. Senate,
Washington, DC.

DEAR SENATOR REID AND SENATOR MCCONNELL: We, the undersigned, urge the Senate to expeditiously provide its advice and consent for United States accession to the United Nations Convention on the Law of the Sea. We agree with President Bush's statement of May 15, 2007, in which he asserted that accession to the Convention is essential to protect national security interests, secure sovereign rights over extensive marine areas, and promote U.S. interests in the environmental health of the oceans. We strongly urge the Senate to approve the Convention before the adjournment of this session of Congress.

The Convention has been thoroughly reviewed in numerous Senate hearings and public forums. It has overwhelming bipartisan support from a broad and diverse range of interests that have carefully considered the issues from a variety of perspectives. It is clear that accession will protect and enhance our country's sovereign military, economic, and environmental interests.

The Convention codifies and strengthens freedoms of navigation and overflight that are essential to U.S. military mobility. The Navy and Coast Guard have testified that joining the Convention will strengthen our ability to defend these and other important maritime rights and will enhance our national and homeland security efforts. Recent statements of support for accession from National Security Advisor Stephen Hadley, Deputy Secretary of State John Negroponte, and Deputy Secretary of Defense Gordon England reinforce the important national security benefits that will accompany accession.

All major U.S. ocean industries, including offshore energy, maritime transportation and commerce, fishing, and shipbuilding, support U.S. accession to the Convention because its provisions help protect vital U.S. economic interests and provide the certainty and stability crucial for investment in global maritime enterprises.

Environmental organizations also strongly support the Convention. As a party, the United States would be in the best position to lead future applications of this framework for regional and international cooperation in protecting and preserving the marine environment.

The congressionally mandated and Presidentially appointed U.S. Commission on Ocean Policy and the independent Pew Oceans Commission both unanimously recommend accession to the Convention as an important part of a comprehensive and coordinated U.S. ocean policy.

Currently, 155 nations are party to the Law of the Sea Convention. Yet, despite an exceptional level of diverse bipartisan support, the United States remains the primary industrialized nation not a party to the Convention. U.S. accession to the Convention would send a clear message in support of our efforts to foster international approaches, while significantly furthering our own national interests.

The Senate should move expeditiously to consider and approve U.S. accession to the United Nations Convention on the Law of the Sea.

Signed by:

James D. Watkins, Admiral, U.S. Navy (Ret.); Chairman, U.S. Commission on Ocean Policy; Cochair, Joint Ocean Commission Initiative
Hon. Leon E. Panetta, Chair, Pew Oceans Commission, Cochair, Joint Ocean Commission Initiative
John Adams, Cofounder, Natural Resources Defense Council
Madeleine Albright, former Secretary of State; Chairman, Board of Directors, the Democratic Institute for International Affairs
David M. Abshire, President, Center for the Study of the Presidency
Bruce Babbitt, former Secretary of the Interior; Chairman, Board of Directors, World Wildlife Fund
James A. Baker III, former Secretary of State; Senior Partner, Baker Botts, LLP
Governor John Baldacci, State of Maine
Robert D. Ballard, Professor, Graduate School of Oceanography, University of Rhode Island
Lillian C. Borrone, former Assistant Executive Director, Port Authority of New York and New Jersey
Ted A. Beattie, President and CEO, John G. Shedd Aquarium
Frances Beinecke, President, Natural Resources Defense Council
Senator John B. Breaux, Senior Counsel, Patton Boggs LLP
Charles J. Brown, President and CEO, Citizens for Global Solutions
Governor Felix Camacho, Territory of Guam
Governor Donald Carcieri, State of Rhode Island
David D. Caron, Codirector, Law of the Sea Institute, University of California, Berkley
Red Cavaney, President and CEO, American Petroleum Institute
Clarence P. Cazalot, Jr., President and CEO, Marathon Oil Corporation
Eileen Claussen, President and Chair of the Board, Pew Center on Global Climate Change
James M. Coleman, Boyd Professor, Coastal Studies Institute, Louisiana State University
John Connelly, President, National Fisheries Institute
Joseph J. Cox, President and CEO, Chamber of Shipping of America
Walter Cronkite, CBS
ADM William J. Crowe, Jr., former Chairman, Joint Chiefs of Staff, U.S. Navy (Ret.); Chairman, Board of Visitors, International Programs Center and Center for Peace Studies
Ann D'Amato, Commissioner, U.S. Commission on Ocean Policy
Thomas Dammrich, President, National Marine Manufacturers Association
John C. Danforth, Bryan Cave LLP

Lawrence R. Dickerson, President and COO, Diamond Offshore Drilling, Inc.
John Englander, CEO, International Seakeepers Society
Donald L. Evans, former Secretary of Commerce
Thomas Fry, President, National Ocean Industries Association
VADM Paul G. Gaffney II, U.S. Navy (Ret.)
Jack N. Gerard, President and CEO, American Chemistry Council
James C. Greenwood, President and CEO, Biotechnology Industry Organization
Governor Christine Gregoire, State of Washington
Carlotta Leon Guerrero, Executive Director, Ayuda Foundation
Alexander M. Haig, Jr., former Secretary of State; Chairman, Worldwide Associations, Inc.
Scott A. Hajost, Executive Director, IUCN–US
Lee Hamilton, President and Director, Woodrow Wilson International Center for Scholars
Mike Hayden, Secretary, Kansas Department of Wildlife and Parks
Tony Maymet, Director, Scripps Institution of Oceanography
Marc J. Hershman, Professor, School of Marine Affairs, University of Washington
Carla A. Hills, former U.S. Trade Representative; Chairman and CEO, Hills & Company
Michael Kantor, former Secretary of Commerce
Paul L. Kelly, Kelly Energy Consultants
Donald Kennedy, Editor in Chief, Science Magazine, American Association for the Advancement of Science
Charles Kennel, Founding Director, Environment and Sustainability Initiative, Scripps Institution of Oceanography
Tony Knowles, former Governor of Alaska
Christopher L. Koch, President and CEO, World Shipping Council
Governor Ted Kulongoski, State of Oregon
Melvin R. Laird, former Secretary of Defense
P. Patrick Leahy, Executive Director, American Geological Institute
Governor Linda Lingle, State of Hawaii
Jane Lubchenco, Wayne and Gladys Valley Professor of Marine Biology, Department of Zoology, Oregon State University
James R. Luyten, Acting President and Director, Woods Hold Oceanographic Institution
Steven J. McCormick, President and CEO, the Nature Conservancy
Robert C. McFarland, former National Secretary Advisor; Chairman, McFarlane Associates, Inc.
Governor Ruth Ann Minner, State of Delaware
Senator George J. Mitchell, Chairman, DLA Piper
John Norton Moore, Director Center for Oceans Law and Policy, University of Virginia School of Law
Frank E. Muller-Karger, Dean, School for Marine Science and Technology, University of Massachusetts, Dartmouth
James J. Mulva, Chairman and CEO, ConocoPhillips
Mike Nussman, President and CEO, American Sportfishing Association
Sean O'Keefe, former Secretary of the Navy; Chancellor, Louisiana State University
Julie Parkard, Executive Director, Monterey Bay Aquarium
Pietro Parravano, President, Institute for Fisheries Resources
Brian T. Petty, Senior Vice President, International Association of Drilling Contractors
Thomas R. Pickering, former Under Secretary for Public Affairs, U.S. Department of State; Vice Chairman, Hills & Company
Colin Powell, former Secretary of State
ADM Joseph W. Prueher, U.S. Navy (Ret.)
Joshua S. Reichert, Managing Director, Pew Environmental Group, the Pew Charitable Trusts
William K. Reilly, former EPA Administrator; Chairman Emeritus, World Wildlife Fund
Joseph P. Riley, Jr., Mayor of Charleston
Carter S. Roberts, President and CEO, World Wildlife Fund
Peter J. Robertson, Vice Chairman of the Board, Chevron Corporation
David Rockefeller, Jr., Director and former Chair of Board of Trustees, the Rockefeller Foundation
Andrew A. Rosenberg, Professor, Department of Natural Resources and Institute for the Study of Earth, Ocean, and Space, University of New Hampshire
William D. Ruckelshaus, Strategic Director, Madrona Venture Group

VADM Roger T. Rufe, Jr., U.S. Coast Guard (Ret.)
Barry Russell, President, Independent Petroleum Association of America
Paul A. Sandifer, Senior Scientist, National Ocean Service, National Oceanic and Atmospheric Administration
RADM William L. Schachte, Jr., U.S. Navy (Ret.)
Harry N. Scheiber, Codirector, Law of the Sea Institute, University of California, Berkley
Richard Schwartz, Chairman and Founder, Boat Owners Association of the United State
Governor Arnold Schwarzenegger, State of California
LTG Brent Scowcroft, U.S. Air Force (Ret.)
Andrew Sharpless, CEO, Oceana
George P. Shultz, former Secretary of State; Chairman, J.P. Morgan Chase International Council
A.F. Spilhaus, Jr., Executive Director, American Geophysical Union
Governor Eliot Spitzer, State of New York
Vikki N. Spruill, President and CEO, Ocean Conservancy
Kathryn Sullivan, Director, Battelle Center for Mathmatics and Science Education Policy, Ohio State University
John Temple Swing, President Emeritus, Foreign Policy Association
Strobe Talbott, President, Brookings Institution
Russell E. Train, Chairman Emeritus, World Wildlife Fund
Mead Treadwell, Chairman, U.S. Arctic Research Commission
Richard D. West, Rear Admiral, U.S. Navy (Ret.); President, Consortium for Oceanographic Research and Education
Patten D. White, Commissioner, Atlantic States Marine Fisheries Commission
Christine Todd Whitman, Whitman Strategy Group
Timothy E. Wirth, President, United Nations Foundation and Better World Fund

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LETTERS SUBMITTED FOR THE RECORD BY DOUGLAS BURNETT

AT&T,
Bedminster, NJ, September 7, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

Hon. RICHARD G. LUGAR,
Ranking Minority Member, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN AND RANKING MINORITY MEMBER LUGAR: As a major U.S. user of the international seabed, AT&T Inc. ("AT&T") supports U.S. accession to the Law of the Sea Convention. We do so because the Convention improves protections for international submarine cables, provides compulsory dispute resolution procedures concerning these cables, and expands the right to lay and maintain them. This is important to the U.S. economy given the rapid growth of global trade and the central role of telecommunications in today's global economy.

As a preliminary matter, AT&T, through its affiliates, owns interests in over 80 international submarine cable systems covering more than 457,000 fiber route miles and operates an advanced global backbone network that serves customers around the world and carries 9.668 terabytes of data per average business day. AT&T also has plans for a new 12,000-mile submarine cable system, the Asia America Gateway cable, to increase high bandwidth transmission capacity between the U.S. and Southeast Asia.

Like other U.S. telecommunications providers. AT&T uses international submarine cables to carry virtually all of its Internet and voice and data telecommunications traffic outside North America. As the result of massive, fast-increasing Internet usage and the rapid globalization of business, total U.S. undersea cable circuit capacity has increased by a staggering 27,000 percent from 1995 through 2007.[1] These submarine cables provide backbone international transmission facilities for the global Internet, electronic commerce and other international voice and data com-

[1] See FCC 2005 Section 43.82 Circuit Status Data, Jan. 2007, Table 7 (total available U.S. undersea fiber-optic capacity increased from 315,630 circuits in 1995 to an estimated 86,222,299 circuits in 2007).

munications services that are major drivers of the 21st century global information-based economy.

Recent experience underscores the importance of taking all appropriate measures to protect these critically important global network facilities from damage and disruption. In March 2007, for example, service was disrupted on two international submarine cables in Southeast Asia on which AT&T and other U.S. carriers hold ownership interests, when large sections of the Asia Pacific Cable Network (APCN) and the Thailand-Vietnam-Hong Kong (TVH) cable were removed from the seabed by local fishermen seeking to sell cable and optical equipment (67 kilometers of APCN and 98 kilometers of TVH). Operation of both cables was disrupted for several months, causing significant financial harm.

The Law of the Sea Convention significantly improves protections for international submarine cables against damage by other parties, and in so doing, protects the interest of U.S. owners of submarine cable systems such as AT&T. Article 113 requires that all states must adopt laws that make damage to submarine cable, done willfully or through culpable negligence, a punishable offense. Article 114 requires submarine cable owners that damage other cables in laying or repairing their cables to bear the cost of repairs. Article 115 provides that vessel owners, who can prove they sacrificed an anchor or fishing gear to avoid damaging a cable, can recover their loss against the cable owner, provided the vessel took reasonable precautionary measures beforehand.

Additionally, Article 297 provides parties to the Treaty with compulsory dispute resolution procedures for the provisions concerning submarine cables. Having rights to this dispute resolution process is a key benefit of U.S. accession to the Convention, and one that does not exist for the U.S. presently. Although the U.S. already benefits to some extent from aspects of the Convention as customary international law, it cannot take action under the important dispute resolution provisions until the U.S. accedes to the Convention.

The Convention also expands the right to lay and maintain submarine cables in the oceans of the world. Articles 58, 79 and 112 establish the rights of nations and private parties to lay and maintain submarine cables on the continental shelf, in the Exclusive Economic Zone and on the bed of the high seas. These articles—when supplemented by the compulsory dispute resolution procedures available to parties to the Convention under Article 297—provide important recourse for AT&T and other U.S. submarine cable operators against onerous and unreasonable permitting requirements by coastal states that may impede the timely repair and maintenance of undersea cables, or delay the construction of new cables.

In conclusion, it has never been more important to our U.S. economic infrastructure to strengthen the protection and reliability of international submarine cables. The Law of the Sea Convention, particularly as assisted by the enforcement mechanisms available to parties under Article 297, is a critical element of this protection. AT&T therefore urges the United States Senate to give its advice and consent to accede to the Law of the Sea Convention and to ratify the Agreement Relating to the Implementation of Part Xl of the Convention.

We would be more than happy, at your convenience, to brief you or your staff on the matters raised in this letter or to answer any questions that you or your staff may have.

Sincerely,

KEVIN R. PETERS,
Senior Vice President,
Global Network Operations.

TYCO TELECOMMUNICATIONS,
Morristown, NJ, October 3, 2007.

Re U.S. Accession to the United Nations Convention on the Law of the Sea

Senator JOSEPH R. BIDEN, Jr.,
Chairman, Senate Foreign Relations Committee, Dirksen Senate Office Building, Washington, DC.

Senator RICHARD G. LUGAR,
Ranking Minority Member, Senate Foreign Relations Committee, Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS BIDEN AND LUGAR: Tyco Telecommunications (US) Inc. ("Tyco Telecom") urges the Senate to give its advice and consent to U.S. accession to the United Nations Convention on the Law of the Sea ("LOS Convention") and U.S. ratification of the 1994 Implementing Agreement modifying Part XI of the LOS Conven-

tion ("1994 Implementing Agreement"). As one of the leading manufacturers, suppliers, and maintainers of undersea telecommunications networks for commercial and government customers—and the only such supplier based in the United States—Tyco Telecom has a keen interest in ensuring unfettered and timely access to the seas, with clearly defined and enforceable rights and responsibilities, as guaranteed by the LOS Convention. Tyco Telecom strongly believes that that LOS Accession would ensure unquestioned international acceptance of existing U.S. policy and thereby further U.S. economic, diplomatic, and security interests as they pertain to undersea telecommunications networks.

Tyco Telecom is headquartered in Morristown, New Jersey. It owns research and development facilities—once part of Bell Laboratories—in New Jersey and manufacturing facilities in New Hampshire and New Jersey. It also operates a fleet of 8 cable ships, with global fleet operations headquartered in Baltimore, Maryland. To date, Tyco Telecom has completed more than 120 projects around the world involving more than 400,000 kilometers of installed cable, and Tyco Telecom has constructed a substantial percentage of the undersea telecommunications cables currently serving the United States.

Contrary to popular perception, undersea telecommunications cables (and not satellites) carry more than 95 percent of voice, data, and Internet traffic between the United States and foreign countries, not to mention most of the traffic between the continental United States, Alaska, Hawaii, and various U.S. possessions and territories, including Guam, Puerto Rico, and the U.S. Virgin Islands, and also internally in Alaska, Hawaii, and the U.S. Virgin Islands. Commercial cables carry commercial, government, and military communications. Undersea telecommunications cables also support U.S. military installations in remote parts of the world.

To install, maintain, and operate undersea telecommunications cables, suppliers of installation and maintenance services—such as Tyco Telecom—and cable operators rely heavily on international treaty protections, which guarantee freedoms to install and maintain undersea cables, and also provide for compensation to cable owners in the event of damage to undersea cables.

Tyco Telecom and its customers regularly confront situations where a foreign country makes a jurisdictional assertion far beyond the limits established by the LOS Convention, and where a foreign country seeks to impose unilateral or unreasonable restrictions on installation and maintenance operations. These actions, left unchecked, impose substantial costs and delays on Tyco Telecom and its customers. Given booming demand for installation and maintenance services, this problem is only becoming more acute.

President Reagan announced in 1983 that the United States would, as a matter of policy, abide by the LOS Convention except those provisions (later modified) regarding deep seabed mining—a policy continued by all subsequent administrations. But the absence of formal U.S. accession to the LOS Convention has created doubts regarding the nature of U.S. policy.

It is therefore critical that the United States ensure unquestioned international acceptance of existing U.S. policy. By acceding to the LOS Convention, the United States would clarify that providers of installation and maintenance services and cable operators have the unfettered and timely access to the seas, as guaranteed by the LOS Convention, and that the United States will not tolerate other countries' excessive jurisdictional claims over undersea cable operations or imposition of overly burdensome conditions on installation and maintenance operations. The relevant guarantees in the LOS Convention include:

- The freedom to install and maintain undersea telecommunications cables on the high seas beyond the continental shelf (LOS Convention art. 112(2));
- The freedom to install and maintain undersea telecommunications cables on the continental shelf and provides that subject to the right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of such cables (LOS Convention art. 79(2));
- The ability to install undersea telecommunications cables in a State's territory or territorial sea subject to conditions (LOS Convention art. 79(4));
- The freedom to repair existing undersea telecommunications cables on the continental shelf (LOS Convention art. 79(5));
- The freedom to install and maintain undersea telecommunications cables in the exclusive economic zone of all States (LOS Convention art. 58(1)); and
- The freedom to maintain existing undersea telecommunications cables passing through the waters of an archipelagic State without making landfall (LOS Convention art. 51(2)).

U.S. accession to the LOS Convention would also better protect undersea telecommunications cables from disruption and damage by clarifying the liability rules and requiring the United States to update its existing statutory protections for damage to undersea cables (LOS Convention arts. 113–115).

By giving advice and consent to U.S. accession to the LOS Convention, the Senate would help to clarify U.S. policy and reinforce access rights and responsibilities for undersea cable installation and maintenance operations. In doing so, the Senate would support significant U.S. economic activity, research and development, and employment relating to undersea telecommunications and thereby further U.S. economic, diplomatic, and security interests.

Tyco Telecom would be pleased to brief you and your staff members regarding any of the matters discussed in this letter, and representatives of Tyco Telecom would be pleased to testify before your committee at any hearings scheduled on the subject of the LOS Convention.

Yours sincerely,

DAVID COUGHLAN,
President.

LETTER AND PREPARED STATEMENT OF PATRICIA FORHAN, PRESIDENT, HUMANE SOCIETY INTERNATIONAL

HUMANE SOCIETY INTERNATIONAL,
Washington, DC, October 3, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Senate Foreign Relations Committee,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN: The Humane Society of the United States (HSUS) and our international arm, Humane Society International (HSI), appreciate your leadership in convening hearings on the U.N. Law of the Sea Convention. We believe that the United States involvement in this Convention is crucial and urge the Senate to act by supporting accession to UNCLOS as quickly as possible. This action is long overdue.

HSUS/HSI has a long history working to help protect marine mammals and the marine environment. We were instrumental in passage of the U.S. Marine Mammal Protection, Act in 1972, and played a significant role in the LOS negotiations regarding marine mammals. In fact, our work on behalf of marine mammals resulted in the adoption of Article 65 within the LOS Convention which carved out a special category for marine mammals.

Article 65, inter alia allows coastal states to fully protect all marine mammals. It does not require the optimum utilization test required for other living marine resources, As a result, a number of coastal states (including the USA) have set up special marine reserves and protected areas for marine mammals. Article 65 has provided the legal basis for doing so. The International Whaling Commission has established two sanctuaries which encompass both high seas and coastal areas for whales in the Indian Ocean and the Antarctic (Southern Ocean Sanctuary). Again, Article 65 provides the legal basis for establishing these protected areas.

Another important element of Article 65 is that it requires States to cooperate in the conservation of marine mammals and in the case of cetaceans requires States to work through the "appropriate international organizations." It is the latter reference to international organizations that concerns the bulk of our written submission. We are concerned that the U.S. has not been at the table to defend the proper interpretation of that terminology and that whaling nations have had a free hand to "spin" it in a way to benefit their own interests. We need to participate and work to ensure the original intent of the article is carried out.

I had the pleasure of working with Ambassador Elliot Richardson during his tenure representing the USA on this important treaty. He felt strongly that U.S. citizens would want our country to support this cutting edge language on behalf of beloved animals like whales, dolphins and polar bears. He personally worked to obtain the best language possible for Article 65.

With your permission, I am attaching a detailed legislative history of the genesis and ultimate meaning intended for Article 65, and request that you include this cover letter and the attached history in the committee's record of hearings.

Thank you on behalf of our more than 10 million members and constituents.

Sincerely,

PATRICIA A. FORKAN,
President.

Attachment.

PREPARED STATEMENT OF PATRICIA FORKAN SUBMITTED ON BEHALF OF THE HUMANE SOCIETY OF THE UNITED STATES/HUMANE SOCIETY INTERNATIONAL

THE LEGISLATIVE HISTORY AND INTERPRETATION OF ARTICLE 65 OF THE LAW OF THE SEA CONVENTION

Nothing in this Part restricts the right of a coastal state or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.[1]

Introduction

The 1970s were a turning point for cetaceans in general and whales in particular, with attitudes shifting away from the exploitation of a resource towards conservation and protection of a unique creature. I have been attending meetings of the International Whaling Commission (IWC) since 1973, and have also had the privilege of being appointed in 1977 to the Marine Environment Sub-Committee of the Law of the Sea Advisory Committee which was involved in the negotiations leading up to the adoption of the final version of Article 65 of the United Nations Convention on the Law of the Sea (UNCLOS). Thus I have seen the evolution of both the IWC and the UNCLOS as parallel systems, one driving the other, and one influencing the other.

As the 1982 U.N. Convention on the Law of the Sea is largely considered a "constitution for the oceans,"[2] its role in the conservation of marine mammals is of vast importance, and needs to be accurately understood and interpreted. This report therefore seeks to clarify the meaning of Article 65, and in particular its relation to the IWC.

History of the Drafting of Article 65, UNCLOS

The marine mammal article of UNCLOS is considered a significant advance in our common efforts to stop the over-exploitation of marine mammals, especially whales and dolphins, and to conserve them.[3] Nevertheless, it has been argued that potential ambiguity arises in relation to the second sentence of the final version of Article 65 which reads: "States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study." Therefore, the historical background that follows will go towards clarifying the meaning in particular of the appropriate international organizations referred to in the second sentence of Article 65, UNCLOS.

During the mid-seventies, there had been almost single-minded concentration on improving the IWC with regard to whale conservation, and the UNCLOS went largely ignored. In 1977 a meeting was convened to discuss the problem of the weak UNCLOS Marine Mammal article. This resulted in a new coalition of environmental and animal welfare groups being formed to urge the U.S. to work for improved protection of marine mammals in general and cetaceans in particular within UNCLOS.[4]

The U.S. spearheaded the movement to clarify the marine mammal conservation provisions of UNCLOS. An informal negotiating group, to which I was appointed by Ambassador Elliot Richardson, was established in the late seventies to consider re-

[1] www.globelaw.com/LawSea/Is82__2.htm#article__65__marine__mammals.

[2] John Temple Swing, "What Future for the Oceans?", Foreign Affairs, September–October 2003, p. 139.

[3] The 12th J. Seward Johnson Lecture in Marine Policy, "Should the United States Ratify the New Law of the Sea Treaty?" by Ambassador T T B Koh of Singapore at the Woods Hole Oceanographic Institution, Woods Hole, MA, 6/4/1980.

[4] This new coalition and effort was led by Dr. Robbins Barstow of the Connecticut Cetacean Society. He brought together Members of Congress, NOAA, NMFS, Marine Mammal Commission and NGOs to strengthen whale protective provisions in the LOS Treaty.

In a 6/18/1979 Letter to the Honorable John B. Breaux, Chairman of the Subcommittee of Fish and Wildlife Conservation and the Environment, House Committee on Merchant Marine and Fisheries, the National Wildlife Federation suggested that the U.S. should propose language at the next Law of the Sea meeting that would among other things make clear that "management of at least the large whales and direct catches of small cetaceans should be regulated by a single international organization, the International Whaling Commission."

vising the Informal Composite Negotiating Text (ICNT) provisions. The states were clearly aware of the need to conserve and protect marine mammals.[5]

Initially, the agreed upon language, for the second sentence of Article 65, referred to "the appropriate international organization." At a meeting of the informal negotiating group, the representative from Japan requested that the group consider changing the word organization from singular to plural. He explained that since this article covered all cetaceans, it would be better to leave the issue of cetacean by-catch associated with regional fisheries in the hands of those various entities. In order to be responsive to Japan, it was agreed that the word organization would be plural. Thereby, allowing by-catch to remain a regional fisheries responsibility.

Over many months of ongoing negotiations, progress was clearly made as UNCLOS agreed to recognize marine mammals as unique and separate from other living resources, and as such not subject to "optimum utilization." The provisions for other living resources under UNCLOS require coastal states to determine allowable catch, and if the coastal state cannot harvest the entire catch, they must give other states access to take the surplus. In the case of marine mammals this does not apply, and coastal states can be more restrictive than the international standard and can even protect marine mammals totally.

In addition, there was also a growing global demand from NGOs that the IWC move away from a strictly quota setting whale killing operation to one of conservation, protection and humanness towards these creatures. Thus UNCLOS and the IWC in the mid and late seventies were developing as parallel systems, and in order to accurately interpret Article 65 of UNCLOS, the changes being discussed at the time in relation to the IWC need to be examined. In 1978 the IWC held a Preparatory Meeting on the Revision of the International Convention for the Regulation of Whaling (ICRW), the culmination of years of work to change the thrust and general character of the IWC. The U.S. began to push for a renegotiation of the ICRW to make an International Cetacean Convention. The NGO community also strongly supported renegotiating the treaty calling for an International Cetacean Commission (ICC)—not only changing the emphasis from whaling to the whales themselves but to broaden jurisdiction to small cetaceans such as dolphins and porpoises. The future ICC was to be primarily a scientific research and study organization aimed at protecting cetaceans, not killing them, with jurisdiction on a global basis.[6]

In a letter to Ambassador Richardson,[7] one of the participants in the renegotiation of Article 65 listed one of the objectives as being to clearly establish the authority of a single international conservation organization to set the standards for protection and conservation of cetaceans throughout their range.

> At the present time such an organization exists (the IWC) although the United States has sought to strengthen it as an International Cetacean Commission, aimed less at "whaling" and more at "cetacean protection." The recent moratorium within the IWC suggests that the organization can be strengthened substantially along these lines and that within the next few years the time may be right for favorable international consideration of efforts for a strengthened ICC.[8]

This clearly demonstrates that the U.S. position during the drafting of Article 65 was that the "appropriate international organization" for the conservation of cetaceans was the IWC, though the plural of the word "organization" leaves open the additional possibility for a successor organization such as an ICC to qualify as such. As another nongovernmental organization succinctly stated: "While the text implies there is more than one organization for the conservation of cetaceans, the reference is intended to apply to the International Whaling Commission or a successor organi-

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[5] U.S. General Accounting Office, "The Law of the Sea Conference—Status of the Issues, 1978," March 9, 1978.

[6] On April 19, 1978, a "Briefing Seminar on Potential Options in the Pending Renegotiation of the IWC Treaty" was conducted at the National Headquarters of The Humane Society of the United States in Washington, DC. It was cosponsored by The HSUS and the American Cetacean Society. The seminar was attended by representatives of more than a dozen different whale and conservation organizations, and the program included background briefing presentations by a distinguished panel of experts from the United States Department of State, Department of Commerce (NOAA and NMFS), Marine Mammal Commission, and Council on Environmental Quality. As a result of the day's deliberations, including the study of extensive background information documents provided each participant, a positive consensus was reached by NGO representatives in support of a statement of "Objectives for International Cetacean Conservation."

[7] The Honorable Elliot L. Richardson was Ambassador at Large, and Special Representative of the President to the Law of the Sea Conference, U.S. Mission to the United Nations.

[8] Letter by John Norton Moore, Walter L. Brown Professor of Law and Director of the Center for Ocean Law and Policy, University of Virginia to the Honorable Elliot L. Richardson, August 15, 1979.

zation."[9] This was of course in addition to the role of regional fisheries in cetacean by-catch issues.

In 1979 at the same time as a partial moratorium passed at the annual IWC meeting, and votes for a total moratorium continued to increase, the proposed U.S. text for a new strengthened marine mammal article was accepted as a working document in Committee II of the Law of the Sea Conference. Finally, on March 21, 1980, the revised Article 65 was successfully adopted. Crucial to any interpretation of the article are Ambassador Elliot Richardson's comments upon the occasion of its adoption:

> The text that was incorporated into the ICNT, Rev. 2 was the product of lengthy negotiations with approximately 25 States of all persuasions and geographical regions. It was supported (or not objected to) at an informal meeting of Committee II and in Plenary. In fact, several speakers represented States which were not part of the representative group. It was particularly gratifying that speakers included representatives of the major whaling nations as well as those States primarily interested in the protection and conservation of marine mammals.
>
> The new provision establishes a sound framework for the protection of whales and other marine mammals with critical emphasis on international cooperation. It exempts marine mammals from the optimum utilization requirements of other provisions of the ICNT Rev. 2 and permits States and competent international organizations to establish more stringent conservation regulations than otherwise mandated by ICNT, Rev. 2. Indeed, it explicitly permits States and international organizations to prohibit the taking of marine mammals. *The text also preserves and enhances the role of the International Whaling Commission (or a successor organization)* (emphasis added). It recognizes the role of regional organizations in the protection of marine mammals, which are often taken incidental to fishing operations. In sum, the article is a basic and sound framework with which States and international organizations may pursue the future protection of these wonderful creatures for generations to come."[10]

As Ambassador Richardson indicated, the revised Article 65 received ample support in the Committee from non-whaling[11] and whaling nations alike. In floor statements in Committee II on the Deliberations on the Article 65 Amendment (3/21/1980), Japan, a strongly pro-whaling nation, for example raised some concerns about Article 65, but made no mention of the possibility of an organization other than the IWC fulfilling the "appropriate international organization" role. The floor statements of Japan were as follows: "My delegation continues to consider that the concept of optimum utilization also applies to marine mammals. Consequently, there is no need to single out marine mammals in a special provision, or to focus on cetaceans in such a provision. As a practical matter, however, we can support this text on the understanding, with regard to the second sentence, that these activities do not necessarily need to be undertaken simultaneously with the first sentence, but on an individual (per species) basis when appropriate with consultations with other nations."[12]

Norway and Iceland, also pro-whaling nations, merely stated their support for Article 65 without any further comments.[13] Fast-forward 12 years to 1992 when Iceland withdrew from the IWC and tried to establish a new organization to manage whales. Iceland, Norway, Greenland, and the Faroe Islands formed a group called, NAMMCO, North Atlantic Marine Mammal Commission. The purpose of NAMMCO was to unseat the IWC as the organization with jurisdiction over whale conservation and management. For numerous reasons, NAMMCO has never been recognized as the organization managing whale stocks. By 2002 even Iceland realized that NAMMCO was not going to replace the IWC, and in that year, the country rejoined the IWC.

Neither Japan nor any other country has ever joined NAMMCO. However, 23 years after Japan agreed to the language and interpretation of Article 65 they announced a change in plans. Japan is now arguing that the "appropriate inter-

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[9] Sierra Club, International Report, Volume VIII, Number eight, April 28, 1980.

[10] Letter from Ambassador Elliot L. Richardson to Patricia Forkan, 4/29/1980.

[11] Netherlands, a country favor of conservation stated: "We acknowledge the great importance of marine mammal conservation, particularly through the IWC. This proposal is a contribution and we support it." Committee II, Deliberations on Article 65 amendment, Floor statements, 3/21/1980.

[12] Committee II, Deliberations on Article 65 amendment, Floor Statements, 3/21/1980.

[13] Ibid.

national organizations" clause of Article 65 means that it is possible to have several organizations managing cetaceans under UNCLOS. In a recent statement Japan claims that they are considering setting up a rival organization to the IWC or joining NAMMCO because they are displeased with the recently adopted conservation measures at the IWC.[14]

The United States, both then and now has not wavered in their support of the language or the interpretation of Article 65. The U.S.'s interpretation of Article 65 was clearly outlined in a statement prepared by the State Department in 1980 to be used as clarifying language on Article 65: "The appropriate/primary international organization referred to in Article 65 is the International Whaling Commission or a successor organization. Certain regional organizations, which are concerned with the regulation of fishing, may also appropriately play a role as cetaceans are occasionally taken as incidental catch to fishing activities. It is further understood that the minimum international standards for the protection of cetaceans apply throughout the migratory range of such cetaceans whether within or beyond the exclusive economic zone."[15]

The protection and conservation afforded to marine mammals in the exclusive economic zone[16] of coastal states by Article 65 was expanded by Article 120 of UNCLOS to apply to the high seas as well. This expansion of coverage to the high seas also lends support to the interpretation that the IWC (or its successor) is the "appropriate international organization" for the conservation of cetaceans.

U.S. Position on Marine Mammal Conservation

Since the wording of Article 65 of UNCLOS originated with a United States proposal, an accurate interpretation of this provision necessitates an understanding of the U.S. position towards marine mammal conservation in general and whaling in particular.

Setting the scene for the U.S. position on marine mammals was the passage in 1972 of the far-reaching Marine Mammal Protection Act (MMPA). The MMPA was amended in 1977 to forbid commercial whaling within the U.S.'s 200-mile zone. This, in effect, recognized that coastal states have the right to take action more restrictive than that agreed upon in the international body, but not less restrictive action which would weaken internationally accepted conservation measures. The MMPA also required the renegotiation of relevant treaties to reflect its standards. The MMPA was therefore an important impetus for the U.S. position within UNCLOS that coastal states could be more protective of whales than the IWC, but not less.

The U.S. Government began in the early 1990s to oppose more forcefully all commercial whaling,[17] and in 1993 both Houses of Congress unanimously adopted a resolution, H. Con. Res. 34 (103rd Congress), calling for the U.S. to oppose "any resumption of commercial whaling."

The U.S. has also relied upon the threat of unilateral sanctions to induce whaling nations to give greater consideration to whale conservation.[18] It has done this mainly through the 1971 Pelly Amendment[19] to the 1954 Fishermen's Protective Act, which allows fishery product imports to be prohibited from nations acting to diminish the effectiveness of international fishery (including whaling) ageements. Presidential authority under the Pelly Amendment was expanded to impose sanctions against non-fishery imports from nations acting contrary to IWC guidelines in the 102nd Congress.[20] In addition, the 1979 Packwood-Magnuson Amendment[21] to the Fishery Conservation and Management Act of 1976 allows the U.S. to reduce or suspend fishing privileges in U.S. waters for nations acting contrary to IWC guidelines.[22] Although Pelly amendment sanctions have never been imposed for whaling, the U.S. has used its certification process to obtain some concessions from offending nations to improve whale conservation and has influenced whaling nations

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[14] Japan Plans to Create Rival Organization of International Whaling Commission (IWC) From Atuma.com, Japan, October 10, 2003.

[15] Drafted by George Taft (State Department) et al. at the last session of the Law of the Sea Conference, 8/22/1980.

[16] The exclusive economic zone is a 200-mile zone in which coastal states have sovereign rights over resources and other activities related to economic exploration and exploitation.

[17] CRS Report 97–55, "Norwegian Commercial Whaling: Issues for Congress," Carl Elk, December 31, 1996.

[18] CRS Report 97–588, "Whale Conservation and Whaling," Eugene H. Buck.

[19] 22 U.S.C. 1978.

[20] Section 201 of P.L. 102–582.

[21] 16 U.S.C. 1821.

[22] The threat of Packwood-Magnuson sanctions is no longer influential, since no foreign whaling nation currently fishes in U.S. waters.

to join the IWC.[23] Norway, Japan, and Canada have all been certified under the Pelly amendment in the past for undermining the IWC.

The strong position of the U.S. that the IWC is the "appropriate international organization" under Article 65 of UNCLOS was reinforced in 1996, when Canada permitted the harvesting by Inuit of two bowhead whales. The U.S supports aboriginal whaling when it is managed through the IWC, the global body charged with responsibility for the international conservation and management of whale stocks and the regulation of whaling.[24] Although Canada was not a member of the IWC at the time, the U.S. still certified Canada under the Pelly amendment, taking the view that the bowhead whale harvest had undermined the effectiveness of the IWC. In a message to Congress, President Clinton stated that, under international law, Canada was obligated to work through the IWC with regard to any whaling activities.[25]

As recently as 2004, members of the Senate reaffirmed that at the Annual Meeting of the IWC the U.S. should "remain firmly opposed to commercial whaling."[26]

International Reinforcement of the IWC's Role in Relation to Article 65

Apart from the very clear position of the United States both during the negotiation process and in subsequent years that Article 65 of UNCLOS is to be interpreted so that the IWC (or an even stronger conservation-oriented successor organization such as International Cetacean Commission) is understood to be the "appropriate international organization," there is also international support for this interpretation.[27]

International organizations recognize IWC's primacy for the conservation of whales. Most notably, Chapter 17 of Agenda 21, the environmental action plan endorsed by the 1992 United Nations Conference on Environment and Development adopts Article 65 of UNCLOS, and provides that states recognize:

> (a) The responsibility of the International Whaling Commission for the conservation and management of whale stocks and the regulation of whaling pursuant to the 1946 International Convention for the Regulation of Whaling;
>
> (b) The work of the International Whaling Commission Scientific Committee in carrying out studies of large whales in particular, as well as of other cetaceans.[28]

This position was bolstered by language in an IWC Resolution on the interaction of fish stocks and whales that was passed by consensus. The parties acknowledged at the outset of the Resolution that "the IWC is the universally recognized international organization with competence for the management of whale stocks."[29]

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has always recognized IWC primacy over whale management and conservation, In 1986, in deference to the IWC's commercial whaling moratorium, all great whales were placed on Appendix 1 (meaning whales and whale products

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[23] Supra n. 17.

[24] NOAA Press Release, 12/18/1996, "Commerce Department Certifies Canada Under Pelly Amendment for Whaling," at www.publicaffairs.noaa.gov/pr96/dec96/noaa96-r194.html.

[25] President William J. Clinton, Message to Congress on Canadian Whaling Activities, 2/10/1997, 33 Weekly Comp. Pres. Doc. 175 (1997).

[26] S. Con. Res. 55 (108th Congress), 6/12/2003.

[27] There even appears to be support for this interpretation from pro-whaling nations. One commentator notes that Iceland, a pro-whaling nation, interpreted Article 65 of UNCLOS to mean that the IWC is the appropriate international organization with jurisdiction over whale management. "In 1991, Iceland, a party to the 1982 Law of the Sea Convention, was contemplating withdrawing from the IWC. It appears that Iceland took the view that Article 65 required it to adhere to IWC quota regulations irrespective of its membership in the IWC." Ted L. McDorman, "Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention," Ocean Development & International Law, 29: p. 183–184 (1998).

A commentator from Norway, also a pro-whaling nation, has stated: "However poorly the IWC may be seen to function, as measured against what it was intended to be, or could have been, it is a fact that by the large majority of member states it is seen as the only legitimate international body for dealing with the whaling issue. These nations include the U.S., all the main EU (European Union) states, most major western countries, including most Nordic countries." Steinar Andresen, The Fridtjof Nansen Institute, Oslo Norway, "NAMMCO, IWC and the Nordic Countries" from Whaling in the North Atlantic—Economic and Political Perspectives, Ed. Gudrun Petursdottir, University of Iceland, 1997. Proceedings of a conference held in Reykjavik on March 1, 1997, organized by the Fisheries Research Institute and the High North Alliance, at www.highnorth.no/Library/Publications/Iceland/na-iw-an.htm.

[28] Agenda 21, para. 17.61 at www.on.org/esa/sustdev/documents/agenda2l/english/agenda21 chapter17.htm.

[29] IWC, Proposed Resolution on Interactions Between Whales and Fish Stocks, Resolution 2001–9 (2001).

cannot be traded internationally). Moreover, CITES has adopted several resolutions that relate to whales and the IWC that were consolidated in 2000 in Resolution 11.4 on "Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission." This resolution recognizes the primacy of the IWC over whale management and conservation.

The Evolution of the IWC

Finally, it needs to be said that the evolution of the IWC itself into a more conservation and welfare oriented organization reinforces the interpretation that the IWC is the appropriate international organization as envisioned by the negotiators of Article 65 of UNCLOS. Some commentators have argued that Article 65 reflects a trend in the protection of cetaceans beyond economic value, to include considerations of a moral and ethical nature.[30]

Since the IWC implemented a commercial whaling moratorium in 1986, it has placed greater emphasis on conservation of whales than regulating their exploitation. For example, it has designated established sanctuaries in the Southern and Indian Oceans. Today, a majority of IWC members are more concerned with protecting and conserving whales (and small cetaceans) than promoting and defending an industry that previously decimated whale stocks and proved impossible to regulate.[31] The IWC has also taken on a welfare mandate, advancing "humane killing" and discussing associated welfare issues in various committees.

In addition, the IWC has adopted numerous resolutions whose purpose is to improve the welfare of whales, and at the 2003 meeting of the World Parks Congress it was agreed that marine species require "protection" and that their habitat needs "conservation" through domestic and high seas protected area systems.[32]

The IWC adopted the Berlin Initiative which strengthened the IWC's conservation agenda by forming an official committee to deal with such issues as by-catch and pollution. The initiative established a conservation committee to draft a "Conservation Agenda" as well as the means to implement it. This has helped to bring the IWC into the 21st century. Unfortunately the three remaining whaling nations have yet to adhere to either a moratorium or accept a more conservation-oriented IWC.

An International Cetacean Commission, as envisioned by the U.S. at the time of the drafting of Article 65 in the late 1970s never materialized. Nonetheless, in accordance with its objective of "providing for the proper conservation of whale stocks," the IWC has become increasingly focused on the conservation of cetaceans. A clear majority of IWC members now oppose the commercial exploitation of whales and support whale conservation and protection. Since Article 65 reflects a worldwide interest in and the belief that marine mammals in general and cetaceans in particular are unique, and must be protected on a global basis, the only accurate interpretation is that the IWC is the "appropriate international organization" to conserve, manage and study whales. A few whaling nations who for whatever misguided belief that they must continue to "utilize" the resource cannot now alter or rewrite the history of Article 65 simply because they do not wish to honor the conservation measures adopted at the IWC. The commercial whaling moratorium adopted at the IWC in 1982, and still in place today, reflects the will of nations and civil society.[33] We must not allow the purpose and meaning of Article 65 to be distorted and become the excuse or justification for whaling nations to ignore their conservation obligations at IWC and form a new organization that endorses the resumption of commercial whaling.

As someone who spent 5 years working on Article 65 and over 30 years at the IWC, I ask that the U.S. Senate act by supporting accession to the Convention on the Law of the Sea. I thank you on behalf of our more than 10 million members and constituents for the opportunity to speak on this very important issue and to clarify on the record the correct meaning of Article 65.

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[30] Maffei, M.C., 1992, The Protection of Endangered Species of Animals in the Mediterranean Sea in The Law of the Sea: New Worlds, New Discoveries, Proceedings of the 26th Annual Conference of the Law of the Sea Institute, Edited by Miles & Treves, Law of the Sea Institute, Honolulu.

[31] Kitty Block and Sue Fisher, "Legal Precedents for Whale Protection."

[32] World Parks Congress, 2003, The Durban Accord and Recommendation 5.22 Building a Global System of Marine and Coastal Protected Area Networks and Recommendation 5.23 Protecting Marine Biodiversity and Ecosystem Processes Through Marine Protected Areas Beyond National Jurisdictions, Vth IUCN World Parks Congress, World Conservation Union and World Commission on Protected Areas, Durban, South Africa.

[33] In Stockholm in 1972, delegates to the United Nations Conference on the Human Environment called for a moratorium on commercial whaling. The resolution proposed by the United States called for a ten-year moratorium on commercial whaling. It passed by fifty-three votes to zero (Japan, Brazil and South Africa abstained).

LETTERS SUBMITTED FOR THE RECORD BY FRANK GAFFNEY FROM THE COALITION TO PRESERVE AMERICAN SOVEREIGNTY TO EIGHT SENATE COMMITTEES

WASHINGTON, DC,
September 24, 2007.

Hon. CARL LEVIN,
Chairman, Senate Committee on Armed Services,
Russell Senate Office Building, Washington, DC.

Hon. JOHN MCCAIN,
Ranking Minority Member, Senate Committee on Armed Services,
Russell Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN AND RANKING MEMBER MCCAIN: We understand that the Senate Foreign Relations Committee will convene the first of several hearings this week in connection with possible U.S. ratification of the United Nations Law of the Sea Treaty (LOST). It is our view that this accord is seriously defective in a number of respects—including several with adverse implications for matters within your committee's jurisdiction.

Accordingly, the Coalition to Preserve American Sovereignty formally requests that the Armed Services Committee promptly conduct its own hearings on LOST, so the individuals listed below may be afforded an opportunity to testify in connection with, among other things, the following negative implications of the Treaty for the United States military and national security.

First, ratification of LOST would commit the United States to submit to mandatory dispute resolution with respect—among other things—to its compliance with a number of obligations that would, on their face, interfere with vital U.S. military and intelligence operations. These include: Article 88 which "reserves" the oceans for peaceful purposes; Article 301 which dictates that states parties must refrain from "the threat or use of force against the territorial integrity or political independence of any state"; Article 19 which proscribes the use of territorial waters to collect intelligence and conduct other operations; Article 20, which obliges submarines to travel on the surface and show their flag in territorial waters; and Article 110 which enumerates the circumstances under which ships can be intercepted at sea—piracy, slavery, narcotics trafficking, and unauthorized broadcasting.

Senior military and intelligence officials are on record as stating that these provisions will not impede their operations on, under, or above the world's oceans. These assurances appear to rely, however, on interpretations of LOST that may prove unwarranted, or at least unsustainable over time, given the complexion of the various panels that would adjudicate disputes. The stakes are sufficiently high that we can afford no misapprehensions on such points.

For instance, LOST proponents argue that the United States will choose available arbitration mechanisms to avoid legal decisions from the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS). Such arbitration panels are no less perilous for U.S. interests, however, since the decisive, "swing" arbiters would be appointed by generally unfriendly U.N.-affiliated bureaucrats. The arbitration panels can also be relied upon to look to rulings by the ICJ or ITLOS to inform their own decisions.

Furthermore, while there is a LOST provision exempting "military activity" from such dispute resolution mechanisms, the Treaty makes no attempt to define "military activity." This virtually guarantees that such matters will be litigated—in all likelihood to our detriment—before one or another of LOST's arbitration mechanisms. And the rulings of such arbitrators cannot be appealed.

Second, even if the military's own activities were able to be exempted from the Treaty's provisions, it is far from clear that exemption would also apply to all of the companies that comprise the Navy and Coast Guard's civilian technology and logistical supply chains. These supply chains would certainly not be spared exposure to dispute resolution demanded by other treaty parties or activist groups alleging violations of the LOST-imposed obligation to protect the marine environment. This sort of "Lawfare" has become a highly effective, asymmetric weapon in the arsenal of America's far less powerful enemies and cannot be safely discounted. Neither can we credit the proposition offered by some LOST supporters that the United States will simply abrogate the Treaty if it proves to be as deeply problematic for our maritime forces as its critics predict.

Third, the Law of the Sea Treaty contains provisions that risk putting sensitive, militarily useful information and technology in the hands of America's adversaries and its companies' commercial competitors. LOST's proponents would have you believe that there is no problem with technology transfer since the Treaty's relevant mandates were eliminated by a 1994 agreement relating to the implementation of

LOST's Part XI. Unfortunately, this is another area that cries out for close examination by the Senate and the Nation.

For one thing, it is unclear to what extent the Treaty could be and was amended by the '94 Agreement. For another, a number of provisions obligating the transfer of potentially sensitive technology and data were not addressed in the Agreement. For example, LOST arbitration procedures specify that parties to a dispute would be required to provide an arbitral tribunal with "all relevant documents, facilities and information"—a potential avenue for compelling such transfers.

Finally, the ratification of LOST—a treaty that seeks to establish a legal regime for the world's oceans—will make it difficult for the United States to argue against binding arrangements for other "international commons," including areas critical to American military operations such as outer space. President Reagan's Ambassador to the U.N., the late Jeane Kirkpatrick, warned the Senate in 2004 not to consent to ratification of LOST, in part on the grounds that American interests in outer space could be adversely affected by the LOST precedent.

The Armed Services Committee last held a hearing about the Law of the Sea Treaty in 2004. Since then: New members have joined the Committee; the adverse implications of surrender of U.S. sovereignty to supranational organizations with mandatory dispute resolution authority (i.e., the World Trade Organization) have become clearer; the phenomenon of "Lawfare" is more widely in evidence; the dangers associated with militarily relevant technologies migrating into the hands of our potential or actual adversaries are more evident; and the perils for our vital security and economic interests should we cede control of outer space have grown dramatically.

For these, among other reasons, the Coalition to Preserve American Sovereignty respectfully suggests that, given its jurisdiction, the Armed Services Committee has an obligation to convene further hearings on the Law of the Sea Treaty. We formally request that you and your colleagues afford an opportunity to hear from a number of the following individuals whose expertise in a wide variety of fields should be available to the full Senate before it takes up an accord we are convinced will be harmful to, not supportive of, our national security interests:

Edwin Meese, Former Attorney General; William Middendorf, former Secretary of the Navy; John F. Lehman, Jr., former Secretary of the Navy; Frank J. Gaffney, Jr., former Assistant Secretary of Defense (Acting); Peter Leitner, Author, "Reforming the Law of the Sea Treaty"; Jeremy Rabkin, George Mason University; Lawrence Kogan, Institute for Trade, Standards and Sustainable Development; Cliff Kincaid, America's Survival; John Fonte, Hudson Institute; David Keene, American Conservative Union; Phyllis Schlafly, Eagle Forum; Fred Smith, Competitive Enterprise Institute; John O'Sullivan, Hudson Institute; Doug Bandow, American Conservative Defense Alliance; Baker Spring, Heritage Foundation; Thomas P. Kilgannon, Freedom Alliance; Kevin Kearns, U.S. Business & Industry Council.

Sincerely,

FRANK J. GAFFNEY, Jr.

WASHINGTON, DC,
September 24, 2007.

Hon. DANIEL K. INOUYE,
Chairman, Senate Committee on Commerce, Science and Transportation, Dirksen Senate Office Building, Washington, DC.

Hon. TED STEVENS,
Ranking Minority Member, Senate Committee on Commerce, Science and Transportation, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN AND RANKING MEMBER STEVENS: We understand that the Senate Foreign Relations Committee will convene the first of several hearings this week in connection with possible U.S. ratification of the United Nations Law of the Sea Treaty (LOST). It is our view that this accord is seriously defective in a number of respects—including several with adverse implications for matters within your committee's jurisdiction.

Accordingly, the Coalition to Preserve American Sovereignty formally requests that the Commerce, Science and Transportation Committee promptly conduct its own hearings on LOST so that the individuals listed below may be afforded an opportunity to testify in connection with, among other things, the Treaty's negative implications for the Coast Guard as well as oceans-related and even interstate commerce.

First, ratification of LOST would commit the United States to submit to mandatory dispute resolution with respect—among other things—to its compliance with a

number of obligations that would, on their face, interfere with vital Coast Guard operations. These provisions include Article 88 which "reserves" the oceans for peaceful purposes and Article 301 which dictates that states parties must refrain from "the threat or use of force against the territorial integrity or political independence of any state." Given the greatly expanded role the Coast Guard has come to play in the War on Terror, it is predictable that those who have adopted "Lawfare"—the use of treaties and other international legal mechanisms as a form of asymmetric warfare against the United States—will seek to use LOST to interfere with the Coast Guard's missions.

The same will probably be true of Article 110, which enumerates the circumstances under which ships can be intercepted at sea. These are: Piracy, slavery, narcotics-trafficking and unauthorized broadcasting. Counterterrorism and preventing the proliferation of weapons of mass destruction and their delivery systems are not legal grounds for such intercepts. Should the U.S. become a party to the Law of the Sea Treaty, opponents of the vital Proliferation Security Initiative (PSI) will almost certainly seek to haul the Coast Guard before one or another of LOST's dispute resolution mechanisms, knowing that the membership of each of these arbitral panels is stacked against the United States and their rulings are binding and cannot be appealed.

Second, ratification of LOST would provide a backdoor through which the greenhouse gas emissions-limiting Kyoto Protocol could be imposed on the United States, without the Protocol having been ratified by the Senate. LOST Article 194 requires state parties to take all necessary measures to "prevent, reduce, and control pollution of the marine environment from any source." These provisions would enable LOST's mandatory dispute resolution mechanisms to become forums for legal action against American companies and government entities for alleged adverse effects on the marine environment through the greenhouse gas emissions of ocean-going vessels, space-launch vehicles and even land-based activities, irrespective of the fact that the U.S. is not a party to the Kyoto Protocol.

Third, LOST tribunals have jurisdiction over any dispute dealing with an international agreement related to the purposes of LOST, including protection of the marine environment. LOST could therefore also serve as a backdoor to the imposition of numerous other treaties that the United States has not ratified, thereby imposing a costly and unpredictable regulatory regime on American businesses and government entities that engage in marine transport.

Fourth, the Law of the Sea Treaty recognizes the competence of several international bodies that develop standards used by businesses and in their regulation. The European Union has long understood the competitive advantage associated with determining and imposing such standards. It has dominated this field of activity and repeatedly sought ways in which to compel the United States and its entities to conform to European standards. Should the U.S. ratify LOST, the EU will be afforded a formidable mechanism for this purpose insofar as such standards can be expected to be employed to determine compliance with the Treaty and in the adjudication of disputes.

Fifth, LOST itself, as well as regulations already issued by LOST agencies, clearly apply the "precautionary principle." This legal tenet holds that a company or country must be able to assure that a proposed action will not cause any harm before it can proceed. As a practical matter, this means that a given commercial or sovereign activity can be banned without any scientific proof of harm or cost-benefit analysis—a standard that would have a devastating effect on American business innovation and entrepreneurial activity.

Sixth, the Law of the Sea Treaty contains provisions that risk putting sensitive, proprietary and—in some cases, at least—militarily useful information and technology in the hands of U.S. companies' competitors and our Nation's adversaries. LOST's proponents would have you believe that there is no problem with technology transfer since the Treaty's relevant mandates were eliminated by a 1994 agreement relating to the implementation of LOST's Part XI. Unfortunately, this is another area that cries out for close examination by the Senate and the Nation.

For one thing, it is unclear to what extent the Treaty could be and was amended by the '94 Agreement. For another, a number of provisions obligating the transfer of potentially sensitive technology and data were not addressed in the Agreement. For example, LOST arbitration procedures specify that parties to a dispute would be required to provide an arbitral tribunal with "all relevant documents, facilities, and information"—a potential avenue for compelling such transfers.

Seventh, U.S. ratification of LOST—a treaty that purports to establish a legal regime for the world's oceans—will inevitably give rise to precedential arrangements for governing other "international commons," including the Internet and outer space. Given the enormous stakes for U.S. commerce and security associated with

our dominant position vis-a-vis not only the world's oceans but the Internet and outer space, initiatives like LOST that could have the effect of dramatically altering the status quo should be approached with the utmost care.

For these, among other reasons, the Coalition to Preserve American Sovereignty respectfully suggests that, given its jurisdiction, the Committee on Commerce, Science and Transportation has an obligation to convene its own hearings on the Law of the Sea Treaty. We formally request that you and your colleagues afford an opportunity to hear from a number of the following individuals whose expertise in a wide variety of fields should be available to the full Senate before it takes up an accord we are convinced will be harmful to, not supportive of, our Nation's economic as well as national security interests:

Edwin Meese, Heritage Foundation; Fred Smith, Competitive Enterprise Institute; Peter Leitner, Author, "Reforming the Law of the Sea Treaty"; Lawrence Kogan, Institute for Trade, Standards and Sustainable Development; Kevin Kearns, U.S. Business & Industry Council; John Fonte, Hudson Institute; Jeremy Rabkin, Cornell University; John O'Sullivan, Hudson Institute; William Middendorf, Defense Forum Foundation; Frank J. Gaffney, Jr., Center for Security Policy; Doug Bandow, American Conservative Defense Alliance; Baker Spring, Heritage Foundation; David Keene, American Conservative Union.

Sincerely,

FRANK J. GAFFNEY, Jr.

WASHINGTON, DC,
September 24, 2007.

Hon. JEFF BINGAMAN,
Chairman, Senate Committee on Energy and Natural Resources, Dirksen Senate Office Building, Washington, DC.

Hon. PETE V. DOMENICI,
Ranking Minority Member, Senate Committee on Energy and Natural Resources, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN AND RANKING MEMBER DOMENICI: We understand that the Senate Foreign Relations Committee will convene the first of several hearings this week in connection with possible U.S. ratification of the United Nations Law of the Sea Treaty (LOST). It is our view that this accord is seriously defective in a number of respects—including several with adverse implications for matters within your committee's jurisdiction.

Accordingly, the Coalition to Preserve American Sovereignty formally requests that the Energy and Natural Resources Committee promptly conduct its own hearings on LOST, so the individuals listed below may be afforded an opportunity to testify in connection with, among other things, the following negative implications of the Treaty for the United States' energy security and related technologies, policies, and programs.

First, ratification of LOST would provide a backdoor through which the greenhouse gas emissions-limiting Kyoto Protocol could be imposed on the United States, without the Protocol having been ratified by the Senate. LOST Article 194 requires state parties to take all necessary measures to "prevent, reduce, and control pollution of the marine environment from any source," including those from land-based sources.

The Treaty's Article 212 goes on to require states parties to "adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from or through the atmosphere." This obligation can be used to compel the adoption of far-reaching implementing legislation—legislation whose impact and costs cannot be assessed with confidence at this time, but are likely to be severe.

These provisions would, moreover, enable LOST's mandatory dispute resolution mechanisms to become forums for legal action against American companies, government entities and even the military for alleged adverse effects on the marine environment through their greenhouse gas emissions, even absent Senate ratification of the Kyoto Protocol.

Second, LOST tribunals have jurisdiction over any dispute dealing with an international agreement related to the purposes of LOST, including protection of the marine environment. LOST could therefore also serve as a vehicle for the imposition of numerous other environmental treaties that the United States has also not ratified. The effect could be to impose a costly and unpredictable environmental regime on American mining, oil and other businesses and on official entities—possibly wholly outside the ambit of our constitutional, representative form of government.

Third, regulations already issued by LOST bodies clearly apply the "precautionary principle"—a legal tenet according to which a company or country must assure that a proposed action will not cause any harm before it can proceed. As a practical matter, this means that a given activity can be banned without any scientific proof of harm or cost-benefit analysis. Through the application of this Luddite principle, enforceable through LOST's dispute resolution mechanisms, the Treaty would involve far more draconian and costly environmental requirements than those currently enacted in the Clean Air Act or Clean Water Act.

Fourth, LOST enables one of its institutions, the International Seabed Authority (ISA), to extract payments from countries seeking to exploit resources on portions of their own continental shelves extending beyond 200 miles from their coastlines. Additionally, LOST would require American companies to make payments to the ISA for the right to exploit resources in "the Area" (the portion of the ocean floor and its subsoil that lies beyond the jurisdiction of any one country)—a right already enjoyed by American companies without requirement of such payment.

Fifth, the Law of the Sea Treaty contains provisions that risk putting in the hands of America's adversaries and its companies' competitors sensitive, proprietary technology related to the exploration and recovery of deep-sea minerals and energy resources. At least in some cases, such data and hardware has significant military applications.

LOST's advocates would have you believe that there is no problem with technology transfer since the Treaty's relevant mandates were eliminated by a 1994 Agreement relating to the implementation of LOST's Part XI. Unfortunately, this is another area that cries out for close examination by the Senate and the Nation.

For one thing, it is unclear to what extent the Treaty could be and was amended by the '94 accord. For another, a number of provisions obligating the transfer of potentially sensitive technology and data were not addressed in the latter agreement. For example, LOST arbitration procedures specify that parties to a dispute would be required to provide an arbitral tribunal with "all relevant documents, facilities and information"—a potential avenue for compelling such transfers.

Finally, it should be of concern to, among others, your committee that LOST affords foreign entities an opportunity to use its arbitral panels to hinder, and possibly hobble, America's Armed Forces by determining that the latters' activities are harmful to the marine environment in ways other than greenhouse-gas emission. For instance, the transport of naval, transportation and jet fuels vital to our military operations worldwide could be subjected to this sort of "Lawfare"—the use of treaties and tribunals as an increasingly effective, asymmetric weapon in the arsenal of America's far less powerful enemies.

Although LOST exempts "military activities" from the Treaty's dispute resolution mechanisms, it does not define such activities. This ambiguity leaves the question of whether a given activity is "military" or "environmental" in nature subject to the determination of the arbitral panels themselves. Given the composition of those panels—which will allow them to be dominated by individuals who may be at best unsympathetic to American interests—the outcome will probably be not to our liking.

For these, among other reasons, the Coalition to Preserve American Sovereignty respectfully suggests that, given its jurisdiction, the Committee on Energy and Natural Resources has an obligation to convene its own hearings on the Law of the Sea Treaty. We formally request that you and your colleagues afford an opportunity to hear from a number of the following individuals whose expertise in a wide variety of fields should be available to the full Senate before it takes up an accord we are convinced will be harmful to, not supportive of, our national security interests:

Edwin Meese, former Attorney General; John F. Lehman, Jr., former Secretary of the Navy; William Middendorf, former Secretary of the Navy; Fred Smith, Competitive Enterprise Institute; Doug Bandow, American Conservative Defense Alliance; Peter Lehner, Author, "Reforming the Law of the Sea Treaty"; Kevin Kearns, U.S. Business & Industry Council; ADM James L. Lyons, USN (Ret.); VADM Robert M. Monroe, USN (Ret.); Lawrence Kogan, Institute for Trade, Standards and Sustainable Development; Jeremy Rabkin, American Enterprise Institute and George Mason University; Frank J. Gaffney, Jr., former Assistant Secretary of Defense (Acting); Cliff Kincaid, America's Survival; John Fonte, Hudson Institute; David Keene, American Conservative Union; Phyllis Schlafly, Eagle Forum; John O'Sullivan, Hudson Institute; Baker Spring, Heritage Foundation; Thomas P. Kilgannon, Freedom Alliance.

Sincerely,

FRANK J. GAFFNEY, Jr.

WASHINGTON, DC,
September 24, 2007.

Hon. BARBARA BOXER,
Chairwoman, Senate Committee on Environment and Public Works, Dirksen Senate Office Building, Washington, DC.

Hon. JAMES M. INHOFE,
Ranking Minority Member, Senate Committee on Environment and Public Works, Dirksen Senate Office Building, Washington, DC.

DEAR MADAME CHAIRWOMAN AND RANKING MEMBER INHOFE: We understand that the Senate Foreign Relations Committee will convene the first of several hearings this week in connection with possible U.S. ratification of the United Nations Law of the Sea Treaty (LOST). It is our view that this accord is seriously defective in a number of respects—including several with adverse implications for matters within your committee's jurisdiction.

Accordingly, the Coalition to Preserve American Sovereignty formally requests that the Environment and Public Works Committee promptly conduct its own hearings on LOST, so the individuals listed below may be afforded an opportunity to testify in connection with, among other things, the Treaty's negative implications for your committee's legislative responsibilities for matters concerning air and water pollution, ocean dumping, environmental policy, and nonmilitary environmental regulation and control of nuclear energy

Among the areas of concern of direct relevance to your committee's jurisdiction are the following:

First, ratification of LOST would provide a backdoor through which the greenhouse gas emissions-limiting Kyoto Protocol could be imposed on the United States, without the Protocol having been ratified by the Senate. LOST Article 194 requires state parties to take all necessary measures to "prevent, reduce, and control pollution of the marine environment from any source," including those from land-based sources.

The Treaty's Article 212 goes on to require states parties to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere." This obligation can be used to compel the adoption of far-reaching implementing legislation—legislation whose impact and costs cannot be assessed with confidence at this time, but are likely to be severe.

These provisions would, moreover, enable LOST's mandatory dispute resolution mechanisms to become forums for legal action against American companies, government entities and even the military for alleged adverse effects on the marine environment through their greenhouse gas emissions, even absent Senate ratification of the Kyoto Protocol.

Second, LOST tribunals have jurisdiction over any dispute dealing with an international agreement related to the purposes of LOST, including protection of the marine environment. LOST could therefore also serve as a vehicle for the imposition of numerous other environmental treaties that the United States has also not ratified. The effect could be to impose a costly and unpredictable environmental regime on American businesses and official entities—possibly wholly outside the ambit of our constitutional, representative form of government.

Third, regulations already issued by LOST bodies clearly apply the "precautionary principle"—a legal tenet according to which a company or country must guarantee that a proposed action will not cause any environmental harm before it can proceed. As a practical matter, this means that a given business activity can be banned without any scientific proof of harm or cost-benefit analysis. Through the application of this Luddite principle, enforceable through LOST's dispute resolution mechanisms, the Treaty would involve far more draconian and costly environmental requirements than those currently enacted in the Clean Air Act or Clean Water Act.

Finally, it should be of concern to, among others, your committee that LOST affords foreign entities an opportunity to use international tribunals to hinder, and possibly hobble, America's Armed Forces by determining that such activities are harmful to the marine environment in ways other than greenhouse gas emission. Although LOST exempts "military activities" from the Treaty's dispute resolution mechanisms, it does not define such activities. This arrangement leaves the question of whether a given activity is "military" or "environmental" in nature subject to the determination of the arbitral panels themselves. Given the composition of those panels—which will allow them to be dominated by individuals who may be at best unsympathetic to American interests—the outcome will probably be not to our liking.

The Environment and Public Works Committee last held a hearing about the Law of the Sea Treaty in 2004. Since then: New members have joined the Committee; the adverse implications of surrender of U.S. sovereignty to a supranational organi-

zations with mandatory dispute resolution authority (i.e., the World Trade Organization) have become clearer; and the deleterious impact of the "precautionary principle" on innovation and progress in Europe is more evident.

For these, among other reasons, the Coalition to Preserve American Sovereignty respectfully suggests that, given its jurisdiction, the Environment and Public Works Committee has an obligation to convene further hearings on the Law of the Sea Treaty. We formally request that you and your colleagues afford an opportunity to hear from a number of the following individuals whose expertise in a wide variety of fields should be available to the full Senate before it takes up an accord we are convinced will be harmful to, not supportive of, our Nation:

Edwin Meese, former Attorney General; William Middendorf, former Secretary of the Navy; John F. Lehman, Jr., former Secretary of the Navy; Frank J. Gaffney, Jr., former Assistant Secretary of Defense (Acting); David Keene, American Conservative Union; Phyllis Schlafly, Eagle Forum; Fred Smith, Competitive Enterprise Institute; Lawrence Kogan, Institute for Trade, Standards and Sustainable Development; John O'Sullivan, Hudson Institute; Doug Bandow, American Conservative Defense Alliance; Baker Spring, Heritage Foundation; Thomas P. Kilgannon, Freedom Alliance; Cliff Kincaid, America's Survival; Peter Leitner, Author, "Reforming the Law of the Sea Treaty"; Kevin Kearns, U.S. Business & Industry Council; John Fonte, Hudson Institute; Jeremy Rabkin, George Mason University.

Sincerely,

FRANK J. GAFFNEY, Jr.

WASHINGTON, DC,
September 24, 2007.

Hon. MAX BAUCUS,
Chairman, Senate Committee on Finance,
Dirksen Senate Office Building, Washington, DC.

Hon. CHARLES E. GRASSLEY,
Ranking Minority Member, Senate Committee on Finance,
Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN AND RANKING MEMBER GRASSLEY: We understand that the Senate Foreign Relations Committee will convene the first of several hearings this week in connection with possible U.S. ratification of the United Nations Law of the Sea Treaty (LOST). It is our view that this accord is seriously defective in a number of respects—including several with adverse implications for matters within your committee's jurisdiction.

Accordingly, the Coalition to Preserve American Sovereignty formally requests that the Finance Committee promptly conduct its own hearings on LOST, so the individuals listed below may be afforded an opportunity to testify in connection with, among other things, the following negative implications of the treaty for American tax policy and U.S. economic interests more generally.

First, ratification of LOST would allow the American taxpayer to be subjected for the first time to levies by an international organization—taxation without representation. This would take place through a LOST body known as the International Seabed Authority (ISA), designed to regulate economic activities in the portion of the ocean floor and its subsoil that lies beyond the jurisdiction or sovereignty of any one country (dubbed "the Area").

A throwback to the Soviet/non-aligned nations' socialist-redistributionist agenda known as the New International Economic Order, LOST tasks the ISA with providing for the "equitable sharing" of economic benefits derived from the Area. Under the Treaty, the revenue to be equitably shared—as well as that for underwriting a portion of the costs of the ISA itself—is to be obtained from country payments to the organization. These will be made in the form of various fees, in addition to profit-sharing or royalties arrangements. Additionally, the ISA also obtains payments from countries seeking to exploit resources on the portions of their own continental shelves extending beyond 200 miles from the coastline.

Were the United States to become a party to the Law of the Sea Treaty, it would thus subject its citizens at least to what amounts to indirect taxation through the removal of profits from the American business revenue stream for a governmental purpose—namely, the payment of ISA's own expenses and the distribution of revenue to developing countries. In some cases, however, taxpayers may actually have to pick up the tab in the event the U.S. Treasury is assessed fees owed by its corporations and unable to obtain reimbursement from the companies in question.

Proponents of LOST try to minimize the significance of this departure from past practice by arguing that such royalties would not go to the United Nations. Instead,

they would be redistributed to developing countries in accordance with a formula to which the United States would have to agree.

The point, however, is not who would benefit from what amount to the international taxes imposed by LOST. Whether the revenue flows into international organizations, whose practices are notoriously nontransparent and corrupt (e.g., the Oil for Food Program), or to underdeveloped nations too often ruled by kleptocracies, both results are undesirable. Either way, Americans whose resources are diverted to one or both of these beneficiaries would be taxed without consent.

Second, the precedent the United States would be setting by agreeing to become party to a treaty that institutionalizes international taxes is extremely worrying. There is already intense pressure in U.N. circles to design such new revenue streams, designed to make supranational agencies more independent of member nations and their support. This ambition will be greatly stoked by American accession to one such arrangement, resulting inevitably in international organizations that are less transparent, less accountable, and still more hostile to the United States and its interests.

Finally, U.S. ratification of LOST will likely also feed the appetite of champions of supranational government determined to establish similar binding arrangements—and international taxation schemes—with respect to other so-called "international commons." These would likely include the Internet and outer space. In light of the enormous stakes for U.S. commerce and security associated with our dominant position vis-a-vis not only the world's oceans but the Internet and outer space, initiatives like LOST that could have the effect of dramatically altering the status quo in these areas—including ceding to others the right to determine fees and other taxes for their use—should be approached with the utmost care.

For these, among other reasons, the Coalition to Preserve American Sovereignty respectfully suggests that, given its jurisdiction, the Committee on Finance has an obligation to convene its own hearings on the Law of the Sea Treaty. We formally request that you and your colleagues afford an opportunity to hear from a number of the following individuals. Their expertise in a wide variety of fields should be available to the full Senate before it takes up an accord we are convinced will be harmful to, not supportive of, our national interests:

Edwin Meese, former Attorney General; Lawrence Kogan, Institute for Trade, Standards and Sustainable Development; Doug Bandow, American Conservative Defense Alliance; Fred Smith, Competitive Enterprise Institute; David Keene, American Conservative Union; Phyllis Schlafly, Eagle Forum; Kevin Kearns, U.S. Business & Industry Council; Peter Leitner, Author, "Reforming the Law of the Sea Treaty"; John Fonte, Hudson Institute; Cliff Kincaid, America's Survival; John O'Sullivan, Hudson Institute.

Sincerely,

FRANK J. GAFFNEY, Jr.

WASHINGTON, DC,
September 24, 2007.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Senate Committee on Homeland Security and Governmental Affairs, Dirksen Senate Office Building, Washington, DC.

Hon. SUSAN COLLINS,
Ranking Member, Senate Committee on Homeland Security and Governmental Affairs, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN AND RANKING MEMBER COLLINS: We understand that the Senate Foreign Relations Committee will convene the first of several hearings this week in connection with possible U.S. ratification of the United Nations Law of the Sea Treaty (LOST). It is our view that this accord is seriously defective in a number of respects—including several with adverse implications for matters within your committee's jurisdiction.

Accordingly, the Coalition to Preserve American Sovereignty formally requests that the Homeland Security and Governmental Affairs Committee promptly conduct its own hearings on LOST. We would ask that the individuals listed below be afforded an opportunity to testify in connection with, among other things, the following negative implications of the treaty for the counterterrorism responsibilities vested in the Department of Homeland Security, the effectiveness of present national security methods and national disaster recovery strategies.

First, ratification of LOST would commit the United States to submit to mandatory dispute resolution with respect—among other things—to its compliance with a number of obligations that would, on their face, interfere with vital U.S. counter-

terrorism operations and counterproliferation initiatives. These include: Article 88 which "reserves" the oceans for peaceful purposes; Article 301 which dictates that states parties must refrain from "the threat or use of force against the territorial integrity or political independence of any state"; and Article 19 which proscribes the use of territorial waters to collect intelligence and conduct other operations.

Senior military and intelligence officials are on record as stating that these provisions will not impede their operations on, under, or above the world's oceans. These assurances appear to rely, however, on interpretations of LOST that may prove unwarranted, or at least unsustainable over time, given the complexion of the various panels that would adjudicate disputes. The stakes are sufficiently high that we can afford no misapprehensions on such points.

For instance, LOST proponents argue that the United States will choose available arbitration mechanisms to avoid legal decisions from the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS). Such arbitration panels are no less perilous for U.S. interests, however, as the decisive, "swing" arbiters would be appointed by generally unfriendly U.N.-affiliated bureaucrats. The arbitration panels can also be relied upon to look to rulings by the ICJ or ITLOS to inform their own decisions.

Furthermore, while there is a LOST provision exempting "military activity" from such dispute resolution mechanisms, the Treaty makes no attempt to define "military activity." This ambiguity virtually guarantees that such matters will be litigated—in all likelihood to our detriment—before one or another of LOST's arbitration mechanisms. And the rulings of such arbitrators cannot be appealed.

Of particular concern in this regard is the Law of the Sea Treaty's Article 110 which identifies only four circumstances under which vessels can be stopped on the high seas—namely, on suspicion of slave-trading, piracy, drug trafficking, and illegal broadcasting. For states parties to LOST, the transfer of weapons of mass destruction, shipping of ballistic or other delivery systems or terrorism are not approved reasons for performing such intercepts. While supporters of the Treaty insist that it will not impede the vital Proliferation Security Initiative, clearly if one or more of Article 110's conditions do not apply, the Treaty will at the very least complicate PSI interceptions, if not preclude them altogether.

Second, LOST involves unprecedented environmental obligations, which can be used to interfere with U.S. sovereignty on the grounds that what is being done on American soil or in its airspace will have negative repercussions for the oceans. This could have direct bearing on the ability of the United States to respond to natural and national disasters. For instance, among the urgent steps aimed at resuscitating New Orleans in the wake of Hurricane Katrina was the dumping of vast quantities of toxic waste from Lake Pontchartrain into the Gulf of Mexico. Were the United States a party to the Law of the Sea Treaty, such a step would almost certainly have been prohibited by the ruling of a LOST body. Such a ruling could then have been enforced by U.S. Federal courts increasingly acting under the sway of international tribunals and treaties.

Third, the Law of the Sea Treaty contains provisions that risk putting sensitive, militarily useful information and technology in the hands of America's adversaries and its companies' competitors. LOST's advocates would have you believe that there is no problem with technology transfer since the Treaty's relevant mandates were eliminated by a 1994 Agreement relating to the implementation of LOST's Part XI. Unfortunately, this is another area that cries out for close examination by the Senate and the Nation.

For one thing, it is unclear to what extent the Treaty could be and was amended by the '94 accord. For another, a number of provisions obligating the transfer of potentially sensitive technology and data were not addressed in the latter agreement. For example, LOST arbitration procedures specify that parties to a dispute would be required to provide an arbitral tribunal with "all relevant documents, facilities, and information"—a potential avenue for compelling such transfers.

Finally, U.S. ratification of LOST—a treaty that purports to establish a legal regime for the world's oceans—will inevitably give rise to precedential arrangements for governing other "international commons," including the Internet and outer space. In light of the enormous stakes for U.S. commerce and security associated with our dominant position vis-a-vis not only the world's oceans but the Internet and outer space, initiatives like LOST that could have the effect of dramatically altering the status quo should be approached with the utmost care.

For these, among other reasons, the Coalition to Preserve American Sovereignty respectfully suggests that, given its jurisdiction, the Committee on Homeland Security and Governmental Affairs has an obligation to convene its own hearings on the Law of the Sea Treaty. We formally request that you and your colleagues afford an opportunity to hear from a number of the following individuals. Their expertise in

a wide variety of fields should be available to the full Senate before it takes up an accord we are convinced will be harmful to, not supportive of, our homeland and national security and other governmental interests:

Edwin Meese, Former Attorney General; William Middendorf, former Secretary of the Navy; John F. Lehman, Jr., former Secretary of the Navy; Frank J. Gaffney, Jr., former Assistant Secretary of Defense (Acting); Peter Leitner, Author, "Reforming the Law of the Sea Treaty"; Jeremy Rabkin, George Mason University; Lawrence Kogan, Institute for Trade, Standards and Sustainable Development; Cliff Kincaid, America's Survival; John Fonte, Hudson Institute; David Keene, American Conservative Union; Phyllis Schlafly, Eagle Forum; Fred Smith, Competitive Enterprise Institute; John O'Sullivan, Hudson Institute; Doug Bandow, American Conservative Defense Alliance; Baker Spring, Heritage Foundation; Thomas P. Kilgannon, Freedom Alliance; Kevin Kearns, U.S. Business & Industry Council.

Sincerely,

FRANK J. GAFFNEY, Jr.

WASHINGTON, DC,
September 24, 2007.

Hon. JOHN D. ROCKEFELLER IV,
Chairman, Senate Select Committee on Intelligence,
Hart Senate Office Building, Washington, DC.

Hon. CHRISTOPHER S. BOND,
Ranking Minority Member, Senate Select Committee on Intelligence,
Hart Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN AND RANKING MEMBER BOND: We understand that the Senate Foreign Relations Committee will convene the first of several hearings this week in connection with possible U.S. ratification of the United Nations Law of the Sea Treaty (LOST). It is our view that this accord is seriously defective in a number of respects—including several with adverse implications for matters within your committee's jurisdiction.

Accordingly, the Coalition to Preserve American Sovereignty formally requests that the Select Committee on Intelligence promptly conduct its own hearings on LOST, so the individuals listed below may be afforded an opportunity to testify in connection with, among other things, the following negative implications of the Treaty for American intelligence activities and operations.

First, ratification of LOST would commit the United States to submit to mandatory dispute resolution with respect—among other things—to its compliance with a number of obligations that would, on their face, interfere with vital U.S. intelligence operations. These include: Article 88 which "reserves" the oceans for peaceful purposes; Article 301 which dictates that states parties must refrain from "the threat or use of force against the territorial integrity or political independence of any state"; Article 19 which proscribes the use of territorial waters to collect intelligence and conduct other operations; Article 20, which obliges submarines to travel on the surface and show their flag in territorial waters; and Article 110 which enumerates the circumstances under which ships can be intercepted at sea—piracy, slavery, narcotics trafficking and unauthorized broadcasting.

Senior intelligence and military officials are on record as stating that these provisions will not impede their operations on, under, or above the world's oceans. These assurances appear to rely, however, on interpretations of LOST that may prove unwarranted, or at least unsustainable over time, given the complexion of the various panels that would adjudicate disputes. The stakes are sufficiently high that we can afford no misapprehensions on such points.

For instance, LOST proponents argue that the United States will choose available arbitration mechanisms to avoid legal decisions from the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS). Unfortunately, such arbitration panels are no less perilous for U.S. interests as the decisive, "swing" arbiters would be appointed by generally unfriendly U.N.-affiliated bureaucrats. The arbitration panels can also be relied upon to look to rulings by the ICJ or ITLOS to inform their own decisions.

Furthermore, while there is a LOST provision exempting "military activity" from such dispute resolution mechanisms, the Treaty makes no attempt to define "military activity," virtually guaranteeing that such matters will be litigated—in all likelihood to our detriment—before one or another of LOST's arbitration mechanisms. And the rulings of such arbitrators cannot be appealed.

Second, the Law of the Sea Treaty contains provisions that risk putting sensitive, militarily useful information and technology in the hands of America's adversaries

and its companies' commercial competitors. LOST's proponents would have you believe that there is no problem with technology transfer since the Treaty's relevant mandates were eliminated by a 1994 Agreement relating to the implementation of LOST's Part XI. Unfortunately, this is another area that cries out for close examination by the Senate and the Nation.

For one thing, it is unclear to what extent the Treaty could be and was amended by the '94 accord. For another, a number of provisions obligating the transfer of potentially sensitive technology and data were not addressed in the latter agreement. For example, LOST arbitration procedures specify that parties to a dispute would be required to provide an arbitral tribunal with "all relevant documents, facilities and information"—a potential avenue for compelling such transfers.

Third, LOST identifies only four circumstances under which vessels can be stopped on the high seas—namely, on suspicion of slave-trading, piracy, drug trafficking and illegal broadcasting. If a vessel is believed to be engaged in the transfer of weapons of mass destruction, shipping ballistic or other delivery systems or terrorism, we would not be allowed as a party to LOST to intercept it. While proponents of the Treaty insist that it will not impede the vital Proliferation Security Initiative, clearly if one or more of the foregoing conditions do not apply, the Treaty will at the very least complicate PSI interceptions, if not preclude them altogether.

Finally, the ratification of LOST—a treaty that seeks to establish a legal regime for the world's oceans—will make it difficult for the United States to argue against binding arrangements for other "international commons," including areas critical to American intelligence operations such as Outer Space. President Reagan's Ambassador to the U.N., the late Jeane Kirkpatrick, warned the Senate in 2004 not to consent to ratification of LOST, in part on the grounds that American interests in outer space could be adversely affected by the LOST precedent.

The Select Committee on Intelligence last held a hearing about the Law of the Sea Treaty in 2004. Since then: New members have joined the committee; the adverse implications of surrender of U.S. sovereignty to supranational organizations with mandatory dispute resolution authority (i.e., the World Trade Organization) have become clearer; the phenomenon of "Lawfare"—the use by foreign entities of international treaties and other legal instruments as asymmetric weapons against the United States—is more widely in evidence; the dangers associated with militarily relevant technologies migrating into the hands of our potential or actual adversaries abound; and the perils for our vital security and economic interests should we cede control of outer space have grown dramatically.

For these, among other reasons, the Coalition to Preserve American Sovereignty respectfully suggests that, given its jurisdiction, the Select Committee on Intelligence has an obligation to convene further hearings on the Law of the Sea Treaty. We formally request that you and your colleagues afford an opportunity to hear from a number of the following individuals whose expertise in a wide variety of fields should be available to the full Senate before it takes up an accord we are convinced will be harmful to, not supportive of, our intelligence and other national security interests:

Edwin Meese, former Attorney General; William Middendorf, former Secretary of the Navy; John F. Lehman, Jr., former Secretary of the Navy; ADM James L. Lyons, USN (Ret.); VADM Robert M. Monroe, USN (Ret.); Frank J. Gaffney, Jr., former Assistant Secretary of Defense (Acting); Peter Leitner, Author, "Reforming the Law of the Sea Treaty"; Jeremy Rabkin, George Mason University; Lawrence Kogan, Institute for Trade, Standards and Sustainable Development; Cliff Kincaid, America's Survival; John Fonte, Hudson Institute; John O'Sullivan, Hudson Institute; Doug Bandow, American Conservative Defense Alliance; Baker Spring, Heritage Foundation; Thomas P. Kilgannon, Freedom Alliance.

Sincerely,

FRANK J. GAFFNEY, Jr.

WASHINGTON, DC,
September 24, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Senate Committee on the Judiciary,
Dirksen Senate Office Building, Washington, DC.

Hon. ARLEN SPECTER,
Ranking Minority Member, Senate Committee on the Judiciary,
Dirksen Senate Office Building, Washington, DC

DEAR MR. CHAIRMAN AND RANKING MEMBER SPECTER: We understand that the Senate Foreign Relations Committee will convene the first of several hearings this

week in connection with possible U.S. ratification of the United Nations Law of the Sea Treaty (LOST). It is our view that this accord is seriously defective in a number of respects—including several with adverse implications for matters within your committee's jurisdiction.

Accordingly, the Coalition to Preserve American Sovereignty formally requests that the Judiciary Committee promptly conduct its own hearings on LOST, so the individuals listed below may be afforded an opportunity to testify in connection with, among other things, the following negative implications of the Treaty for: The U.S. Constitution; American jurisprudence; United States Government, businesses and citizens' exposure to litigation; and the potential for infringement of American intellectual property rights, patents, copyrights and trademarks.

First, the Law of the Sea Treaty establishes a supranational, global sovereign vested with exclusive responsibility for seven-tenths of the world's surface: Its oceans. LOST entrusts to this entity—the International Seabed Authority (ISA) and related agencies—authorities which clearly would transgress various constitutional rights, limitations, and responsibilities.

The International Tribunal on the Law of the Sea (ITLOS) and the ISA have established the principle and practice of asserting their authority over the internal waters, land and air of sovereign nations on the grounds that activities in those areas can affect "the marine environment." Consequently, were the United States to become a party to the Treaty, it would compromise the legislative responsibilities vested exclusively by the Constitution in the Congress (Article I, Section 1) and the executive powers vested exclusively in the President (Article II, Section 1).

Such unconstitutional actions can result in the American people being subjected to international taxation without representation and high-cost regulations in the absence of accountable, representative government (in violation of Article I, Sections 7 and 8 of the United States Constitution, as well as amendment XVI of the Bill of Rights).

Second, matters would be made worse to the extent the Law of the Sea Treaty gives encouragement to U.S. courts already inclined to allow the dictates of international treaties and foreign tribunals to supercede those of the United States Constitution. This so-called "universal jurisprudence" is contributing to the further erosion of the checks and balances inherent in the Nation's founding documents, not least, the authority of the Congress to legislate.

Under LOST a case in point would be the application of the "precautionary principle"—a legal tenet according to which a company or country must guarantee that a proposed action will not cause any harm before it can proceed. As a practical matter, this means that a given activity can be banned without any scientific proof of harm or cost-benefit analysis. To date, the United States has wisely eschewed this principle in World Trade Organization negotiations and other venues, regarding it as utterly at odds with America's interest in innovation and entrepreneurial activity.

American ratification of LOST, however, would assist significantly in establishing the precautionary principle as universal international law. Such a validation would expose the U.S. and its corporations to lawsuits under the Alien Tort Claims Act, which as you know, allows foreign nationals the right to sue in American courts for violations of international law. Such a development would encourage American courts to impose the dictates of nonrepresentative international bodies on American defendants based on alleged violation of the precautionary principle.

Second, the Law of the Sea Treaty contains provisions that risk putting sensitive, proprietary and—in some cases, at least—militarily useful information and technology in the hands of U.S. companies' competitors and our Nation's adversaries. LOST's proponents would have you believe that there is no problem with technology transfer since the Treaty's relevant mandates were eliminated by a 1994 Agreement relating to the implementation of LOST's Part XI. Unfortunately, this is another area that cries out for close examination by the Senate and the Nation.

For one thing, it is unclear to what extent the Treaty could be and was amended by the '94 Agreement. For another, a number of provisions obligating the transfer of potentially sensitive technology and data were not addressed in the Agreement. For example, LOST arbitration procedures specify that parties to a dispute would be required to provide an arbitral tribunal with "all relevant documents, facilities, and information"—a potential avenue for compelling such transfers.

For these, among other reasons, the Coalition to Preserve American Sovereignty respectfully suggests that, given its jurisdiction, the Committee on the Judiciary has an obligation to convene its own hearings on the Law of the Sea Treaty. We formally request that you and your colleagues afford an opportunity to hear from a number of the following individuals. Their expertise in a wide variety of fields should be

available to the full Senate before it takes up an accord we are convinced will be harmful to, not supportive of, our national interests:

Edwin Meese, former Attorney General; Lawrence Kogan, Institute for Trade, Standards and Sustainable Development; Jeremy Rabkin, George Mason University; Andrew McCarthy, Foundation for Defense of Democracy; Jack Goldsmith, American Enterprise Institute, Harvard Law School; Peter Leitner, Author, "Reforming the Law of the Sea Treaty"; John Fonte, Hudson Institute; Frank J. Gaffney, Jr., former Assistant Secretary of Defense (Acting); Cliff Kincaid, America's Survival; David Keene, American Conservative Union; Phyllis Schlafly, Eagle Forum; Fred Smith, Competitive Enterprise Institute; John O'Sullivan, Hudson Institute; Doug Bandow, American Conservative Defense Alliance; Baker Spring, Heritage Foundation; Thomas P. Kilgannon, Freedom Alliance; Kevin Kearns, U.S. Business & Industry Council.

Sincerely,

FRANK J. GAFFNEY, Jr.

LETTER FROM THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

TO THE MEMBERS OF THE UNITED STATES SENATE: The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, supports ratification of the United Nations Convention on the Law of the Sea ("Law of the Sea Treaty" or "Treaty"). With various nations claiming control of territory in the Arctic well beyond those nations' natural borders, ratification of the Law of the Sea Treaty will provide much-needed certainty and predictability.

In conjunction with ratification of the Treaty, the Chamber endorses establishment of an Exclusive Economic Zone (EEZ) in which the United States will exercise sovereign rights over living and non-living resources and the marine environment within 200 nautical miles of the coast. The Chamber favors extending the EEZ to the outer edge of the continental margin (which is composed of the Continental Shelf, the Continental Slope and the Continental Rise) where the continental margin extends beyond 200 nautical miles; some estimates indicate that the continental shelf of the United States extends 600 miles from the coast of Alaska, north and east of the Bering Strait. Upon ratification of the Treaty, the United States should promptly file a claim with United Nations Commission on the Limits of the Continental Shelf to establish that the United States undersea shelf extends beyond the 200-mile EEZ.

The Chamber notes, however, that the Treaty's environmental provisions are written in a very vague and overbroad fashion, and could be interpreted in a way that conflicts with the nation's environmental statutes, such as the Clean Air Act and Clean Water Act. The Chamber, therefore, urges the Senate, in its advice and consent, to state clearly that the Treaty's environmental provisions are not self-executing, and that ratification of the Treaty does not create private rights of action or domestic legal rights against the U.S. government or its nationals.

Ratification of the Law of the Sea Treaty will protect the claims of the United States to the vast natural resources contained on the ocean floor, and will ensure that ships flying American flags will travel safely and securely through international waters. Therefore, the Chamber urges the Senate to ratify the Law of the Sea Treaty.

Sincerely,

R. BRUCE JOSTEN,
Executive Vice President,
Government Affairs.

PACIFIC CROSSING LIMITED,
Dallas, TX, October 8, 2007.

Re U.S. Accession to the United Nations Convention on the Law of the Sea.

Senator JOSEPH R. BIDEN, Jr.,
Chairman, Senate Foreign Relations Committee,
Dirksen Senate Office Building, Washington, DC.

Senator RICHARD G. LUGAR,
Ranking Minority Member, Senate Foreign Relations Committee,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS BIDEN AND LUGAR: Pacific Crossing Limited and its U.S. cable landing licensee, PC Landing Corp. (together, "PCL"), urges the Senate to give advice and consent to the U.S. accession to the United Nations Convention on the Law of the Sea ("UNCLOS") and U.S. ratification of the 1994 Implementation Agreement modifying part XI of UNCLOS ("1994 Agreement") (collectively the "Convention").

PCL owns and operates PC–1, a 21,000 kilometer trans-Pacific fiber optic network between the U.S. and Japan, with U.S. landing points in California and Washington State, and is one of only a few major submarine cables between the U.S. and Japan with available capacity. Through its own network facilities and/or arrangements with other telecommunications providers, the PC–1 system provides connectivity to the major telecommunications interconnection centers in California and Washington and major metropolitan areas in Japan, where it is interconnected with other subsea networks serving other parts of Asia.

As a major link between the U.S. and Japan and a user of the international seabed, PCL has a significant interest in the goals of the Convention, namely protection and preservation of international submarine cables, rights to lay and maintain cables, and clear procedures for resolving international disputes. However, the importance of undersea fiber optic cable networks extends far beyond PCL's business interests. Undersea cable networks carry 95 percent of all digital traffic from the U.S. to the rest of the world. U.S. cable systems are responsible for more than 70 percent of U.S. telecommunications international connections, including voice, data and video services. If these cables were suddenly unavailable, only 7 percent of the U.S. communications infrastructure would be available through the use of satellites. As for Internet capabilities, nearly 100 percent of the global Internet network flows through submarine cables.

As an undersea cable operator, PCL relies heavily on international treaty protections, which guarantee freedoms to install and maintain undersea cables, and also provide for compensation to cable owners in the event of damage to undersea cables. PCL has confronted situations where coastal states or their constituencies have made jurisdictional assertions beyond the limits established by the Convention, and have sought to impose unilateral and unreasonable restrictions on installation and maintenance operations.

It is critical that the United States, by acceding to the Convention, clarify that cable operators have the unfettered and timely access to the seas, as guaranteed by the Convention, and that the United States will not tolerate excessive jurisdictional claims over undersea cable operations or imposition of overly burdensome conditions on installation and maintenance operations. The Convention also provides important recourse for cable operators against onerous and unreasonable permitting requirements that may impede the timely repair and maintenance of undersea cables or delay the construction of new cables.

Together, Articles 58, 79, and 112 ensure the rights of nations and private parties to install, maintain and repair cables in the oceans of the world without interference from coastal states. These protections extend to activities whether beyond or along the continental shelf, in the Exclusive Economic Zone, or, subject to certain conditions, in the territorial sea.

Significantly, fiber optic cable lines are routinely damaged by fishing vessels and have also been targets of malicious, willful activity, imposing large costs on operators and users, both in terms of repair costs, and in extreme cases, where protective circuits are not available and a cable is forced out of service pending repair. Indeed, vessel costs alone, associated with a cable repair operation can easily exceed $500,000, with substantial additional costs for equipment replacement and repair.

The Convention protects these U.S. interests by holding violators financially responsible for damage to submarine cables, clarifying the liability rules applicable to disruption and damage to submarine cables, and requiring the United States to update its existing statutory provisions applicable to damage to submarine cables. Specifically, Article 113 requires all states to implement laws making it a punishable offense to willfully or negligently damage undersea cables. Article 114 holds ac-

countable submarine cable owners who damage other cables inadvertently in installation or maintenance of their own cables. Article 115 provides compensation for marine vessel owners who took reasonable measures to avoid harm to cables and in turn suffered damage to their own vessel or gear.

The Convention also offers a mechanism for international dispute resolution. It is common for foreign countries to make unilateral and unreasonable restrictions on repair and maintenance of cables, which often leads to international lawsuits. These disputes are extremely costly to private businesses. The Convention includes compulsory dispute resolution procedures for such claims under Article 297.

By giving advice and consent to the U.S. accession to the Convention, the Senate will help reinforce access rights and responsibilities for submarine cable installation and maintenance operations. This will help ensure the continued investment in and development of this critical telecommunications infrastructure that is so vital to our national economic and security interests, and help preserve the position of the United States as a leader in international telecommunications.

PCL would be happy to brief you and your staff members regarding any of the matters mentioned in this letter and to answer any questions you or your staff may have.

Sincerely,

RODERICK BOSS,
President and CEO,
Pacific Crossing Limited.

STATE DEPARTMENT WATCH,
Woodland Hills, CA, September 17, 2007.

Re U.N. Law of the Sea Convention Hearing, Sept. 27.

Hon. JOSEPH BIDEN, Jr.,
Chair, Foreign Relations Committee,
U.S. Senate, Washington, DC.

DEAR CHAIR BIDEN: This is a request that you include the attached two-page statement in the record for the hearing on the United Nations Convention on the Law of the Sea scheduled for September 27.

This is also a request that you invite me to testify at the proposed October hearing on the same subject. You may remember that we testified at the hearing on the U.S.–U.S.S.R. Maritime Boundary Treaty.

State Department Watch is a nonpartisan foreign policy watchdog group. Please address all replies to our West Coast Office.

Sincerely,

CARL OLSON,
Chairman,
State Department Watch.

Enclosure.

5 TOP REASONS TO DEFEAT LOST

Most of the two-thirds of our Earth's surface is open ocean and is not under the rule of any government. Practices and disputes are already handled very well by existing international law on a case-by-case basis. Despite the lack of widespread government antagonisms over the high seas, the United Nations wants to jump in and hold sway with intricate regulations in 400-plus sections of the Law of the Sea Treaty. The rejection of this misguided LOST by our lawmakers in Congress would be a major safeguard for the rights and interests of Americans. Nevertheless, the Bush Administration is plowing forward. Here are five top reasons to reject LOST.

1. Right now individuals and companies can go into the open ocean beyond the 200-mile exclusive economic zones and explore for resources. If they find useful products for the publics of the world, there's currently nothing stopping them or imposing extra bureaucratic costs. Now comes the U.N. regime with its LOST Authority and Enterprise which wants to impose regulations and fees on many of these resource developers. These mandatory charges are a type of U.N. tax. Moreover, such companies would then have to become officially sponsored by a signatory government in order to develop those resources, inasmuch as the U.N. is made up of governments, not people or companies. Unfair favoritism by these government sponsors would undoubtedly be the norm, and cartels could easily hold sway with their substantial political power.

2. Americans are used to due process rights for all regulatory activity. At the U.N., however, there are absolutely no rights for any person or company. Individ-

uals have no right to comment, to appear before, or be informed for anything in the U.N. The LOST bureaucracy is lodged in the U.N. Division for Ocean Affairs and the Law of the Sea in the Office of Legal Affairs. its operations and deliberations are insulated from the outside world. There is no Freedom of Information Act for the U.N. Even Congress has a nearly impossible time to conduct oversight.

3. Instead of addressing one or two subjects, LOST has over 400 sections, It is several times larger than the U.S. Constitution. As a treaty, it would have the power of the supreme law of the land. Too much power and authority could easily be surrendered to the U.N. under LOST without any safeguards for American rights. We all have heard of the "devil in the details." There are thousands of "details" that the Bush Administration has failed to tell Congress or the public. If LOST is to be honestly considered, Congress should be considering an implementation bill at the same time that explains how all the 400-plus sections will create duties, enforcement responsibilities, appeal rights, and so on. Such a bill would need to pass both the House and Senate. The trouble is that the Bush Administration has not presented such an implementation bill so we can see what it is really up to. We should also be provided with complete transparency with all the U.N. Enterprise and Authority proceedings.

4. The State Department would be the lead agency for any and all activities of LOST at the U.N. Not the Commerce Department, not the Interior Department, not the Energy Department, and not any other agency with a primary resource and enterprise mission. Unfortunately the State Department has been recently lagging in even the most elemental aspects of ocean issues. For neighboring countries to administer their 200-mile exclusive economic zones starting back as far as 1976, the respective governments need to agree on maritime boundaries. Inexplicably, the State Department has failed to establish any maritime boundaries with Canada in the Arctic Ocean or the Pacific Ocean. Even though the state legislature of Alaska complained loudly by resolution in 1999, no negotiations have been opened up. The State Department has also failed to assert the American EEZ's with maps for about 60 American Guano Act islands in the Caribbean Sea and Pacific Ocean—a lapse amounting to millions of square miles of neglected resources. Finally, the State Department has not challenged the Russian suspect claim to the North Pole under LOST provisions which is based on contested sovereignty over five Arctic islands. If LOST is adopted by the U.S., the Russians would expect the State Department to support the process.

5. The International Court of Justice and the International Tribunal for the Law of the Sea would be charged with adjudicating some of LOST disputes. These agencies are not part of American jurisprudence subject to the Bill of Rights, They would be an intrusion into American law without any specific Congressional authorization. Even more troubling is how they would attempt to enforce their rulings. Would they have power over a United Nations Force against Americans? Would the State Department be allowed and required to enforce the edicts with the American military, with American spy agencies, with American civil law enforcement, with U.S. marshals, with state National Guards, or what? Would the enforcement be against Americans and other country citizens? Congress should know before it acts.

The issues of the high seas are too important and valuable to leave up to the chancy administration by the United Nations. The temptation of corruption, as exemplified in the Iraq Food-For-Oil scandal, is everpresent with the 180-member governments constantly jockeying for position and favors with each other, A well-known disappointment is trying to expect meaningful human rights out of the United Nation Human Rights Commission which is dominated by infamous human rights abusers.

A better alternative to LOST would be for the U.S. to negotiate specific topics about the open seas under individual treaties. That would be the responsible avenue for real progress. The 400-plus articles of the proposed LOST are too much and too dangerous for the American public to be force fed.

LEVEL 3 COMMUNICATIONS
Broomfield, CO, October 15, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

Hon. RICHARD G. LUGAR,
Ranking Member, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN AND RANKING MINORITY MEMBER LUGAR: As a United States user of the international seabed, Level 3 Communications LLC, (LVLT), supports U.S. accession to the Law of the Sea Convention. Level 3 supports the Law of the Sea because the Convention improves protections for international submarine cables, provides dispute resolution procedures, and expands the right to lay and maintain undersea cables. Submarine cables are essential to the U.S. and global economy given fundamental role of global communications.

Level 3 owns or leases capacity on over 15 international submarine cables covering more than 350,000 fiber route miles. Our submarine fiber optic cable capacity along with our 48,000 fiber route miles in the United States and Europe connects our network and our customers to North America, Europe, Southeast Asia and Australia. We have access to 85 percent of all the undersea cable system capacity connecting the United States to the world.

Level 3 expects to increase its submarine capacity to meet the exponentially increasing demand created by Internet usage. We depend on the provisions of UNCLOS to work with our global partners who are also under UNCLOS jurisdiction.

Like other U.S. telecommunications providers, Level 3 uses international submarine cables to carry its Internet and voice traffic outside North America. As the consequence of exploding Internet usage and economic globalization, U.S. undersea cable circuit capacity has increased by 27,000 percent from 1995 through 2007. These submarine cables provide backbone international transmission facilities for the global Internet, electronic commerce, voice and data communication services that are the drivers of our global information-based economy.

It is essential to protect critically important global network infrastructure from damage and disruption. The Law of the Sea Convention significantly improves protections for international submarine cables against damage by other parties, and protects U.S. submarine cable owners.

Article 113 requires that all signatories must adopt laws that make damage to submarine cable, done willfully or through culpable negligence, a punishable offense. Article 114 requires submarine cable owners that damage other cables in laying or repairing their cables to bear the cost of repairs. Article 115 provides that vessel owners, who can prove they sacrificed an anchor or fishing gear to avoid damaging a cable, can recover their loss against the cable owner, provided the vessel took reasonable precautionary measures beforehand.

Additionally, Article 297 provides parties to the Treaty with compulsory dispute resolution procedures for the provisions concerning submarine cables. Having rights to this dispute resolution process is a key benefit of U.S. accession to the Convention, and one that does not exist for the U.S. presently. Although the U.S. already benefits to some extent from aspects of the Convention as customary international law, it cannot take action under the important dispute resolution provisions until the U.S. accedes to the Additionally, Article 297 provides parties to the Treaty with compulsory dispute resolution procedures for the provisions concerning submarine cables. Having rights to this dispute resolution process is a key benefit of U.S. accession to the Convention, and one that does not exist for the U.S. presently. Although the U.S. already benefits to some extent from aspects of the Convention as customary international law, it cannot take action under the important dispute resolution provisions until the U.S. accedes to the Convention. The Convention also expands the right to lay and maintain submarine cables in the oceans of the world. Articles 58, 79 and 112 establish the rights of nations and private parties to lay and maintain submarine cables on the continental shelf, in the Exclusive Economic Zone and on the bed of the high seas.

These articles, supplemented by the compulsory dispute resolution procedures available to parties to the Convention under Article 297 provide important recourse for Level 3 and other U.S. submarine cable operators against onerous and unreasonable permitting requirements by coastal states that may impede the timely repair and maintenance of undersea cables or delay the construction of new cables.

The United States economy depends on reliability of international submarine cables. The Law of the Sea Convention, particularly as assisted by the enforcement

mechanisms available to parties under Article 297, is a critical element of this protection.

Level 3 Communications urges the United States Senate to give its advice and consent to accede to the Law of the Sea Convention and to ratify the Agreement Relating to the Implementation of Part X1 of the Convention.

Please call if you or your staff has any questions.

Sincerely,

JOHN M. RYAN,
Assistant Chief Legal Officer.

MILITARY OFFICERS ASSOCIATION OF AMERICA,
Alexandria, VA, August 29, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I write on behalf of the Board of Directors and the more than 360,000 members of the Military Officers Association of America (MOAA), the nation's largest association of uniformed officers. Although we are an Association of officers and their surviving spouses, we represent the interests of all men and women in uniform, as well as those of their families and survivors, through our dedication to maintaining a strong national defense. It is in this capacity that I write to urge you to complete favorable Committee action on the Law of the Sea Convention and to bring it to the full Senate for consideration and accession.

MOAA joins many others—organizations and individuals alike—who recognize the critical national-defense implications that are addressed by the Convention. With our Armed Forces now under inordinate stress and facing greatly increased operational tempo, United States accession to the Convention will support our maritime strategy today, and will well serve our military and economic interests in the future.

We very much appreciate your tireless efforts, and those of Ranking Member Senator Lugar, in bringing this important decision to the Senate for its favorable consideration, which MOAA strongly endorses.

Sincerely,

MICHAEL P.C. CARNS,
General, U.S. Air Force, Retired,
Chairman of the Board.

AUGUST 15, 2007.

Hon. JOSEPH BIDEN,
Chirman, Foreign Relations Committee,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As former Commandants of the U.S. Coast Guard, we welcome the President's May 15th statement in support of Senate approval of the Law of the Sea Convention during this session of Congress, as well as the Senate Foreign Relations Committee's support of moving the treaty forward. The Coast Guard has long been a proponent of achieving a comprehensive and stable regime with respect to traditional uses of the oceans. As the current Commandant noted in his May 17th statement supporting the Convention, "[f]rom the Coast Guard's perspective, we can best maintain a public order of the oceans through a universally accepted law of the sea treaty that preserves and promotes critical U.S. national interests."

National interests at stake include freedom of navigation, maritime security, law enforcement, and protection of the marine environment. In each respect, the Convention provides a legal and policy framework that serves U.S. interests. As a global maritime power and a nation with one of the longest coastlines, the United States has strong interests both in preserving freedom of the seas and in protecting our own coastal areas, including offshore marine resources. The Convention strikes the right balance between these sets of interests.

The Coast Guard has multiple missions, each of which would benefit from U.S. accession to the Convention. As part of the U.S. armed forces, the Coast Guard relies on the Convention's freedom of navigation on principles to use the oceans to meet national security requirements. In this regard, the Convention secures the right of our military and commercial vessels and aircraft to move through, under, and over the world's oceans, including through the enjoyment of the rights of innocent passage, transit passage, and archipelagic sea lanes passage, as well as high seas freedoms. While the United States has to date relied upon the Convention's

navigational provisions by asserting that they are reflective of customary international law, becoming a part to the Convention would enhance our ability to invoke and enforce these provisions. In other words, we should be putting these vital navigational rights on the firmest possible legal footing.

As a law enforcement agency and lead Federal agency for maritime security, the Coast Guard also relies on the Convention's framework. The Convention limits a nation's territorial sea to 12 nautical miles, beyond which all nations enjoy the freedom to engage in law enforcement activities. The Coast Guard relies upon these freedoms to conduct extensive maritime interdictions including of illicit drug traffickers and other criminals. Many interdictions and seizures take place on distant maritime transit routes far from our shores. As a party to the Convention, we would undoubtedly be in a stronger position to engage in such operations and refute excessive maritime claims of other countries (which often have the effect of creating maritime safe havens).

Closer to our shores, and vital to our homeland security, the Coast Guard benefits from other provisions of the Convention. By providing for a 24-mile contiguous zone, the Convention enhances our ability to interdict foreign flag vessels off the U.S. coast for violations of customs, immigration, fiscal, and sanitary laws. The Convention also supports our ability, as a port State, to condition entry into U.S. ports and enforce U.S. laws therein. As just one example, the Coast Guard conducts a wide-ranging port State control program to purge our waters of substandard vessels,

The Coast Guard is actively involved in efforts at the International Maritime Organization to develop international vessel standards to improve marine safety (such as regarding safety of life at sea) and protection of the marine environment (such as concerning oil discharge). Becoming a party to the Convention would increase our credibility and influence as the international community interprets and applies the relevant provisions of the Convention.

For all these reasons, it is high time the United States got off the sidelines and joined the Law of the Sea Convention. Joining would not only increase the ability of the Coast Guard to carry out its multiple maritime missions, but would also enhance the ability of the United States to guarantee its national security and economic rights, to challenge excessive maritime claims of other countries, and to maximize its influence in the application of the Convention to real-world situations.

Each of us has had opportunities to engage colleagues from around the world on these issues over the years. To our understanding, all the issues that have prevented ratification have been satisfactorily solved. We each and together solicit committee and full Senate approval during this congressional session.

ADM THOMAS H. COLLINS,
USCG (Ret.).
ADM JAMES M. LOY,
USCG (Ret.).
ADM ROBERT E. KRAMEK,
USCG (Ret.).
ADM PAUL A. YOST,
USCG (Ret.).

UNITED NATIONS ASSOCIATION OF THE USA
AND THE BUSINESS COUNCIL FOR THE U.N.,
New York, NY, July 3, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations, U.S. Senate,
Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the Board of Directors of the United Nations Association of the USA (UNA–USA) and our members throughout the country, I would like to offer our strong endorsement of your efforts to achieve United States accession to the U.N. Convention on the Law of the Sea. Our Association has supported this important treaty since it was adopted by the U.N. General Assembly in 1982. UNA–USA's institutional interest in the treaty stems, in large part, from our late chairman, Ambassador Elliot L. Richardson, who represented the United States at the international negotiations that produced the treaty. Ambassador Richardson often referred to the successful outcome of the negotiations as one of his greatest achievements.

It is a testament to the treaty's value to U.S. national interests that all sectors of American civil society, industry, and government with a direct stake in oceans issues strongly supports the Law of the Sea Treaty. We agree with their expert analyses that U.S. accession would provide crucial and wide-ranging benefits for

U.S. national security, commerce, and environmental conservation. For instance, the treaty guarantees critical navigation and overflight rights through strategic sea lanes for both commercial and military craft, codifies U.S. control over extensive oil, gas, and fisheries resources up to 200 miles from shore, and establishes anti-pollution and marine conservation obligations.

In addition to the benefits that would be derived from joining the treaty, the case for ratification is bolstered by the dangers of inaction. By failing to ratify the treaty, the United States is unable to participate fully in decisions concerning amendments to the treaty and in the deliberations of treaty bodies, such as the Commission on the Limits of the Continental Shelf. The Commission's workload is sharply increasing and it will be making important decisions on a number of countries' claims to jurisdiction beyond the 200-mile Exclusive Economic Zone.

In our view, the U.N. Convention on the Law of the Sea fulfills a longstanding objective of U.S. policy—the creation of a widely accepted comprehensive legal framework regulating the use of the world's oceans. With extensive economic and political interests spanning the globe, one of the world's longest coastlines, and some of the earth's richest waters, the United States has more to gain from joining this legal regime than any other country. Thank you for your efforts to ensure that the United States does not lose out on these important benefits.

Sincerely,

WILLIAM H. LUERS,
President.

NATIONAL OCEAN INDUSTRIES ASSOCIATION,
Washington, DC, June 19, 2007.

Hon. JOE BIDEN,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN: The National Ocean Industries Association (NOIA) is the only national trade association representing all segments of the offshore energy industry. Our 300 member companies are engaged in activities ranging from drilling to producing, engineering to marine and air transport, offshore construction to equipment manufacture and supply, and telecommunications to finance and insurance.

We strongly support U.S. ratification of the United Nations Law of the Sea Convention. The convention offers a non-adversarial process. for resolving potential disputes and conflicts over the precise limits of the outer continental shelf where the margin extends beyond 200 miles. The assertion of jurisdiction over the development of natural resources beyond 200 miles to the outer edge of the continental margin is particularly important to the United States, because this is one of the few nations in the world with broad continental margins. The legal certainty provided by the convention with respect to control of these resources is a critical component of industry's willingness to make the investments needed to develop important energy resources.

By staying outside the treaty, the United States forfeits its membership in institutions that will make decisions about the future of the oceans and increases the risk that such decisions will be contrary to U.S. interests.

NOIA requests that you take action on this matter in the Foreign Relations Committee and urge your colleagues to ratify the convention. Your leadership in this matter is greatly appreciated, and we thank you for considering our views.

Sincerely,

TOM FRY,
President.

THE PEW CHARITABLE TRUSTS,
Philadelphia, PA, May 30, 2007.

Hon. JOSEPH R. BIDEN,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The United Nations Convention on the Law of the Sea (Convention) has established a comprehensive, international framework for coordinated cooperation by the global community of nations to both protect the marine environment and promote its sustainable development. We commend you for your leadership and welcome the President's support for U.S. Senate "advice and con-

sent" to accession to the Convention. We urge the Members of the Senate to give their early consent to such accession during this 1st Session of the 110th Congress.

In the Trusts' view, the benefits of the Convention far outweigh any real or perceived drawbacks. Its basic obligations call upon all states to protect and preserve the marine environment and conserve marine living species, and to further develop global and regional rules on these subjects—set within a framework of important, guiding principles and objectives. It addresses existing rights and responsibilities, on the one hand, while facilitating the further development and implementation, on the other, of effective global, regional, sub-regional and national measures for the protection, conservation and sustainable use of the oceans.

The Convention defines the rights and obligations upon which other international environmental and marine resource treaties are based, necessitating cooperation in the conservation of marine resources in international waters with those multilateral environmental agreements. In addition, coastal states are also required to take measures to preserve marine life in their own waters. The scope of conservation-related issues covered by the Convention is deservedly far-ranging, from fisheries management to vessel pollution, ocean dumping, protection of marine mammals, and prevention of invasive species, inter alia.

New issues related to global warming, including international questions of access to oil and gas reserves beneath the polar ice cap, have reawakened interest in the Convention among policymakers, ports, and energy companies. Recent data on the melting of the Arctic ice cap has both business and governments involved in a multibillion-dollar rush for virgin territory and natural resources. Yet it is unclear where the rights to those resources lie, with similar access questions raised for fishery resources.

As is evident from the new pressures confronting the Arctic, the Convention's reach extends far beyond conservation measures, including but not limited to navigation and over-flight, development of minerals in offshore and deep seabed areas, commercial and sport fishing, marine scientific research, maritime boundaries, laying of submarine cables and pipelines, artificial islands and seabed installations, piracy, illicit drug trafficking, and dispute settlement.

The Trusts are impressed by the depth and diversity of support for U.S. accession to the Convention. It has been endorsed within the Bush Administration by the Departments of Defense, State and Homeland Security, the National Security Council, Joint Chiefs of Staff, and the U.S. Navy; by diverse business sectors involving oil, gas and minerals extraction, telecommunications, shipping, shipbuilding, fishing and others; and by consortiums and coalitions, including the Joint Ocean Commission Initiative, as well as the environmental and marine communities.

At present, the United States largely complies with the obligations set out in the treaty. U.S. accession, however, would give current and future administrations enhanced credibility and leverage in calling upon other nations to meet Convention responsibilities. With these considerations in mind, The Pew Charitable Trusts urges that the U.S. Senate convene the necessary hearings and give its "advice and consent" to accession, enabling the United States to avail itself of the full suite of Law of the Sea Convention rights and responsibilities.

With special thanks, in advance, for your leadership on this important undertaking.

Respectfully,

JOSHUA S. REICHERT,
Managing Director,
Pew Environment Group.

JOINT OCEAN COMMISSION INITIATIVE,
Washington, DC, May 17, 2007.

President GEORGE W. BUSH,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: We commend you for your strong statement of support for United States accession to the United Nations Convention on the Law of the Sea and your continuing commitment to the nation's leadership in international ocean governance. Accession to the Convention will protect U.S. security and sovereignty, promote international commerce, and further the conservation of ocean resources, while also enhancing progress toward a coordinated and comprehensive national ocean policy.

As co-chairs of the Joint Ocean Commission Initiative, a collaborative and bipartisan effort to advance the pace of meaningful ocean policy reform, we are deeply

gratified by your robust reaffirmation of the Convention as being vital to our national interests. As you will recall, both the U.S. Commission on Ocean Policy, to which you appointed all 16 members, and the privately funded Pew Oceans Commission, unanimously recommended accession to the Convention. In fact, the U.S. Commission's first official act was the adoption of a policy resolution urging accession after its initial organizational meeting in the fall of 2001.

Accession to the Convention will advance U.S. interests by preserving the right to use the seas to meet national security requirements and protect navigational freedom for commercial vessels to operate around the world. It also secures our rights to natural resources through the full extent of the continental shelf, even beyond 200 nautical miles. Additionally, the Convention promotes the environmental health of the oceans by supporting scientific research critical to understanding and managing the oceans. This is why the Convention enjoys diverse and strong support from virtually every sector, including national defense interests, ocean-dependent industries, and the environmental and scientific communities.

The time is long overdue for the U.S. to regain a leadership role in the governance of our world's oceans. The Joint Initiative remains committed to working with your Administration to secure the Senate's advice and consent to U.S. accession before the first session of the 110th Congress adjourns. We urge your continued and vigorous personal support in this and related efforts to advance U.S. interests in the world's oceans.

Sincerely,

JAMES D. WATKINS,
Admiral, U.S. Navy (Ret.), Chairman, U.S. Commission on Ocean Policy.
Hon. LEON E. PANETTA,
Chair, Pew Oceans Commission.

UNIVERSITY OF NOTRE DAME,
Notre Dame, IN, February 28, 2007.

Hon. RICHARD G. LUGAR,
Committee on Foreign Relations,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR LUGAR: The purpose of this letter is to prompt your committee to reconsider the United Nations Convention on the Law of the Sea. This Convention addresses important issues, among them: fisheries management, pollution protection, continental shelf resources and the rights of overflight aircraft. A favorable review and vote by your committee would allow the full Senate to vote on ratification of this Convention. The UNCLOS has long been shown to provide numerous national and international advantages to the United States. I fully support ratification.

Looking backward, the UNCLOS tent was negotiated by more than 120 nations over a period of 8 years. As a result, the Convention contains many compromises. From a U.S. perspective, most U.S. interests. were accommodated in the text. Certain flaws were rectified in the ocean mining section and the revised version was forwarded to the Senate for consideration in 1994. Ratification was supported by the U.S. Ocean Commission in 2001 and the Senate Foreign Relations Committee in 2003.

At present, 151 nations have ratified the Convention, which came into force in 1994, following ratification by 60 nations. Currently the text is being implemented. The U.S. is not included in these decisions as the operational procedures are developed. This situation is not prudent and can only be rectified by our ratification.

Looking ahead, ratification will benefit our national security and our private interests along our coastline, offshore and overseas. Ratification will also result in the U.S. to having a full voice in all UNCLOS deliberations.

In closing, I strongly suggest that Committee take action and that your leadership will in turn lead to ratification by the Senate of the United Nations Convention on the Law of the Sea.

Very sincerely yours,

(Rev.) THEODORE M. HESBURGH, C.S.C.,
President Emeritus.

FEBRUARY 6, 2007.

Hon. JOSEPH R. BIDEN, Jr., *Chairman,*
Hon. RICHARD G. LUGAR, *Ranking Member,*
Foreign Relations Committee, U.S. Senate,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS BIDEN AND LUGAR: On behalf of our organizations, we write to urge you to expeditiously report a Resolution of Ratification calling upon the full Senate to give its advice and consent to U.S. accession to the United Nations Convention on the Law of the Sea (UNCLOS).

Our organizations together represent more than a million members, supporters and activists concerned with the conservation of marine resources both here in the United States and on the high seas. We believe prompt U.S. accession to the Convention is essential to the ability of the United States to exercise leadership in key upcoming debates and decisions on international fisheries policy, biodiversity conservation, and appropriate management of rapidly expanding human activity on the high seas.

The Convention establishes an important foundation for the further development and implementation of effective ocean-related international law and policy at global, regional, sub-regional levels, as well as nationally, for protection, conservation, and sustainable use of the ocean. Its basic obligations for all states to protect and preserve the marine environment and to conserve marine living species, its call for the further development of global and regional rules on these subjects, and the principles and objectives it establishes for that development represent significant steps forward.

All major U.S. ocean industries, including the offshore oil and gas, maritime transportation and commerce, fishing and shipbuilding support U.S. accession to the Convention. The fact that our community and a diverse set of industry interests all support swift ratification is testament to the importance of moving forward quickly.

We look forward to working with you to achieve this important goal.

Sincerely,

Frances G. Beinecke, President, Natural Resources Defense Council; William M. Eichbaum, Vice President, World Wildlife Fund, Marine Portfolio; Scott Hajost, Executive Director, IUCN–U.S.; Jimmie Powell, Director of Government Relations, The Nature Conservancy; Robert Irvin, Senior Vice President for Conservation Programs, Defenders of Wildlife; Phil Clapp, President, National Environmental Trust; Sylvia Earle, President, Deep Search International, Chairman, Deep Ocean Exploration, National Geographic Explorer-in-Residence; John F. Calvelli, Senior Vice President for Public Affairs, Wildlife Conservation Society; Vikki Spruill, President and CEO, The Ocean Conservency; Elliott Norse, Ph.D., President, Marine Conservation Biology Institute; and Michael F. Hirshfield, Ph.D., Senior Vice President, North America, Chief Scientist, Oceana.

NOVEMBER 26, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

Hon. RICHARD G. LUGAR,
Ranking Member, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN AND RANKING MEMBER LUGAR: At the Committee business meeting on October 31st, during discussions preceding the Committee's vote on the Law of the Sea Convention, two members of the Committee raised questions concerning the military activities exemption to compulsory dispute resolution. Given the importance of this issue, we would like to take this opportunity to review the compulsory dispute resolution procedures contained in Part XV, Section 2, of the Convention, and explain, in detail, how Article 298 of the Convention, under its express terms, will permit the United States to completely exempt its military activities from dispute resolution, and prevent any court or tribunal from reviewing our determination that an activity is an exempted military activity.

Part XV, Section 2, of the Convention is titled, "Compulsory Procedures Entailing Binding Decisions." Section 2 is comprised of a number of Articles which contain the compulsory dispute resolution procedures that some are concerned could be used to effect a review of our military activities.

Section 2 begins with Article 286, which provides that, "*[s]ubject to section 3*, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to Section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." That is, the limitations and exceptions to jurisdiction set out in Section 3 of Part XV are regarded as sufficiently central to this entire Section 2 as to begin the first sentence of the first article of the section.

Article 287 then provides the choice of tribunal election. The proposed Senate advice and consent resolution, at the President's request, rejects the first two choices available (i.e. the International Court of Justice and the International Tribunal for the Law of the Sea) and instead chooses arbitration (referred to formally as arbitral tribunals).

The other procedures established in Section 2 include Article 288, which provides that a court or tribunal has authority to determine its own jurisdiction, Article 290, which empowers a court or tribunal to impose provisional measures, and Article 292, which empowers a court or tribunal to order the prompt release of a vessel or crew detained only for illegally fishing or committing an act of marine pollution (in accordance with Articles 73 or 230 of the Convention).

The military activities exemption is then contained in Part XV, Section 3, Article 298, as was cross-referenced as an exception in the very first sentence of Section 2 which sets up the compulsory dispute settlement procedures. It provides in pertinent part:

> When signing, ratifying or acceding to this Convention or at any time thereafter, a State may . . . declare in writing that it does not accept any one or more of the *procedures provided for in section 2* with respect to one or more of the following categories of disputes. (emphasis added)

There then follow three categories of disputes: maritime boundary disputes, disputes concerning military activities, and disputes involving matters before the United Nations Security Council. The President has asked the Senate to exempt all three categories and this blanket exemption is in the proposed Senate resolution of advice and consent.

The key language in Article 298 is: "A State may . . . not accept any one or more of the *procedures provided for in section 2*." Thus, under this provision a State has the right when adhering to the Convention to preemptively and completely reject any or all of the dispute resolution procedures in Section 2, including the procedures set out in Articles 286, 287 and 288. It is those very procedures that a court or tribunal would have to rely upon to seek to assert authority. That is, by "not accepting" for military activities the obligation itself to submit to dispute settlement procedures under article 286, not accepting any of the tribunals under Article 287, and not accepting the jurisdiction of any court or tribunal even to determine its own jurisdiction under Article 288, there is not even an initial acceptance of the principal of dispute settlement, or a tribunal for any purpose, with respect to military activities. That is, no tribunal, or even agreement over dispute resolution, exists for military activities following U.S. exemption of such activities as permitted by Article 298.

Thus, the Convention itself makes clear that a State party can completely reject all the dispute resolution procedures in Section 2 for disputes involving maritime boundaries, military activities, and matters before the Security Council. There would be no processes or procedures available to an opposing State or court or tribunal to attempt to review the State's determination that an activity is a military activity. Military officers serving as members of the United States delegation that negotiated the Convention, and one of us as Presidents Nixon's and Ford's Deputy Special Representative for the Law of the Sea Negotiations, ensured that the military activities exemption is ironclad.

All permanent members of the United Nations Security Council (except, as yet, the United States) and numerous other countries have invoked the military activities exemption when adhering to the Convention. They, like us, would never accept a court or tribunal acting ultra vires—beyond the limits of the Convention itself.

We note also that the Convention provides for complete sovereign immunity for warships. Thus, Article 32 provides in relevant part "nothing in this Convention affects the immunities of warships and other government ships operated for noncommercial purposes." It would be a mistake to attempt to define the phrase "military activities." It is unnecessary and unwise to try to capture, in a definition today, future military activities and technologies that are yet to be imagined.

Finally, so that no one could mistake the United States non-acceptance under Article 298, the proposed Senate Resolution of Advice and Consent provides "The United States further declares that its consent to accession to the Convention is con-

ditioned upon the understanding that, under article 298(l)(b), 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." Clearly under this provision ultra vires actions of any tribunal which were taken despite the clear language of the Convention would simply not be followed by the United States.

The language of the Convention and of the Senate Resolution of Advice and Consent matters. It cannot simply be ignored. That language makes it clear that military activities are completely exempted from dispute settlement and that warships have complete sovereign immunity.

Sincerely,

JOHN NORTON MOORE,
Director, Center for Oceans Law & Policy and Professor of Law, University of Virginia, former Chairman of the National Security Council Interagency Task Force on Law of the Sea, and U.S. Ambassador and Deputy Special Representative of the President for the Law of the Sea negotiations.

WILLIAM L. SCHACHTE, Jr.,
RADM, JAGC, USN (Ret.), Member of the U.S. Delegation to the Law of the Sea Convention under President Reagan, Former DOD Representative for Ocean Policy Affairs.

EDWIN D. WILLIAMSON,
Senior Counsel, Sullivan & Cromwell LLP Former State Department Legal Adviser.

NEW YORK CITY BAR,
COMMITTEE ON INTERNATIONAL ENVIRONMENTAL LAW,
New York, NY, November 16, 2007.

Re United Nations Convention on the Law of the Sea.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, U.S. Senate, Committee on Foreign Relations,
Hart Senate Office Building, Washington, DC.

Hon. RICHARD G. LUGAR,
Ranking Minority Member, U.S. Senate, Committee on Foreign Relations,
Russell Senate Office Building, Washington, DC.

DEAR SENATORS BIDEN AND LUGAR: The New York City Bar Committee on International Environmental Law urges the United States Senate to give its prompt consent to the ratification of the United Nations Convention on the Law of the Sea ("UNCLOS") and to the ratification of the Agreement Relating to the Implementation of Part XI of the Convention.

The New York City Bar was founded in 1870 and has grown to more than 23,000 members. The Committee on International Environmental Law is comprised of attorneys working in the private, public and non-profit sectors and specializing in environmental law, commercial litigation, corporate law, land use law and admiralty law. The Committee studies and makes recommendations with regard to international environmental issues in order, to promote the development, enforcement and harmonization of international law for the protection of the environment.

In the past several years, the state of our oceans has received increasing public attention. In 2003 and 2004, the Pew Oceans Commission and the U.S. Ocean Commission conducted the first comprehensive reviews of the state of the oceans since the Stratton Commission of 1969. Their findings noted ongoing serious and chronic overfishing, wasteful and excessive bycatch, and serious declines in both coastal and offshore marine habitats due to pollution and destructive fishing practices. In addition, both commissions highlighted major threats from the spread of invasive species, global climate change, recreational and commercial marine transport, and population growth.

In 2006, Congress took action to strengthen its federal fisheries law, the Magnuson-Stevens Fishery Management and Conservation Act, in ways generally con-

sistent with the recommendations of both commissions to stop overfishing, protect marine habitats and to regulate and reduce bycatch. Similarly, this Congress has maintained provisions of other federal environmental laws, such as NEPA, the Endangered Species Act, and the Marine Mammal Protection Act, that are protective of the marine environment. As the nation with the largest Exclusive Economic Zone in the world, our actions in our own waters invariably affect the condition of the global oceans. Therefore, the Committee commends such domestic actions as the first crucial step toward reversing the declining health of our oceans.

However, the declining health of the oceans is truly a global concern that requires coordination and cooperation at the international level. UNCLOS is the legal foundation upon which international ocean resource use and protection is built. With more than 150 signatories, it is aptly described as a "constitution for the oceans," and provides for a comprehensive framework for navigating and managing the world's oceans. Ratification of UNCLOS will:

(1) Promote Pollution Prevention—UNCLOS encourages nations to prevent pollution of their own territorial waters and to prevent the transfer of pollution to other nations. By improving marine safety, UNCLOS serves to reduce the risk of catastrophic accidents that can harm marine environments.

(2) Promote Fishery Conservation—UNCLOS codifies the establishment of Exclusive Economic Zones and unquestionably affirms the jurisdiction of states to enact and enforce appropriate fishery conservation and management measures within their Exclusive Economic Zones. This allows states to protect their fisheries, as well as endangered species, marine mammals and other biota of special concern.

(3) Strengthen Security—UNCLOS improves the safety and security of worldwide navigation. It encourages states to establish vessel traffic separation schemes and requires states to insure that vessels flying their flags or registered with their registry comply with applicable international rules and standards (see Article 217).

As a nation that has consistently led efforts to conserve and protect marine resources within our Exclusive Economic Zone, it is only to the benefit of the United States to ratify UNCLOS. It will perpetuate our nation's leadership in conserving marine resources at home and abroad.

For the above reasons, the Committee recommends that the Senate take immediate action to consent to the ratification of UNCLOS.

The Committee appreciates the opportunity to comment on this important matter.

Sincerely,

JOHN ROUSAKIS,
Chair.

CALIFORNIA WESTERN SCHOOL OF LAW,
San Diego, CA, November 15, 2007.

Re Law of the Sea Convention.

Senator JOSEPH BIDEN,
Chair, Senate Foreign Relations Committee,
Russell Senate Office Building, Washington, DC.

DEAR SENATOR BIDEN: I urge you to support U.S. accession to the Law of the Sea Convention. This is an issue I have followed closely for over twenty years, and I strongly believe that U.S. acceptance of the Convention, which 155 other nations have accepted, will greatly enhance U.S. national security interests and other U.S. interests.

The strongest reason for U.S. acceptance is that the Convention's navigation provisions, including especially transit passage through straits, are essential to U.S. national security. The Foreign Relations Committee heard striking testimony from U.S. military leaders about how practically important U.S. acceptance of the Convention is for our navy's safety and for U.S. ability effectively to resist creeping jurisdictional claims by coastal nations. In these dangerous times, for the Senate to reject or postpone consideration of a treaty that President Bush and the Joint Chiefs of Staff support as integral to our national security would be irresponsible. Commercial interests also of course benefit from the Convention's navigation provisions. In addition, the Convention creates a mechanism that allows recognition of stable outer boundaries to the continental shelf, something that oil companies know to be essential if they are ever to exploit the oil and gas resources of the continental shelf beyond 200 miles from U.S. baselines. U.S. negotiators, in my view, did a magnificent job of assuring, in the Convention, navigational freedoms in international common

space owned by no state, and at the same time giving the United States rights over resources in an offshore area (the exclusive economic zone) that is larger than that of any other country. The Convention also is important in the day-to-day conduct of international relations. U.S. acceptance of the Convention will signal, in a forceful way, U.S. respect for the rule of law in international commerce and other matters.

I have been struck by statements of the few vocal opponents of the Law of the Sea Convention that, frankly, are simply incorrect:

—It is *not true,* as opponents suggest, that the Convention enmeshes this country in United Nations organizations: It does not. This is a treaty among states, not a United Nations initiative. The treaty does create a Commission on the Limits of the Continental Shelf and an International Seabed Authority (ISA), each with a narrow, technical mandate. Neither body is a U.N. organization. U.S. participation in these bodies will allow us to resist expansive claims by other states (e.g., the Russian claim to the Arctic continental shelf) and resist any effort within the ISA to broaden its mandate (e.g., to encompass deep sea vent resources that are important to the multibillion dollar biotechnology industry).

—It is *not true,* as opponents suggest, that the Convention allows the ISA to adopt, over U.S. objections, significant financial measures related to mining the seabed beyond the limits of national jurisdiction with which the United States disagrees. The original 1982 Convention provisions on seabed mining, which led to President Reagan's refusal to sign the Convention, were fixed by the 1994 Agreement, which legally is an integral part of the Convention. This Agreement met every one of President Reagan's objections, and it gives the United States a veto over substantive measures being considered by the ISA. All seabed mining beyond the limits of national jurisdiction (which remains far in the future) will be conducted through this revised international regime; no commercial U.S. exploitation of deep seabed minerals will be viable outside this regime.

—It is *not true,* as opponents suggest, that the Convention will undercut U.S. security interests by, for example, impeding efforts under the Proliferation Security Initiative. As State Department officials, U.S. military officials, and Ambassador Bolton have testified, this assertion is simply false. Indeed, if we refuse to accept the Convention, some states with which we would like to cooperate on PSI efforts may well be reluctant to cooperate. As the Joint Chiefs have made clear, the Convention strengthens U.S. security.

—It is *not true,* as opponents suggest, that the Convention will force changes in U.S. law or allow private U.S. lawsuits based on the Convention alone. The U.S. understandings and declarations (as proposed in 2004), and particularly the U.S. provision that Convention articles will not be self-executing, assure that no changes will be made in U.S. law unless they are implemented by legislation. Should the United States not accept the Convention and this non-self-executing declaration, the chances actually increase over time that some U.S. courts may directly apply Convention provisions as customary international law.

—It is *not true,* as opponents suggest, that the Law of the Sea Convention will undercut U.S. sovereignty. This assertion is puzzling. One hallmark of a sovereign state is its ability to accept treaties and to participate in international organizations. Entities that are not sovereign do not have this ability. And again, the Convention provides the United States with extensive legal rights in the oceans, an international common space that is not owned by any country; the Convention, rather than restricting our sovereignty, expands our rights. I gather that the "sovereignty" concern of opponents is really based on the Convention's third-party dispute settlement provisions, The United States strongly sought these provisions during the negotiation of the Convention, in order to help solidify the navigational and other rules specified in the Convention, and similar dispute settlement provisions are standard features of many U.S. treaties. Indeed, the Law of the Sea Convention's dispute settlement provisions are the exact same provisions that the United States itself has already accepted, for they are incorporated in the 1995 Fish Stocks. Agreement (a treaty that the Senate approved and the United States ratified when the Foreign Relations Committee was under the leadership of Senator Jesse Helms). The Law of the Sea Convention's dispute settlement provisions exempt military matters and other sensitive disputes from the scope of third-party jurisdiction. The merits of any

dispute involving the United States would be heard by a technical or an arbitral body rather than by the International Tribunal on the Law of the Sea. (I note in passing that the ITLOS's jurisprudence has in any event been conservative. For example, in the *Saiga* case the tribunal reinforced traditional understandings of navigation rights in the exclusive economic zone.) In sum, the Convention's dispute settlement provisions help to reinforce Convention rules important to the United States, cannot threaten any vital U.S. interests, and, indeed, have already been accepted as treaty law by the United States.

I strongly urge you to support. U.S. acceptance of the Law of the Sea Convention.

Sincerely,

JOHN E. NOYES,
Professor of Law.

CITIZENS FOR GLOBAL SOLUTIONS,
Washington, DC, November 5, 2007.

Hon. JOSEPH R. BIDEN,
U.S. Senate, Russell Senate Office Building,
Washington, DC.

DEAR SENATOR BIDEN: I write to thank you for your principled leadership in the Foreign Relations Committee to send the Law of the Sea Convention to the full Senate. Citizens for Global Solutions believes that U.S. accession to the treaty will help restore our international leadership role and advance our security, economic, and environmental interests. Along with the Bush administration, military leaders, environmental groups, ocean industries and research societies, we are grateful for your support and look forward to your continued leadership on this important issue to quickly obtain the advice and consent of the full Senate on U.S. accession to the Law of the Sea.

Sincerely,

DON KRAUS,
Executive Vice President.

CENTER FOR OCEANS LAW AND POLICY,
UNIVERSITY OF VIRGINIA SCHOOL OF LAW,
Charlottesville, VA, October 29, 2007.

Hon. RICHARD G. LUGAR,
Ranking Minority Member, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR SENATOR LUGAR: The Minority Staff Director of the Senate Foreign Relations Committee suggested that I share with you my views regarding the legal effects of the Law of the Sea Convention in United States courts as well as the state-to-state dispute resolution provisions of that Convention. Let me begin by noting that I have the background experience and knowledge to answer this question, having served as the Chairman of the National Security Council Interagency Task Force on Law of the Sea (which coordinated eighteen U.S. Government agencies in developing U.S. oceans policy) and Deputy Special Representative of the President for the Law of the Sea under the Republican Presidents, Nixon and Ford, was appointed as an Ambassador for the negotiations by President Ford (and in that capacity was a U.S. Representative and Deputy Head of the U.S. Delegation during the negotiations of the dispute resolution provisions of the Convention), and was appointed by President Ronald Reagan to the National Advisory Committee on Oceans and Atmosphere. I also served in the Reagan Administration as the Chairman of the Board of the United States Institute of Peace and in that capacity set up and ran the Institute, then the newest federal agency, for its first five years. Perhaps also of relevance, I am a former four-term chairman of the American Bar Association Standing Committee on National Security Law, and currently direct the Center for Oceans Law & Policy of the University of Virginia, which has published the definitive six-volume article-by-article analysis of the Law of the Sea Convention used by governments all over the world.

First, let me address the legal effects of the Law of the Sea Convention in United States Courts. If the United States ratifies the Convention pursuant to the stipulations contained in the "Resolution of Advice and Consent to Ratification" and the Committee Report of March 11, 2004, the Convention will not create private rights of action or other enforceable legal rights in United States courts. Section 3(24) of

the U.S. "Declarations and Understandings" in the proposed Senate Resolution clearly provides that all provisions of the Convention other than those providing the usual diplomatic privileges and immunities "are not self-executing." Quite simply this is legally definitive under the foreign relations law now in force in the United States in establishing, as the accompanying Committee Report states, that "the Convention . . . do[es] not create private rights of action or other enforceable legal rights in U.S. courts. . . ." Indeed, it is useful to look more fully at the statement made in the 2004 Committee Report, which provides as follows:

> The twenty-fourth declaration relates to the question of whether the Convention and Agreement are self-executing in the United States. The committee has included a declaration that the Convention and Agreement, including amendments thereto and rules, regulations, and procedures thereunder, are not self-executing for the United States, with the exception of provisions related to privileges and immunities (articles 177–183, article 13 of Annex IV, and article 10 of Annex VI). Consistent with the view of both the committee and the Executive Branch, this declaration states that the Convention and Agreement do not create private rights of action or other enforceable legal rights in U.S. courts (e.g., for persons accused of criminal violations of U.S. laws, including environmental pollution and general criminal laws).

"United Nations Convention on the Law of the Sea," Report of the Senate Committee on Foreign Relations, 108th Congress, 2nd Sess. (March 11, 2004), at 14.

This statement is an accurate statement of the foreign relations law of the United States as set out in § 111 of "The Restatement of the Foreign Relations Law of the United States." That section clearly provides "'a non-self-executing' agreement will not be given effect as law in the absence of necessary implementation." That is, absent a subsequent act of the Government of the United States, typically an Act of Congress, to create private rights through the normal law-making process of the United States, the Convention will not be given effect as law in U.S. courts. See "Restatement of the Law Third of the Foreign Relations Law of the United States" § 111 (1987). This Restatement is an authoritative statement of the foreign relations law of the United States.

Further, even if the Senate did not attach this clear statement that the Convention will be regarded as non-self-executing in United States courts, most Conventions are viewed by the courts as creating state-to-state, rather than state-to-individual, obligations. Thus, Comment A to § 907 of the Restatement provides: "International Agreements, even those directly benefiting private persons, generally do not create private rights or provide for a cause of action in domestic courts." Nevertheless, in the absence of Senate advice and consent to the Convention, declaring the Convention, which would supersede customary international law of the sea in our courts, as non-self-executing in U.S. courts, there is some risk that from time to time a national court may hold a provision of the Convention as self-executing and as creating rights for private parties. Indeed, that is precisely one reason the Justice Department would prefer the Convention to customary international law and why Justice insisted on a clear statement that the Convention would be non-self executing. Finally, it should be noted that since declaration 24 concerns United States national law in courts of the United States, it is fully permissible under the Law of the Sea Convention.

The summary conclusion on this first point is that Senate Advice and Consent under the proposed resolution would definitively prevent any use of the Convention, or the customary international law of the sea which it embodies, to create private causes of action or rights in U.S. courts. And, to the contrary, absent such action by the Senate pursuant to its proposed resolution, there is continuing risk that courts may in rare cases find that the customary international law of the sea creates private rights of action in U S. national courts.

Second, let me address the state-to-state dispute resolution provisions of the Convention; provisions which have been a routine part of United States efforts in international negotiations since the presidency of George Washington. Indeed, President Washington viewed the 1794 Jay Treaty with Britain, with its submission to arbitration of boundary and property disputes between the United States and Britain, as an important achievement of his presidency. Continuing that tradition of the usefulness of state-to-state arbitration, also a common feature of the commercial world, at present the United States is party to at least 16 multilateral and a plethora of bilateral agreements requiring dispute settlement through arbitration in support of our long-standing national goals of peaceful resolution of disputes and the rule of law. Examples include the Convention on International Civil Aviation, eight ter-

rorism treaties, the International Convention for the Prevention of Pollution from Ships, and the Antarctic Environmental Protection Protocol. Indeed, the Senate recently approved the "Agreement for the Implementation of the Provisions . . . [of the Law of the Sea Convention] Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," which adopts the dispute resolution procedures of the Law of the Sea Convention itself. While these dispute resolution mechanisms are helpful for general reasons going beyond the substance of the agreements, for the law of the sea such mechanisms have a special importance for the United States that is rooted in the substance of long-standing United States oceans policy. A core struggle of the United States has been to protect the sovereign rights and freedoms of United States vessels on the World's oceans; a struggle fought against illegal claims by coastal nations to control our commercial and naval shipping. In that context, even the former Soviet Union, a traditional opponent of third party dispute resolution, was persuaded of the importance of such provisions for the law of the sea. It is naive in the extreme to believe that the United States, or any other nation, can simply shoot its way around the ocean to resolve these disputes, many of which are with our NATO and RIO Treaty partners.

Despite these important reasons why the dispute resolution provisions of the Convention are solidly in the national interest of the United States, the provisions of the Convention are carefully cabined to protect U.S. interests and in no way impinge upon United States sovereignty. Thus:

- Article 287(1) of the Convention permits states to choose from a variety of mechanisms for dispute resolution. The proposed Senate Resolution of Advice and Consent makes it clear that the United States will chose arbitration, a staple of existing United States international agreements, and not the International Court of Justice;
- The principal arbitration mechanism chosen, "special arbitration" under Annex VIII of the Convention, embodies a very ordinary arbitration process by which both parties select two arbitrators and then the four arbitrators initially chosen select the fifth and final arbitrator. In the highly unlikely event that the arbitrators are unable to agree on a fifth arbitrator the parties then have an opportunity to simply agree on any third party to name the fifth arbitrator. And just to close the loop, if no agreement is reached even then, the Secretary General of the United Nations, who becomes Secretary General only upon the recommendation of the Security Council of which the United States is a crucially important permanent member, appoints the fifth arbitrator;
- Moreover, Article 298(1) of the Convention specifically permits nations when ratifying or acceding to the Convention to opt out of the dispute settlement procedures of the Convention with respect to "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service." This provision was welcomed, not just by the United States, but by navies large and small the world over who understand the sensitivity of military activities. Already Argentina, Belarus, Canada, Cape Verde, Chile, China, France, Mexico, Portugal, Republic of Korea, the Russian Federation, Slovenia, Tunisia, Ukraine and the United Kingdom of Great Britain and Northern Ireland have made declarations under this article opting out of the dispute settlement provisions with respect to military activities.

  The proposed Declaration of the United States under Section 2(2) of the Senate Resolution of Advice and Consent would definitively opt out of the dispute resolution mechanisms set out in Section 2 of the "Settlement of Disputes" chapter of the Convention for disputes concerning military activities just as have all of these nations, including all of our fellow permanent members of the Security Council. Moreover, to ensure no misinterpretation of our intent the Senate Resolution of Advice and Consent even goes on to provide: "The United States further declares that its consent to accession to the Convention is conditioned upon the understanding that, under Article 298(1)(b), 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." Since the Convention itself permits any state when ratifying or acceding to the Convention to completely opt out of dispute settlement with respect to disputes concerning military activities this clear statement that the United States is opting out with respect to such "military activities" is a permissible declaration under the Convention. Following such a declaration, which has the effect of removing not only the jurisdiction of the tribunal, but the selection of the tribunal itself, over any such activity, any effort by any tribunal to review "military activities" of the United States or any other nation with such a provision would be ultra vires, that is, beyond the power of the tribunal. Moreover, under international

law, decisions of an international tribunal exceeding its jurisdiction are simply void; and may be disregarded.

- Finally, under the well established foreign relations law of the United States, no Convention can set aside the sovereignty of the United States. Thus, it is settled constitutional law of the United States that no Convention will be able to trump any provision of the Constitution of the United States (*Reid* v. *Covert,* 354 U.S. 1, 16–17 (1957)), and that the Congress of the United States always reserves the power to override any treaty obligation of the United States for purposes of our national law (See, e.g., *Whitney* v. *Robertson,* 124 U.S. 190 (1888)).

The summary conclusion on this second point is that the carefully cabined dispute settlement procedures of the Law of the Sea Convention are quite ordinary dispute settlement provisions as are in force under many U.S. international agreements. They would definitively prevent any submission of military activities to external review; they are in the national interest of the United States as a check on illegal efforts by other nations to interfere with United States sovereign rights over American flag vessels; and, as with all such arbitration procedures, they can in no sense remove the sovereignty of the United States.

Thank you for your important work to fully inform Members of the Senate about this Convention.

Sincerely,

JOHN NORTON MOORE,
Director and
Walter L. Brown Professor of Law.

Enclosure.

ANNEX

MULTILATERAL TREATIES TO WHICH THE UNITED STATES IS PARTY CONTAINING COMPULSORY DISPUTE SETTLEMENT PROVISIONS

ANTARCTICA

Antarctic Protocol on environmental protection, signed at Madrid October 4, 1991, entered into force January 14, 1998, articles 18–20 (arbitration)

CIVIL AVIATION

Convention on International Civil Aviation, 1944, article 84 (arbitration or ICJ)

COFFEE

International Coffee Agreement, 2001, article 42 (Council)

FISHERIES

Straddling Fish Stocks Agreement, 1995, article 30 (special arbitration)

MARINE POLLUTION

MARPOL 1973/1978, article 10 & Protocol I (arbitration)

TERRORISM

Offenses on aircraft, Tokyo, 1963 article 24(1) (arbitration; ICJ as default)
Seizure of aircraft, The Hague, 1970, article 12(1) (arbitration; ICJ as default)
Safety of civil aviation, Montreal, 1971, article 14(1) (arbitration; ICJ as default)
Internationally Protected Persons, 1973, article 13 (arbitration; ICJ as default)
Taking of Hostages, 1979, article 61(1) (arbitration; ICJ as default)
Physical Protection of Nuclear Material, 1979, article 17(2) (arbitration; ICJ as default)
SUA 1988, article 16 (arbitration; ICJ as default)
Marking of Plastic Explosives, 1991, article XI(1) (arbitration; ICJ as default)

TIMBER

International Timber Agreement, 1994, article 31 (Council)

TRADE

NAFTA, 1992, chapter 20, sections B & C (arbitration)
WTO, 1994, annex 2 (arbitration)

COMMANDER, U.S. EUROPEAN COMMAND,
23 OCTOBER 2007.

Hon. JOSEPH BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As the world's preeminent maritime and naval power, it is in our national interest that the United States becomes a party to the Law of the Sea Convention as soon as possible. Maritime governance and public order over the world's oceans is a critical factor in the War on Terrorism, and directly impacts the mission success of our armed forces across the European Command area of operations. Joining the Convention will ensure our leadership role in the continuing development of oceans law and policy.

The Convention codifies navigation and over flight rights and high seas freedoms that are essential for the global mobility of our Armed Forces. In this regard, the Convention secures the right of our military and commercial vessels and aircraft to move through, under, and over the world's oceans, including the enjoyment of the rights of innocent passage, transit passage, and archipelagic sea lanes passage, as well as high seas freedoms. While to date the United States has relied upon the Convention's navigational provisions by asserting that they are reflective of customary international law, becoming a party to the Convention would enhance our ability to invoke and enforce these provisions.

National interests at stake include freedom of navigation, maritime security, law enforcement, and protection of the marine environment. In each respect, the Convention provides a legal and policy framework that serves U.S. interests. The Navy and Coast Guard have testified that joining the Convention will strengthen our ability to defend these and other important maritime rights and will enhance our national and homeland security efforts. I concur with this assessment.

Thank you for your efforts to bring this important Convention to the Senate for consideration.

Very Respectfully,

BANTZ J. CRADDOCK,
General, U.S. Army.

DEPARTMENT OF THE INTERIOR,
DEPARTMENT OF COMMERCE,
Washington, DC, September 23, 2007.

Hon. JOSEPH BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Since the earliest days of the Republic, this Nation has been committed to the underlying tenets of freedom of the seas to guarantee the economic and national security of the United States and the freedom of our people. In fact, one of the earliest treaties signed by the United States by then-Minister to France Thomas Jefferson, the Treaty of Peace and Friendship with Morocco, addressed the same concerns as we discuss today, the free flow of international commerce and the securing of navigational rights. Today, with one of the world's longest coastlines, some of its busiest ports, and the largest exclusive economic zone of any country, the United States has economic and environmental stewardship interests in the oceans that are second to none. These interests underscore the importance of U.S. accession to the Convention on the Law of the Sea.

The Convention creates a comprehensive and balanced legal framework designed to protect ocean resources while preserving navigational rights. It affirms the exclusive U.S. right to manage fisheries and oil, gas and mineral resources out to 200 miles from shore, allows us to maximize our sovereign rights over the valuable resources of the continental shelf beyond 200 miles, guarantees the right to lay telecommunication cables and pipelines, protects and promotes access on the high seas and in coastal areas throughout the world for marine scientific research, and assures navigational rights for merchant vessels upon which the vast majority of our international trade depends.

The Departments of Commerce and the Interior, along with other federal agencies, work to manage our ocean resources and the commerce they support. The Department of Commerce, which is responsible for promoting our nation's economic development, expanding international trade and commerce, and protecting and understanding our oceans, and the Department of the Interior, which is responsible for managing outer continental shelf mineral and energy resources, believe it is im-

perative that the United States accede to the Convention on the Law of the Sea. Our two Departments work together to map coastal lands and the oceans and to manage and protect an integrated coastal ecosystem, and together, as stewards of our nation's oceans, coasts, and the continental shelf, we urge favorable Senate action on U.S. accession during this session of Congress.

Sincerely,

DIRK KEMPTHORNE,
Secretary of the Interior.
CARLOS M. GUTIERREZ,
Secretary of Commerce.

SEPTEMBER 19, 2007.

Senator JOSEPH BIDEN,
Chairman, Senate Foreign Relations Committee,
Dirkscn Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I am writing in support of Senate consent to ratification of the 1982 Convention on the Law of the Sea. I have noted your personal commitment to the Convention and hope that your Committee will do all in its power to secure positive action by the Senate at large during this session of Congress.

As a retired naval officer I am acutely aware of the advantages that ratification of the Convention will bring to the mobility of our naval and air forces and the defense posture of the United States in general. Its provisions on transit passage through international straits and archipelagic sea lanes passage through archipelagos are major enhancements of existing, more limited rights. The stabilization of the limits of the territorial sea at 12 miles is a significant achievement, and its codification into a written agreement is a vital step in stopping the seaward creep of states' jurisdictional claims.

I am familiar with the current arguments being put forth by the opponents of the Convention and believe they are without validity. Most of them use distortions or actual misrepresentations of the text in order to create a "straw man" which they proceed to tear down.

Contrary to the opponents' allegations, the 1994 supplementary Agreement fixed the flaws in Part XI of the Convention identified by President Reagan in 1982. At that time he stated that if these flaws were corrected, he would support adherence to the Convention by the United Stales. The international community responded affirmatively to his invitation, and the 1994 Agreement was the product. It would be a blow to the credibility of the United States if it now rejected the Convention.

Thank you for your past efforts on behalf of the Convention, and I hope you will be able to obtain adoption of your views by the Senate as a whole.

Sincerely,

HORACE B. ROBERTSON, Jr.,
Rear Admiral, U.S. Navy (Ret.).

SEPTEMBER 18, 2007.

DEAR MR. CHARMAN: I am writing in support of Senate consent to ratification of the 1982 Convention on the Law of the Sea. I sincerely hope your Committee will do all in its power to insure a favorable vote by the Senate at large during this session of Congress.

As a retired naval officer with operational experience in commanding ships, battle groups and a fleet, I can attest to the advantages that ratification will bring to the mobility, access and reach of our naval and air forces and the national security of the United States. Specifically, the Convention will stabilize and strengthen the following essential provisions that I relied on in deploying our naval and air forces to protect U.S. national interests:

—Preserving freedoms of navigation and overflight on the high seas.
—Maintaining these high seas freedoms in the 200-mile Exclusive Economic Zone.
—Limiting the width of the territorial sea to twelve nautical miles.
—Guaranteeing freedom of navigation and overflight through international straits and archipelagic sea lanes.

The Navy and the Coast Guard, as well as all U.S. industries, including offshore energy, maritime transportation and commerce, underwater cable communications, and shipbuilding support ratification of the Convention.

The current arguments against the Convention are specious and are largely advanced by those with no operational experience in defending U.S. national interests.

Thank you for your past efforts on behalf of the Convention, and I hope the Senate as a whole will adopt your views.

Sincerely,

JAMES H. DOYLE, Jr.,
Vice Admiral, U.S. Navy (Ret.).

UNITED OIL AND GAS CONSORTIUM
MANAGEMENT CORP. (NEVADA),
Beverly Hills, CA, August 15, 2007.

Senator JOSEPH BIDEN,
Chairman, U.S. Senate, Committee on Foreign Relations,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR BIDEN: On behalf of the United Oil and Gas Consortium Management Corporation and the Oceanic Strategic Metals Corp., U.S.-based companies, we respectfully request an opportunity to testify on the matter of U.S. Senate ratification of the U.N. Convention on the Law of the Sea (UNCLOS). We are concerned that ratification of this treaty could jeopardize our valid legal claims and detailed proposals relating to responsible oil and gas resource development in the Arctic Ocean and polymetallic nodules in the Pacific Ocean.

We want to warn the Senate against getting the U.S. entangled in a global bureaucracy, together with an international tribunal, that could frustrate and defeat the ability of private U.S. companies to compete in the international arena and harvest these resources for the benefit of the American people and the world. We believe the Senate should want to respect and protect the rights of U.S. companies and to serve the national interest.

The fact is that the United States—and U.S. companies—currently have complete freedom of action in regard to making such claims and acting in our own interests. We can pursue these claims under what is called customary international law. All that is required is that the United States protect the claims that have been made, in accordance with U.S. law, for development of these resources. Ratification of UNCLOS could negate these claims, leaving our companies at the mercy of international commissions, agencies and tribunals dominated by socialist anti-American foreign interests and judges.

The establishment under UNCLOS of the International Seabed Authority, ("ISA") known as the Authority, with control over the "area" beyond national jurisdiction, is an unnecessary and major impediment to the functioning of our free enterprise system. The Authority is given the absolute power to collect onerous imposts and taxes or revenue from private companies such as ours seeking to develop oceanic natural resources for the common good. The "Enterprise" of the Authority is authorized to channel a large part of this revenue and even technology used by private companies to other countries which had no role in developing it.

History already shows the International Seabed Authority of UNCLOS to be a slow and unwieldy international bureaucracy with not one single accomplishment to date.

The lSA officially came into existence in 1994 but its first Secretary-General, Satya Nandan of Fiji, wasn't elected until March 1996. The Authority didn't become fully operational until June 1996. It wasn't until 2000 that the Assembly of the Authority issued regulations on prospecting and exploration for polymetallic nodules. It was in 2001 that the Authority entered into the first 15-year contracts for exploration-only for them. This is the only "legblativve" accomplishment to date of the Authority. No rules are available for actually mining polymetallic nodules and none are being recovered commercially nor are they ever likely to be under the ill-conceived ISA regime.

The world has been waiting for ISA regulations for years on such matters as prospecting and exploration of seabed sulfides. The Authority has been working very slowly on these regulations for five years now. Regulations on prospecting and exploration for oil-gas and methane-hydrates are still to come. But nobody knows how long those will take. The world could well have run out of reserves by the time the ISA comes up with rules.

It just doesn't make any practical sense to subject U.S. companies to the proposed onerous imposts, taxes, dictates and bureaucratic inertia of the International Seabed Authority.

The evidence makes it clear that it was extremely wise for the U.S. to wait on ratification on UNCLOS. We can now see that it wiIl operate like a typical and bloated U.N. bureaucracy. We should not want or have any part of it.

This is especially true given LOST's other huge liabilities:

1. Its overreaching environmental obligations placed on operators;
2. It is unaccountable to anyone but itself;
3. A collection of socialist bureaucracies with an abysmal track record of anti "Free Enterprise" behavior;
4. Absurd new onerous international taxes and imposts on commercial operations on the high seas has massive implications for global shipping, cruise liners, etc.;
5. Potential for interfering with U.S. and Allied military operations; and
6. Demands for transfers of sensitive technologies.

We believe that President Reagan rightly declined to subject the United States to LOST. The so called "Fixes" putatively made since then have not altered the treaty's fundamental unacceptability and it's fundamentally "bad bargain."

Despite Russia's flimsy attempt at Arctic blackmail, the U.S. answer on LOST should be a decisive Nyet!

At the very least the U.S. should force the U.N. to restructure LOST rules to become more "free-enterprise" friendly before signing on.

In light of the recent controversy over the Russian claim to part of the North Pole region, and whether the U.N. will play a role in resolving it, we should make the additional point that our claim to explore and drill for hydrocarbon resources in the Arctic Ocean is entirely consistent with American claims in the area and, therefore, should be protected along with them. Even the Russians have recognized that American explorers, one of them U.S. Navy Commander Robert E. Peary, discovered the North Pole and claimed it for the U.S. in 1909. On top of that, the USS *Nautilus* traveled under the Pole in 1958 and restated America's claim to the region "for the United States and the United States Navy," as recounted by Nautilus commander William R. Anderson in his book, "First Under the North Pole."

The U.S. already has a strong legal claim to the resources of the Arctic Commons and Pacific Abyssal without requiring any LOST participation.

We believe that, under no circumstances, should the United States abandon these claims.

We look forward to the opportunity to testify.

Sincerely yours,

PETER STERLING,
President.

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES,
New York, NY, July 5, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Senate Foreign Relations Committee,
Russell Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I am writing as President of The Maritime Law Association of the United States ("MLA") to urge the Senate Foreign Relations Committee to recommend to the Senate that it give its advice and consent to the United States accession to the Law of the Sea Convention.

The MLA is a 108-year-old bar association comprising about 3,200 admiralty lawyers and other professionals in maritime commerce. Because of the international nature of marine trade, the Association was concerned from its founding with international as well as domestic maritime law, having been established in order to be a constituent member of the Comité Maritime International.[1] The MLA's continuing concern with international maritime law is reflected in the recitation of our objectives in our Articles of Incorporation:

> to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, . . . to participate as a constituent member of the Comité Maritime International . . ., and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

Many of our members, including practicing attorneys, judges, academics, and business people, work within and are affected by international laws, standards, and customs. Accordingly, the MLA takes a strong interest in the Law of the Sea Convention.

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[1] The CMI is a nongovernmental organization formed in 1898 and composed of the national maritime law associations of several countries.

The Convention is an important articulation of established and customary international law of the sea. On March 10, 1983, shortly after the Convention was opened for signature, President Reagan recognized that the Convention expresses "traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states." Accordingly, he announced three policy decisions that would give effect to U.S. recognition of the Convention's principles:

(1) The United States would "recognize the rights of other states in the waters off their coasts, as reflected in the Convention," so long as those states also recognize the rights and freedoms of other nations under international law;

(2) The United States would exercise "its navigation and overflight rights and freedoms . . . in a manner that is consistent with the balance of interests reflected in the Convention"; and

(3) An Exclusive Economic Zone was established "in which the United States will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coasts."

Each succeeding administration has implemented the policy and law proclaimed by President Reagan.

Since President Reagan's announcement, the Law of the Sea Treaty has been modified to provide further benefits desired by our nation. Even though not a party, the United States negotiated amendments to the Law of the Sea Treaty to remove flaws that would have affected the development of seabed mineral resources beyond national jurisdiction (Part XI). That reform also was recognized by each succeeding administration and was effectuated by the July 29, 1994, Agreement which President Clinton noted, in his transmittal letter, "meets the objection of the United States and other industrialized nations previously expressed to Part XI."

President Clinton's letter of Transmittal to the Senate noted that the Law of the Sea Treaty protects and promotes the well-being of our country in many essential respects:

> The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea. . . . Following adoption of the Convention in 1982, it has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans and to encourage other countries to do likewise.
>
> The primary benefits of the Convention to the United States include the following:
>
> - *The Convention advances the interests of the United States as a global maritime power.* It preserves the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes. It achieves this, inter alia, by stabilizing the breadth of the territorial sea at 12 nautical miles; by setting forth navigation regimes of innocent passage to the territorial sea, transit passage in straits used for international navigation, and archipelagic sea lanes passage; and by reaffirming the traditional freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond.
> - *The Convention advances the interests of the United States as a coastal State.* It achieves this, inter alia, by providing for an exclusive economic zone out to 200 nautical miles from shore and by securing our rights regarding the resources and artificial islands, installations and structures for economic purposes over the full extent of the continental shelf. These provisions fully comport with U.S. oil and gas leasing practices, domestic management of costal fishery resources, and international fisheries agreements.
> - As a far-reaching environmental accord addressing vessel source pollution, pollution from seabed activities, ocean dumping, and land-based sources of marine pollution, *the Convention promotes continuing improvement in the health of the world's oceans.*
> - In light of the essential role of marine scientific research in understanding and managing the oceans, *the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters, for research activities.*
> - *The Convention facilitates solutions to the increasingly complex problems of the uses of the ocean*—solutions that respect the essential balance between our interests as both a coastal and a maritime nation.

- Through its dispute settlement provisions, *the Convention provides for mechanisms to enhance compliance by Parties with the Convention's provisions.*

* * * * *

Early adherence by the United States to the Convention and the Agreement is important to maintain a stable legal regime for all uses of the sea, which covers more than 70 percent of the surface of the globe. Maintenance of such stability is vital to U.S. national security and economic strength.

(Emphasis added.)

The Convention's benefits and virtues remain unchanged, and the events of recent years make the need for accession even more compelling as our nation relies more and more on the high seas as our first line of defense. The Proliferation Security Initiative, begun by the current Administration to combat attempts by rogue nations to spread weapons of mass destruction, is dependent on the application of international law to the high seas. The Convention will also enhance, not harm, the international legal efforts led by the United States to suppress the illegal proliferation of nuclear weapons and other weapons of mass destruction in a manner similar to the joint anti-slavery patrol off the coast of West Africa established by the Royal Navy and the U.S. Navy in the 1840s.

In addition to security interests, the United States also looks more and more to the world oceans for their wealth of essential resources—from food to energy sources, both present and future—as well as a highway of trade providing access to the materials and products of other nations. The Convention would promote the kind of international stability that would protect our access to this wealth.

Uniformity of the law of the sea is essential to the recognition of the rights of states, their ships, and their citizens, and crucial to economic prosperity. Accession to the Law of the Sea Convention will further establish that the world's territorial seas and high seas are not lawless, but are instead subject, respectively, to carefully crafted bodies of domestic laws and to a regime of international laws that ensure right of law-abiding individuals and nations to enjoy the many benefits of the world's waters. The Courts of the United States. as well as courts of foreign states and the tribunal created under the Law of the Sea Convention, will benefit greatly from the accession of the United States to this Convention as an emblem of world accord on the principles that govern the peaceful use of the high seas.

The current Chief of Naval Operations, Admiral Mike Mullen, who has been nominated to become the next Chairman of the Joint Chiefs of Staff, has eloquently described the vast importance of the world's oceans to the economic and military well-being of the United States. Our historical and continuing role as a maritime nation has led the Joint Chiefs of Staff and all living former Chiefs of Naval Operations to speak in favor of ratification of a Treaty that is especially important to the interests of the United States.

Accession to the Law of the Sea Convention will be a major step forward to protect and ensure the rights of the United States and its citizens around the world and to promote uniformity of the law of the sea. Accordingly, the Maritime Law Association of the United States strongly urges the Senate to give its advice and consent in favor of accession to the Law of the Sea Convention.

Respectfully submitted,

LIZABETH L. BURRELL,
President.

HOOVER INSTITUTION,
STANFORD UNIVERSITY,
Stanford, Ca, June 28, 2007.

Hon. RICHARD LUGAR,
U.S. Senate, Hart Senate Office Building,
Washington, DC.

DEAR SENATOR LUGAR: I understand that the Law of the Sea Treaty is once again likely to be considered by the Senate for consent to ratification.

I am writing to let you know that I support ratification, I have had a long history with this treaty. When I was Secretary of the Treasury in 1973, we got word of this negotiation and discovered the language on control of mining in the deep sea-beds. We blew every whistle we could find to call attention to the undesirable features of what was being negotiated. Nevertheless, negotiations proceeded.

The question of ratification arose once again during the Reagan administration. President Reagan, fully aware of the many desirable aspects of the treaty, neverthe-

less opposed ratification, fundamentally on the same grounds that led us to blow the whistle in the early 1970s.

The treaty has been changed in such a way with respect to the deep sea-beds that it is now acceptable, in my judgment. Under these circumstances, and given the many desirable aspects of the treaty on other grounds, I believe it is time to proceed with ratification.

It surprises me to learn that opponents of the treaty are invoking President Reagan's name, arguing that he would have opposed ratification despite having succeeded on the deep sea-bed issue. During his administration, with full clearance and support from President Reagan, we made it very clear that we would support ratification if our position on the sea-bed issue were accepted.

With my respect and admiration for the sustained high quality of your public service,

Sincerely yours,

GEORGE P. SHULTZ.

OCTOBER 29, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
U.S. Senate,
Washington, DC.

DEAR SENATOR BIDEN: This letter is written to convey to you my recollections of the attitude of former President Reagan regarding the Law of the Sea Treaty, which I am informed has garnered important support throughout the Executive Branch, especially from those departments and agencies bearing security responsibilities. I am also aware of a controversy that has arisen between former members of the Reagan Administration and former Secretary of State George Shultz. I understand that at the time Mr. Shultz was Secretary of State he recalls that the President's objection involved the deep-sea bed issue. This was also my interpretation of the key objection President Reagan had to the Treaty during our discussion of its possible ratification. Like Secretary Shultz, and as one who preceded him from 1981 until I resigned July 1982, I was surprised to learn that opponents of the Treaty are invoking President Reagan's name, arguing that he would oppose ratification despite the fact that he had succeeded in modifying the deep-sea bed issue.

As one who proudly served President Reagan I can assure you that in my experience it was not a rare event for the former President, when properly informed by his staff, to ponder such important issues and to change his point of view when exposed to additional complications or relevant considerations.

Best wishes,

ALEXANDER M. HAIG, Jr.,
General, USA (Ret.),
59th U.S. Secretary of State.

U.S. SENATE,
Washington, DC, October 30, 2007.

Hon. CONDOLEEZZA RICE,
U.S. Department of State,
Washington, DC.

DEAR SECRETARY RICE: The Senate Committee on Foreign Relations has recently held hearings on the 1982 Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the Convention on the Law of the Sea, which was adopted in 1994. The Committee will consider the Convention at its Business Meeting on October 31, 2007.

As you know, P.L. 109–432, the Gulf of Mexico Energy Security Act 0f 2006, establishes a moratorium on oil and gas leasing until June 2022 in the following areas of the Gulf of Mexico:

(1) any area east of the Military Mission Line in the Gulf of Mexico;

(2) any area in the Eastern Planning Area that is within 125 miles of the coastline of the State of Florida; or

(3) any area in the Central Planning Area that is—

(A) within—

(i) the 181 Area; and

(ii) 100 miles of the coastline of the State of Florida; or

(B)(i) outside the 181 Area:

(ii) east of the western edge of the Pensacola Official Protraction Diagram (UTM X coordinate 1,393,920 (NAD27 feet)); and

(iii) within 100 miles of the coastline of the State of Florida.

The moratorium on oil and gas leasing is vital to the protection of the Gulf of Mexico. As the Committee prepares to vote on the Convention, I would be grateful if you could answer the following question: Would U.S. accession to the Convention have any effect on the moratorium generally, and these boundaries specifically?

I am also interested in knowing whether joining the convention would have any effect on the maritime boundary between the United States and Cuba. This boundary is established by the Maritime Boundary Agreement between the United States and Cuba. The Agreement establishes the maritime boundary in the Straits of Florida and in the eastern Gulf of Mexico where the countries' 200 nautical mile zones overlap. The United States has never ratified this instrument, and it is implemented provisionally through an exchange of diplomatic notes every other year. I do not support this Agreement, nor the boundary it establishes. Would accession to the Convention on the Law of the Sea affect the Maritime Boundary Agreement or alter the maritime boundary between the United States and Cuba?

Thank you for your prompt attention to these matters.

Sincerely,

BILL NELSON.

U.S. DEPARTMENT OF STATE,
Washington, DC, October 31, 2007.

Hon. BILL NELSON,
U.S. Senate,
Washington, DC.

DEAR SENATOR NELSON: Thank you for your letter of October 30 regarding the 1982 Convention on the Law of the Sea and the Agreement relating to the implementation of Part XI of the Convention on the Law of the Sea. You expressed concern about United States accession to the convention and the effect on the maritime boundary between the U.S. and Cuba.

The Department of State and the Interior Department's Minerals Management Service have worked closely on this important issue. We can assure you that U.S. accession to the Convention would not affect the moratoria or boundaries in the Gulf of Mexico Energy Security Act of 2006. It would also not affect either the maritime boundary with Cuba or the agreement currently being applied provisionally.

We hope this infbrmation is useful to you. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

JEFFREY T. BERGNER,
Assistant Secretary,
Legislative Affairs.

CONCERNED WOMEN FOR AMERICA,
October 29, 2007.

Hon. JOSEPH BIDEN,
U.S. Senate,
Washington, DC.

DEAR SENATOR BIDEN: During a time of war, the overarching implications of the United Nations Convention on the Law of the Sea bring up red flags. Knowing the history of the United Nations and other international bodies, we should not subject ourselves increasingly to international conventions and laws. As our elected representatives, a primary interest for the Senate should be ensuring the fundamental rights of American citizens. Foremost among them is the right to determine our laws and policies, not relinquishing this right to international bodies made up of members that are hostile to America.

The Law of the Sea Treaty encroaches upon American interests and liberties. On behalf of the 500,000 members of Concerned Women for America, I ask that you vote "no" on this treaty's ratification in the Foreign Relations Committee on Wednesday.

This treaty would creep dangerously close to U.S. interests and becoming a signatory would mandate U.S. policy on energy, the environment, taxation in the form of fees and technology transfer (which includes property rights).

The treaty creates a commission to oversee the rights and access that all signatory countries have in regard to international waters: the International Seabed Authority. Those sitting on the board of the International Seabed Authority would decide which countries can gain access to which waters. Given the anti-American sentiment already prevalent at the United Nations, a second governing body would likely fare no better.

Ratification of this treaty would also subject the U.S. to a foreign tribunal with unaccountable, unelected judges: The Law of the Sea Tribunal. One signatory country can bring a complaint to the tribunal against another signatory country for its resolution. This would undermine U.S. diplomacy and subject ourselves to a "middle man" that does not have our best interest at heart. One can assume the court would not favorably judge U.S. interests such as military activity and business developments when it has expressed its dedication to giving preference to developing countries.

As Senator David Vitter (R-Louisiana) addressed in the Committee hearing on September 27, definitions of military activity and intelligence activity under this convention are also subject to The Law of Sea Tribunal and the International Seabed Authority. Military intelligence is necessary to protect U.S. borders and prevent terrorist attacks, yet if the governing bodies of the treaty decide otherwise, U.S. military operations could be severely hindered. The convention is also designed to promote industry in developing countries by forcing developed countries to give them access to previously unavailable technology. Our military abilities would be compromised and freely given to developing and potentially hostile countries that could then use our technologies against us.

Senator, with the United States already contributing $1.26 billion American taxpayer dollars in mandatory dues to the U.N., while receiving little to no positive result, we should not subject ourselves to more funding of another inadequate and harmful bureaucracy. This treaty would create serious repercussions for private American business interests worldwide and would severely hinder our military capabilities. Our members ask that you consider these points before the markup of the Convention on Wednesday.

Sincerely,

WENDY WRIGHT,
President,
Concerned Women for America.

ADVOCACY COMMITTEE, BUCKS COUNTY CHAPTER,
UNITED NATIONS ASSOCIATION OF THE USA,
Newtown, PA, October 15, 2007.

Re United Nations Convention on the Law of the Sea.

Senator JOSEPH R. BIDEN, Jr.,
Chair, Senate Foreign Relations Committee, U.S. Senate,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR BIDEN: After studying the United Nations Convention on the Law of the Sea, we recommend that the Senate advise and consent to the accession to the treaty, and to the ratification of the Agreement Relating to the Implementation of Part XI of the treaty.

This treaty provides greater certainty and security for the seabeds and the surface of the oceans. Its broad support by the Administration, military, business and environmental groups demonstrates that it is in the bests interests of our nation. It has been accepted by 155 nations and has been in effect for thirteen years with no significant adverse consequences. Without ratifying the treaty, the United States will have no voice in the important decisions regarding its implementation and interpretation in the Arctic and elsewhere.

Thank you for your consideration of this important matter.

Sincerely,

BRUCE B. VANDUSEN,
Chair.
JOSEPH S. GOTTLIEB.
PHILIP J. GREVEN.
DONALD S. GRUBBS, Jr.
JENNIFER HOLLINGSHEAD.
CHARLES F. PETERSON.

U.S. DEPARTMENT OF STATE,
Washington, DC, October 10, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I want to thank you and the Foreign Relations Committee for holding hearings on the Law of the Sea Convention. I think these series of hearings, with both government and private witnesses, provided Committee Members with a wide range of views. In our view, it remains clear that it is strongly in the U.S. interest to join the Convention.

During the course of almost two full days of hearings, the question was raised whether intelligence activities would be considered military activities for purposes of dispute settlement. The Convention recognizes the potential sensitivity of subjecting a State's military activities to third-party scrutiny. As such, Article 298 of the Convention permits a State to completely exclude "disputes concerning military activities" from the dispute settlement procedures. As provided in the draft resolution of advice and consent, the United States would elect this exclusion.

The United States would determine whether particular U.S. activities were "military activities" for purposes of the exclusion from dispute settlement procedures, just as other Parties that have opted to exclude military activities would make such determinations with respect to their activities. The draft resolution of advice and consent reflects this point by conditioning U.S. accession 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.

As DOD and CIA testified in 2004 regarding the Convention, intelligence activities at sea are military activities for purposes of the U.S. dispute settlement exclusion under Article 298. Thus, the dispute settlement procedures under the Convention would not apply to U.S. intelligence activities at sea.

Again, I want to thank you and your Committee staff for the support and hard work you have provided on the Law of the Sea Convention.

Sincerely,

JEFFREY T. BERGNER,
Assistant Secretary,
Legislative Affairs.

THE WHITE HOUSE,
Washington, DC, February 8, 2007.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Recognizing the historic bipartisan support for the Law of the Sea Convention, I anticipate our shared interest in moving it forward. As the President believes, and many members of this Administration and others have stated, the Convention protects and advances the national security, economic, and environmental interests of the United States. In particular, the Convention supports navigational rights critical to military operations and essential to the formulation and implementation of the President's National Security Strategy, as well as the National Strategy for Maritime Security. I appreciate your efforts as Chairman in bringing this important Convention to the Senate for consideration and look forward to its approval as early as possible during the 110th Congress.

Sincerely,

STEPHEN J. HADLEY,
Assistant to the President
for National Security Affairs.

THE SENATE SHOULD GIVE IMMEDIATE ADVICE AND CONSENT TO THE LAW OF THE SEA CONVENTION: WHY THE CRITICS ARE WRONG

BY
JOHN NORTON MOORE* & WILLIAM L. SCHACHTE JR.**

I. Introduction

As national security professionals who have spent much of our lives working on oceans and security issues, we believe that Senate advice and consent to ratification of the Law of the Sea Convention is strongly in the national interest of the United States. Elsewhere we have each testified at length as to why advice and consent is urgently needed.[1] This short paper, which supplements our earlier testimony, is motivated by our mutual concern that arguments being spread against the treaty are simplistic and erroneous.

Not only are specific arguments advanced against the treaty wrong, but even more importantly, the critics ignore the powerful reasons for United States adherence, including that the 1982 Convention supersedes the far less favorable 1958 Conventions currently in force for the United States. This response will first briefly summarize a few of the broader issues ignored by the critics and will then address erroneous arguments or "myths" being advanced against the Convention.

We respect the privilege of all Americans to disagree with their elected officials. It is only through a full exchange of views that truth emerges. And some

[1] *See* Ambassador John Norton Moore's testimony before the Senate Foreign Relations Committee: Senate Advice and Consent to the Law of the Sea Convention: Urgent Unfinished Business (October 14, 2003); testimony before the Senate Committee on Armed Services: Senate Advice and Consent to the Law of the Sea Convention: United States Security Interests (April 8, 2004); testimony before the House Committee on International Relations: United States Adherence to the Law of the Sea Convention: A Compelling National Interest (May 12, 2004).

See Admiral William L. Schachte Jr.'s testimony before the Senate Foreign Relations Committee (October 14, 2003); testimony before the Senate Committee on Armed Services: Senate Advice and Consent to the Law of the Sea Convention (April 8, 2004); testimony before the Senate Select Committee on Intelligence: Senate Advice and Consent to the Law of the Sea Convention: U.S. Accession to the Law of the Sea Convention (June 8, 2004).

of the critics are personal friends. Perhaps, as Churchill said, we should "not resent criticism, even when, for the sake of emphasis, it parts for the time with reality." Nevertheless, the critics are wrong in their opposition to the Law of the Sea Convention and we cannot stand idly by while myths are advanced against a treaty of the utmost importance for the national security of this Great Nation.

II.
The Broadest Context Ignored by the Critics

As we have testified elsewhere there are powerful affirmative reasons rooted in restoring United States oceans leadership, protecting United States oceans interests, and enhancing United States foreign policy, which strongly support United States adherence to the Convention. For example, we will be in a stronger position to respond to illegal oceans claims such as the People's Republic of China harassment of the Navy's ocean survey ship *USNS Bowditch.* And we will be able to move forward more rapidly with development of oil and gas resources beyond 200 nautical miles (approximately 15 percent of our continental shelf), require United States approval of any transfer of seabed revenues, and reclaim for the United States prime deep seabed mining sites now abandoned. Further, adhering to the Convention will finally give the United States an opportunity to officially declare its views as to the correct operation of the Convention. This will end the more than decade long self-imposed silence of the United States in the face of vocal efforts by extremist opponents to roll back gains achieved in the Convention.

The critics show no understanding of the continuing struggle of the United States as a major maritime state for the protection of navigational freedom. Yet controlling unilateral coastal state claims against United States shipping, both military and commercial, is a core oceans issue truly at stake for the United States. In this respect, the Convention is the most important achievement for the protection of our critical naval and commercial shipping interests in the history of the nation. For example, the new provisions for protection of straits transit passage and archipelagic sea lanes passage, and the improved provisions for innocent passage in the territorial sea are of the utmost importance for United States naval mobility. The United States negotiating team achieved a great victory for our nation in these provisions that the critics seem not to understand. By second guessing our naval experts, the critics would have us snatch defeat from the jaws of victory. Paradoxically, by opposing the Convention, they would be reinforcing the views of Third World nations the United States defeated in the negotiations. We must also never forget that thousands of military men and women of the United States who have volunteered to go in harm's way depend on the navigation

and overflight provisions guaranteed in the Convention. As General Richard B. Myers, the Chairman of the Joint Chiefs of Staff, recently unequivocally stated "The Convention remains a top national security priority." See Annex II.

The critics show little understanding of the realities of achieving and protecting the rule of law in the world's oceans. They simplistically seem to believe that American interests will be protected by just shooting our way around the oceans rather than developing a stable and favorable rule of law that provides the basis for our naval and air operations that we are then prepared to defend with force if necessary. The United States is simply not going to shoot our way to acceptable resolution of oceans disputes with Canada, Chile, Brazil, India, Italy and other democracies. Nor is it in the slightest realistic to ignore the effect of law and agreement in our interaction with others. It is simply hubris to believe we can ignore the law without consequences for the behavior of other nations in turn ignoring the law and affecting our interests in important ways. Ironically, at a time when the President of the United States is urging others toward the rule of law as a core foreign policy interest of the United States, the critics voice only disdain for that principle.

The critics present a simplistic view of the Convention as a Soviet Third World conspiracy for the redistribution of wealth or for first steps in world government. The United States and the Soviet Union both sought new provisions on protection of navigation through straits to protect strategic interests in naval mobility long before any Third World interest in a deep seabed mining "common heritage of mankind." And the Soviets, as a major maritime power, supported the United States – and opposed the "Group of 77" Third World states – on almost every major issue in the negotiation. Deep seabed mining, which briefly encouraged Third World dreams of ocean riches, was only one among many critical oceans issues in the negotiations, including navigational freedom, fisheries, oil and gas, telecommunications, ocean surveys, scientific research and environmental protection. Almost all of the issues were decided on bottom line national interests, such as whether a nation was a distant water or coastal fishing nation, or did or did not have a large continental shelf off its coast, rather than on Third World "New Economic Order" principles. True, the original deep seabed mining negotiations in the 1970s did reflect this Third World view, although the protectionist interests of land-based mineral producers were at least equally important in this difficult negotiation. But when the Reagan Administration refused to accept a deep seabed mining regime tainted with the "New Economic Order" it was renegotiated to reflect market principles – and the renegotiation, concluded in 1994, met every one of the Reagan conditions and then some. There was no mystery in this renegotiation; the world simply changed in the aftermath of the collapse of the Soviet Union and the damage done to developing countries by the double oil shock of the 1970s. Even more laughable is the charge of a conspiracy for world government. For the reality was a Convention expanding *national* sovereign rights more than any international agreement in history. The

central thrust of the Convention is an expansion of *coastal nation* resource and economic rights in a vastly expanded exclusive economic zone and continental shelf while also fully protecting sovereign rights in navigational freedom. No, the corridors of the law of the sea negotiation were predominantly filled with thoughts of nationalism rather than internationalism. And ironically, in their attack against the Convention, the critics join extreme internationalists who have been the principal opponents of the Convention because of its focus on national sovereign rights.

The critics complain of provisions requiring submarines to surface and show their flag in the territorial sea, limiting rights to board foreign flag ships, and similar provisions. But apparently out of ignorance they never disclose that such provisions are *already binding* on the United States pursuant to the 1958 Geneva Conventions ratified with the advice and consent of the Senate almost a half-century ago and with which we have lived since. Nor do the critics note the reciprocal nature of the law. Provisions protecting against overly broad boarding are there precisely to protect the sovereignty of America's flag ships on the high seas. And do the critics *really* want Chinese submarines submerged off the beaches of New York or Los Angeles? Most importantly, the critics fail to note that the 1982 Convention has powerfully improved the 1958 Law of the Sea Conventions to meet current United States resource and strategic needs. Arguments against the Convention that ignore the 1958 Conventions as treaty obligations of the United States effectively are arguments to keep the now outdated 1958 Conventions and to forego the new strategic rights of transit passage through straits, archipelagic sea lanes passage, the improved regime of innocent passage, and many other issues critical to U.S. national security and ocean interests.

The critics fail to acknowledge that the Convention deals with the peacetime law of the oceans. It is the law concerning the inherent right of self-defense or the law of war that applies to actions against terrorists. Quite apart from any provision of the Law of the Sea, the right of self-defense under international law would, of course, always permit the United States to intercept a shipment of weapons of mass destruction on the way to a terrorist group for use against the United States.

The critics fail to understand that the negotiations leading to the 1982 Convention were an enormous success for the United States. The United States was by far the most influential player in the negotiations, not the Soviets or the Third World, and every strategic objective of the United States was met in the original 1982 Convention except the regime governing deep seabed mining, which was met in the 1994 renegotiation enabling United States support. The critics would set aside one of the most important United States negotiating successes of the twentieth century – achieved in many cases over the very Third World objections said by the critics to underlie the convention.

The critics evince little knowledge of international law or oceans law and as a result sometimes make arguments contrary to U.S. interests. For example, some have argued that the provision in Article 88 of the Convention limiting use of the high seas for "peaceful purposes" would constrain U nited States warships or prevent military activities on the high seas. But in making this argument they are unknowingly adopting the "old" Soviet line – no longer even embraced by Russia – and which was never supported by the United States. During the Law of the Sea negotiations the United States representative accurately described the "peaceful purposes" language when he said:

> The term "peaceful purposes" did not, of course, preclude military activities generally. The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement.

Indeed, in their zeal to come up with complaints about the Convention, the critics are promoting an interpretation of this language that may be cited by opponents of U.S. space-based missile defense programs in years ahead. Thus, the implication of the critic's argument beyond law of the sea would be to ban space-based ballistic missile defense systems for the United States because of our adherence to the Outer Space Treaty that contains the same "peaceful purposes" language. And the most simple comparison against the yardstick of the real world refutes this argument made by the critics by showing warships of every major power freely navigating the world's oceans des pite the Convention being in force for 148 nations. Moreover, the Senate Text of the Resolution of Advice and Consent to Ratification approved by the Foreign Relations Committee specifically provides: "The advice and consent of the Senate under section 1 is subject to the following . . . understandings: (1) The United States understands that nothing in the Convention, including any provisions referring to 'peaceful uses' or 'peaceful purposes,' impairs the inherent right of individual or collective self-defense or rights during armed conflict." But never mind that this argument of the critics is nonsense on stilts and rooted in ignorance of law, if it sounds plausible in a smokescreen of charges against the Convention, make it! Yet another critic asserts based on ignorance of law that the language in Article 301 that Parties "should refrain from any threat or use of force against the territorial integrity or political independence of any state" would prevent the United States from taking the defensive actions it took in Afghanistan following the September 11, 2001, attacks or taking action in a future defense of Korea or Taiwan. This argument not only fails to understand that Article 301 simply paraphrases an obligation under Article 2(4) of the United Nations Charter already binding on every nation in the world, but it also implicitly and erroneously agrees with America's most extreme critics

that such perfectly lawful defensive actions are illegal. Again, such an interpretation is nonsense!

The critics seem to suggest that if only the United States would refuse to adhere, the Convention will go away. But the Convention is already in force for 148 nations, is acknowledged by the United States as a reflection of customary law, and is the core of modern ocean law. United States continued non-adherence would not, for example, end the International Seabed Authority, but would merely disenfranchise the United States and remove our veto over potential distribution of seabed mining revenues. Every major developed nation is a party. All other NATO members except Turkey are parties. And all other permanent members of the Security Council are parties. Only the United States, among major maritime nations, is not yet a party.

The critics sometimes advance "conspiracy" or "personality" theories that the president has been hoodwinked by Vice President Cheney, military holdovers from the Clinton Administration, or unnamed "special interests." But such charges ignore the reality of what is almost certainly one of the most careful processes for determining United States national interests in any area of foreign policy: United States negotiating instructions during the Nixon and Ford Administrations were developed by an eighteen agency task force specially set up within the National Security Council by presidential order to ensure full vetting of national interests. And this process included an almost 100 member private sector advisory committee representing every oceans interest of the United States as well as representatives of the Senate. A similar methodology was employed by subsequent administrations. Indeed, there has probably never in the history of the nation been a process for as thorough vetting of the national interests on any complex issue of foreign policy as was the case under the NSC Interagency Task Force on the Law of the Sea. Subsequently, the Reagan Administration conducted a multi-year full interagency review which concluded that the provisions of the Convention other than those on seabed mining were in the national interest. The Clinton Administration then conducted a review before submitting the Convention, with its renegotiated part XI on deep seabed mining, to the Senate in 1994. And, most recently, the Bush Administration conducted careful reviews before twice recommending the Convention to the Senate on its top priority list of treaties for Senate approval. This Bush Administration review included an exhaustive Defense Department review of every objection raised by anyone, no matter how remote the risk, and careful interagency review of recommended United States statements for the proposed Senate resolution of advice and consent. For more than a quarter century the Joint Chiefs of Staff and the Navy, fully understanding our strategic needs for naval mobility, have been among the strongest supporters of the Convention. We also note that recently high-level Administration officials have strongly supported United States' accession to the Convention. These officials have included Condoleezza Rice, in her confirmation hearing as Secretary of State, and John Bellinger, in his confirmation hearing as Legal Adviser of the

Department of State. Further, even John Bolton, in his confirmation hearing as United States Ambassador to the United Nations, testified that he supports the Administration's decision to make accession to the Convention a priority.

The critics urge that the Convention will turn the world's oceans over to the United Nations. To the contrary, the Convention establishes coastal nations' control over the principal resources of the oceans while protecting freedom of navigation. The United Nations has no decision authority over any oceans issue under the Convention and no organization created is a branch of the United Nations. Rather, the three strictly limited organizations created report to the States parties to the treaty, not the United Nations. As with many arms control agreements of the United States, the negotiations proceeded under United Nations auspices. It was individual nations, however, who developed the Convention, not the United Nations. And the negotiations leading to the Convention were supported by the United States precisely because of its strategic and resource interests in the oceans. The real threat to United States ocean interests has been out-of-control coastal state "unilateralism" sometimes referred to as "creeping jurisdiction." This is a threat for which multilateral negotiations provided the best forum for protecting core U.S. oceans interests – and the great success of the United States in this negotiation bore this out.

The effort of the critics, if even erroneously, to "tar" the treaty through equating it with the United Nations is also a simplistic argument in relation to United States interests toward the United Nations. The United Nations, of course, has serious deficiencies and lapses, the now-repealed infamous "Zionism as Racism" resolution is one such example. But in other respects the United Nations has served United States interests well, supporting United States actions in the Korean and Gulf Wars, delimitation of the boundary between Iraq and Kuwait after the Gulf War and substituting Canadian for United States forces in Haiti after the United States went into Haiti. The availability of the United Nations facilities for negotiating law of the sea issues – and rebutting out-of-control coastal state unilateralism threatening U.S. navigational interests – unequivocally served United States national interests.

The totality of argument from the critics is a denigration of law: they seem implicitly to urge that any international agreement is an unwelcome infringement of sovereignty of the United States. But to the contrary agreements are an exercise of sovereignty of this Great Nation. President George Washington regarded the Jay Treaty with Great Britain as the most important achievement of his administration. No one accepts a loss of United States sovereignty. At the same time, one of our most important sovereign rights is our legal ability to enter into agreements – just as individual citizens in our own country have a right to agree to contract with one another. In fact, it is only children and the mentally incompetent who have no right to contract – thus truly losing some of their "sovereignty." To deny our government the right to enter into agreements with other nations would deprive it of one of the most fundamental rights of sovereignty and leave us with

few options short of expending the lives of our armed forces to establish and enforce our rights. It should also be understood that under the Constitution of the United States national sovereignty, meaning our national freedom of action, can never be lost through an international agreement. It is well-accepted foreign relations law of the United States that a subsequent act of Congress can override a prior international agreement for purposes of national law. Further, the critics fail to mention that precisely because we do always retain our national sovereignty the United States remains free to withdraw from the Convention.

The critics argue that the Convention has not had adequate consideration by the Senate. But again this ignores a process of Senate, and even House consideration, far beyond that for most treaties, including the SALT I arms control treaty, and the four 1958 law of the sea treaties currently binding on the United States. Thus the Senate Foreign Relations Committee held a full committee hearing on the Convention in 1994 even before it was submitted by the President to the Senate. And last year, *after a decade in which the Convention was before the Senate*, full committee hearings were held on the Convention before the Senate Foreign Relations Committee, the committee of principal jurisdiction. All members of the Senate Foreign Relations Committee then supported the Convention unanimously by a vote of 19-0. The Senate Committee on Environment and Public Works, the Senate Armed Services Committee, the Senate Select Committee on Intelligence, and even the House International Relations Committee (which has no role in treaty advice and consent) also held full committee hearings. The argument for more hearings is in fact a transparent tactic urged by critics of the Convention to kill it through delay. They correctly understand that whenever the Convention is taken to a Senate vote it will be overwhelmingly approved.

Finally, the critics brush aside the consensus among affected oceans interests and knowledgeable oceans experts in the United States in favor of their own judgment as persons admittedly lacking expertise in international law or the operational aspects of oceans policy of the United States and representing no United States oceans interest. Indeed, almost no conventions have been so unanimously supported by knowledgeable experts and affected interests. Support includes every president of both parties who has considered the Convention subsequent to the successful renegotiation of Part XI on deep seabed mining in 1994, every Chairman of the Joint Chiefs from the Nixon Administration to today, all military services from the Nixon Administration until today, all of the Combatant Commanders, every Secretary of State from the Nixon Administration until today, every affected American oceans interest from the oil and gas industry, fisheries interests, shipping, oceanic cables, marine scientists, and environmentalists. Most recently, the congressionally established United States Oceans Commission and the new Bush Administration Oceans Interagency Task Force each *unanimously* recommended Senate advice and consent. As Senators consider advice and consent they might want to ask who they trust more for

national security advice – every Chairman of the Joint Chiefs, the Combatant Commanders of our united geographic commands and the consistent view of the Navy since the Nixon Administration, or those few who admittedly are not naval, oceans, or international law experts. Further, how can the totality of United States agencies, military departments and private sector oceans industries and interests constitute a "special interest" as charged by the critics? By what criteria are the most vocal critics *not* special interests?

III.
Setting the Record Straight:
Specific Myths Advanced Against the Convention[2]

A. MYTHS CONCERNING NATIONAL SOVEREIGNTY

- **Myt h: The United States is giving up sovereignty to a new international authority that will control the oceans.** Nothing could be further from the truth. The United States does not give up an ounce of sovereignty in this Convention. Rather, as just noted, the Convention solidifies a truly massive increase in resource and economic jurisdiction of the United States, not only to 200 nautical miles off our coasts, but to a broad continental margin in many areas even beyond that. The new International Seabed Authority created by this Convention, which, as noted, has existed for a decade and will continue to exist regardless of United States actions, deals solely with the mineral resources of the deep seabed beyond national jurisdiction. It has nothing to do with the water column above the seabed. The deep seabed is an area in which we not only have no sovereignty but also in which we and the entire world have consistently opposed extension of national sovereignty claims. Moreover, to mine deep seabed minerals requires security of tenure for the billion dollar plus costs of such an operation. 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 as the critics seem to suggest. Rather, they must have both exclusive rights to mine sites – and international recognition of titles to the minerals recovered – requirements that led to a limited international agency to provide security of tenure and title for mineral resources

[2] A list of myths (with page reference to the specific myth and response) is appended to this paper (Annex I).

of the seabed beyond national jurisdiction and otherwise owned by no one. The Authority was a necessary specialized agency, of strictly limited jurisdiction, to deal with this need for security of tenure and stable property rights so that investors may securely amortize their debt. Quite contrary to the recent testimony of one critic before the Senate Committee on Environment and Public Works, the Seabed Authority would not have "the exclusive right to regulate what is done, by whom, when and under what circumstances in subsurface international waters and on the sea-floor." Rather, the Authority is a small, narrowly mandated specialized international agency that, emphatically, has no ability to control the water column and only has functional authority over the mining of the minerals of the deep seabed beyond national jurisdiction. Again, this is a necessary requirement for seabed mining, in an area beyond where any nation has sovereignty, to provide security of tenure to mine sites, without which mining will not occur. Without adherence to the treaty America will simply lose its deep seabed mine sites, the best in the world, and our seabed mining industry will be permanently deep sixed.

- **Myth: U.S. adherence will entail history's biggest voluntary transfer of wealth and surrender of sovereignty.** To the contrary, the Convention enhances not only sovereignty of United States military ships and aircraft, but also bolsters our resource jurisdiction over a vast area off the coasts of the United States. In fact, the Convention supports the 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. The area of resource jurisdiction confirmed under national control of the United States by this Convention is approximately equal to that of the continental United States and exceeds the area of the Louisiana purchase, the purchase of Alaska or any other addition to United States sovereignty in American history. It is also the most extensive of any nation in the world. The mandatory technology transfer provisions of the deep seabed mining part of the original Convention, an element of the Convention that the United States objected to, were eliminated in the 1994 Agreement. Any transfer of funds to nations from deep seabed mining revenues, or oil and gas development beyond 200 miles, is subject to a United States veto. As such, we not only have a veto over where revenue from our seabed mining would go, but also from that of all other nations in the world. This new power is simply lost if we fail to adhere.

B. MYTHS CONCERNING THE UNITED NATIONS

- **Myt h: The Convention would turn the oceans over to the United Nations.** Completely and utterly false. Not a drop of oceans water nor an ounce of oceans resources would be turned over to the United Nations. To the contrary, the Convention disappointed extreme internationalists who believed in "blue helmet" solutions to oceans issues. It placed all coastal resources of the water column and the continental shelf under coastal nation rather than international jurisdiction. And it maintained and strengthened freedom of navigation on the world's oceans. These critical issues in the negotiation, by far the most important at stake, both hugely strengthened *national sovereign rights.* Even the International Seabed Authority that the Convention creates is an independent international authority, supported by the United States, as necessary to provide stability of property rights to deep seabed minerals not owned by any nation. Without such an authority *providing exclusive property rights* to seabed mine sites of the deep ocean floor, seabed mining, including U.S. mining in the oceans, would never be realized. And remember that this body is limited to the mineral resources of the deep seabed *beyond national jurisdiction* that have yet to be mined, in contrast with the billions of dollars in economic value in the fisheries and oil and gas of the continental margins, all placed under national jurisdiction.

- **Myth: 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 erroneous as to be humorous if it were not so seriously and repeatedly advanced by the critics. The Executive Branch that led U.S. negotiations on the Convention and that is supporting Senate Advice and Consent would never have supported such nonsense. The International Seabed Authority deals solely with mineral resources beyond national jurisdiction, not with fishing, not with global pollution and not with navigation – or even activities in the water column. It is necessary in order to create enforceable rights to mine sites not owned by any nation as required if United States mining firms are ever to mine the deep seabed. The United States is already party to hundreds of specialized international organizations. The Seabed Authority would add an unremarkable one more. Indeed, one more that even after ten years of operation today still has a staff of only thirty-five.

- **Myt h: The Convention gives the United Nations its first opportunity to levy taxes.** False. The Convention does not provide for or authorize taxation of individuals or corporations. It does include modest revenue sharing provisions for oil/gas activities on the continental shelf beyond 200 miles after the first five years of production and certain fees for deep seabed mining operations. The oil/gas fees are less than the royalties paid to foreign countries for drilling off their coasts and none of the revenues go to the U.N. These *de minimus* revenues, averaging between two and four percent over the projected life of a well, were a small price to pay for enlarging the U.S. continental shelf by 15 percent – an area larger than the state of California. This is one of the reasons the U.S. oil and gas industry so strongly supports the Convention. With respect to deep seabed mining 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 – that is its veto would be applicable – would be required for any transfer of such revenues. With respect to deep seabed mining, because the United States is a non-party, U.S. companies currently lack the 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 who are Convention parties. When the Interior Department charges royalties to American oil companies for development of the oil and gas from our continental shelf it is not exercising a "taxing power," rather it is selling access to an asset. Similarly, royalties paid for access rights to deep sea mineral resources are not a "tax" on the American taxpayers anymore than such royalties paid by U.S. miners to Chile or Indonesia to mine resources there are such a "tax." Perhaps most importantly, until the United States accedes to the Convention it will not be able to exercise its veto over distribution of revenues from every other nation in the world generated by these provisions. And when we do accede we not only have veto rights over distribution of revenues from U.S. mines but also from all other seabed mines. As such, these provisions greatly expand United States influence over financial aid decisions.

C. MYTHS CONCERNING NATIONAL SECURITY

- **Myt h: The Convention is harmful to the Proliferation Security Initiative (PSI).** Again, this is false. The Proliferation Security Initiative has already been negotiated explicitly in conformance with the Convention; and not surprisingly so, since the nations with which we are coordinating in that initiative are parties to the Convention. This charge apparently rests on the false belief that if the United States does not adhere to the Convention it will be free from any constraints in relation to oceans law. Again, a false assumption; we are today a party to the 1958 Geneva Conventions that are much more restrictive than the 1982 Convention now before the Senate. This charge is also misguided in failing to understand the critically important interest we have in protecting navigational freedoms on, in and above the worlds oceans. The Convention allows our vessels to get on station, a capability that is essential before any issue even arises about boarding. Moreover, we emphatically do not want a legal regime that would permit any nation in the world to seize United States commercial vessels anywhere in the worlds oceans. *That* would be a massive loss of U.S. sovereignty! The Proliferation Security Initiative was carefully constructed with parties to the 1982 Convention, using the flag state, port state and other jurisdictional provisions of the 1982 Convention precisely to avoid this problem. Nor is this charge at all realistic in failing to note that nothing in the Law of the Sea Convention could or does trump our inherent rights to individual and collective self-defense. Most recently, we note, Under-Secretary of State John Bolton, a principal architect of the PSI, has testified to the Senate that adhering to the Convention will not harm the PSI.

- **Myt h: The Convention would interfere with the operations of our intelligence community.** Having either chaired or participated in the eighteen agency National Security Council interagency process that drafted the United States negotiating instructions for the Convention, we found this charge so bizarre that we recently checked with the Intelligence Community to see if we had missed something. The answer that came back was that they, too, were puzzled by this charge, and there was absolutely no truth to it. We are confident that there is no provision in the Law of the Sea Convention which will, if approved by the Senate, add constraints on the operations of our intelligence community. Indeed, remember in this connection that the United States is already bound by the 1958 Conventions and that since 1983, pursuant to President Reagan's

order, we have been operating under the provisions of the 1982 Convention, other than for deep seabed mining in part XI.

- **Myt h: Freedom of navigation is only challenged from "[t]he Russian navy [that] is rusting in port [and] China has yet to develop a blue water capability. . . ."** The implication here is that the principal challenge to navigational freedom comes from major power war or conflict and we do not really have any national concerns at this time about preserving freedom of navigation. But the 1982 Convention deals with the law of peace, not war, or self-defense. Thus this argument misses altogether the serious and insidious challenge, which, again, is what the LOS Convention is designed to deal with; that is, repeated efforts by coastal nations to control navigation, many from allies and trading partners of the United States, which through time add up to death from a thousand pin-pricks. That is the so-called problem of "creeping jurisdiction" that remains the central struggle in preserving navigational freedom for a global maritime power. After years of effort we have won in the Law of the Sea Convention the legal regime that supports our operators in our efforts to control this "creeping jurisdiction." To unilaterally disarm the United States from asserting what we won in the Convention against illegal claimants is folly and undermines our national security.

- **M yth: 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).** Wrong. It is not true that our navigational freedoms are not threatened. There are more than one hundred illegal, excessive claims around the globe adversely 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 as reflected in the Convention. On occasion these operations can 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 and aligning expectations of behavior at sea.

- **Myt h: Friendly relations with the few states that sit astride sea lanes are more likely to protect U.S. navigational rights than an abstract multilateral treaty to ensure passage.** This myth simply does not understand oceans policy. There are not simply a "few" states that "sit astride" sea lanes, rather there are more than 100 straits used for navigation overlapped by a twelve-mile territorial sea. Our difficulties in working with bordering "straits" states shows we were far better off as a party to an international agreement that articulates these rights in a multilateral negotiation in which we would mobilize the major maritime powers of the world against extreme straits states demands. The implication that bilaterally negotiated agreements with straits states is a better way to protect U.S. ocean interests is fundamentally wrong – indeed it is the path to a rapid loss of our sovereign rights to freedom of navigation. This was our bitter experience concerning the Persian Gulf and our reliance on the Shah of Iran to provide stability. Finally, there is nothing "abstract" about the Convention, it protects our navigational rights with greater clarity than ever before in our history.

- **Myt h: The Convention was drafted before – and without regard to – the war on terror and what the United States must do to wage it successfully.** An irrelevant canard. 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.

- **Myt h: Obligatory technology transfers will equip actual or potential adversaries with sensitive and militarily useful equipment and know-how (such as anti-submarine warfare technology).** Bunk! 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. Further, 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.

- **Myt h: 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.** Absurdly false! 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 nation 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 descriptions of both the status quo and the Convention's provisions are incorrect and seriously misleading. Adhering to the Convention will make no change in our existing ability or authority to search ships entering our EEZ with regard to security or protection of the environment. And under the Convention, the UN *has no role at all,* much less a role in deciding when and where a foreign ship may be boarded.

- **Myt h: The Convention would place restriction on antisubmarine sonars to protect whales.** This is false. The Convention's provisions concerning the environment do not apply to warships that enjoy complete immunity under the Convention. The environmental measures the United States applies to its own warships remain a matter of national law.

- **Myt h: 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.** Wrong again on both facts and law. The United States Government is 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 would be illegal under 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.

D. MYTHS CONCERNING PART XI ON SEABED MINING

- **Myt h: The Convention would mandate technology transfer and contains other fundamentally non-free market provisions with respect to deep seabed mining in Part XI.** This charge seems to stem from a failure to understand that a series of flawed seabed mining provisions in Part XI of the 1982 Convention, including mandatory transfer of technology, were successfully renegotiated at the courageous insistence of President Reagan. Today, the Convention, as so modified, provides for first-come rights to mine the deep seabed under a joint venture arrangement providing guaranteed access rights to deep seabed minerals. And the renegotiated Part XI even goes beyond the Reagan conditions in adopting the important pro-free-market GATT principle against subsidization of seabed miners. The mining regime adopted by the Authority may well be even more flexible than what we have here at home. But whatever imperfections there may be in the deep seabed regime, it is a certainty that *United States non-adherence has to date, and if continued will permanently, kill all hope of a United States seabed mining industry.* Bankers simply will not lend the billion dollars plus required for a deep sea mining operation without an unchallengeable legal title to the resource.

- **Myt h: The problems identified by President Reagan in 1983 were not remedied by the 1994 Agreement relating to deep seabed mining.** Wrong. Each objection was addressed and remedied. 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; restructures the regime to comport with free-market principles, including the elimination of the earlier mandatory technology transfer provisions and all production controls. The unique, and singular, veto awarded the United States in this renegotiation is of enormous precedental importance to the United States. This is worth repeating: the United States has been singled out in the renegotiation as *the only nation in the world to be given a permanent veto over critical decisions of the Authority.* By

non-adherence we turn our back on this highly favorable development.

- **Myt h: The International Seabed Authority has the power to regulate seven-tenths of the earth's surface, impose international taxes, etc.** Nothing could be further from the truth. The Convention does address seven-tenths of the earth's surface, but primarily to affirm coastal nation sovereign rights over resources and freedoms of all nations. However, the International Seabed Authority (ISA) does not apply to seven-tenths of the earth's surface. The authority of the ISA is strictly limited to administering mining of minerals in seafloor 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.

- **Myt h: The United States might end up without a vote in the ISA.** Not possible unless we follow the critics' advice and refuse to participate. 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. This is a unique international precedent – *to provide the United States and only the United States with a permanent seat in the Seabed Authority.* It would be folly to reject this precedent.

E. MYTHS CONCERNING DISPUTE SETTLEMENT

- **Myt h: United States military activities will be subject to a world court.** There was consensus in the UNCLOS negotiations that military activities should be exempted from dispute settlement. Accordingly, Article 298 of the Convention permits nations to opt out of the dispute settlement provisions for military activities, and under the president's submission, as embodied in the Senate draft resolution of advice and consent, this option is unmistakably

exercised for the United States. Further, the scope of dispute settlement is severely cabined in general. For example, none of the decisions of the United States in relation to access by foreign fishermen to our fish stocks are subject to dispute settlement. In addition, under the president's submission, as embodied in the Senate draft resolution, the United States will be accepting "special arbitration" as our preferred modality of dispute settlement rather than the International Court of Justice (the World Court) or the International Tribunal for the Law of the Sea. The United States is already a party to literally hundreds of international agreements, including more than eighty-five submitting disputes to the International Court of Justice, that provide for compulsory dispute resolution. Recently, the Senate of the United States approved the 1995 agreement implementing certain fisheries provisions of the LOS Convention; an agreement strongly supported by American fishing interests and which contains the dispute resolution procedures decried by the critics. As a result of these agreements concerning dispute resolution, remedies are often available when the rights of the United States or its citizens are violated by other countries. In this connection, compulsory dispute settlement is particularly useful in controlling illegal interference with navigation. Indeed, because of its importance in constraining these illegal claims, even the former Soviet Union was persuaded of the importance of compulsory dispute settlement in the Law of the Sea Convention, despite its longstanding general opposition to compulsory dispute settlement. The severely cabined dispute settlement procedures in the Law of the Sea Convention are far more restrictive than in most of the other dispute resolution provisions already binding on the United States. Moreover, as noted above, in the Law of the Sea Convention we would choose special arbitration rather than the International Court of Justice or the International Tribunal for the Law of the Sea.

- **Myt h: The Convention mandates a tribunal to adjudicate the ocean disputes of the United States.** The Convention does establish the International Tribunal for the Law of the Sea. However, Parties are free to choose other methods of dispute settlement. The United States has stated that it will choose two forms of arbitration rather than the Tribunal. While the limited area of U.S. mining of the deep seabed would be subject to the Sea-bed Disputes Chamber if deep seabed mining ever takes place, the proposed Resolution of Advice and Consent makes clear that the Sea-bed 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." Importantly, the Chamber's authority extends only to disputes involving the mining of minerals from the deep seabed; no other activities, including operations in the water column or on the surface of the oceans, are subject to it.

- **Myt h: The International Law of the Sea Tribunal has already asserted, in the MOX case involving a UK nuclear plant, that it will determine its own competence, or scope and jurisdiction, even in the face of other extant treaties designed to address the issue at hand.** The MOX case was brought by Ireland against the UK. The Tribunal, in a setting in which the UK had failed to assert its right to invoke exceptions under Article 297 of the Convention, and in dealing solely with "provisional measures," focused its analysis on the highly technical question regarding the relationship among a series of different treaties the UK had accepted, all of which provided for compulsory jurisdiction, but in different fora. Upon the completion of its analysis, the Tribunal denied Ireland's request for intrusive provisional restraints on the UK's activities. Then the Tribunal simply recommended that the parties cooperate, and dropped out of the case. An arbitral panel had been selected by Ireland and the UK, and that panel also suspended proceedings (which have not been resumed) pending litigation in the European Court of Justice pursuant to European law. Implying that these facts should be portrayed as an example of the Tribunal grabbing jurisdiction away from other courts is wrong.

F. MYTHS CONCERNING THE NEGOTIATING PROCESS

- **Myth: "[T]he Law of the Sea Convention was a grand scheme to create 'an oceanic Great Society'. . . ."** It is true that one motivation of developing countries in the UNCLOS negotiations more than three decades ago, played out in the negotiation for Part XI, was an exaggerated hope of riches from deep seabed mining. It is also true that the concept of the "New International Economic Order" played a harmful role in the negotiation of Part XI on deep seabed mining. The motivation of the United States and other major powers, however, was to protect navigational freedom, end the out-of-control coastal state grab for the oceans, extend our jurisdiction

fully to the fish stocks and much of the oil and gas off our coasts and achieve international agreement on a mechanism providing security of tenure for deep seabed mining in areas beyond national jurisdiction. It was the other non-Part XI issues that were the real core of the UNCLOS negotiations, as attested by the fact that heads of delegation did not focus on Committee I, where Part XI was being negotiated, and spent their efforts in Committees II and III, where more critical national security issues were at stake. The United States and other major developed nations coordinated closely together on these crucial navigational and resource issues in the "Group of Five." Moreover, the interest of certain land-based producers of nickel and copper, including developed nations, in preventing competition from deep seabed minerals, was probably a more important factor in the negotiating difficulties in Part XI than the "New International Economic Order." The renegotiation of Part XI pursuant to the Reagan conditions solved this latter problem by abolishing the "production limitations" that the land-based producers had written into the original agreement.

- **Myt h: The Convention is an effort by the radical left to move toward world government.** The reality is the opposite! The Convention works a massive extension of national sovereign rights over the most important oceans resources, including fish stocks and oil and gas, while protecting national sovereign rights in freedom of navigation for all nations. As such, it is a direct repudiation of radical claims, urged by some, for an international agency to control the oceans. Only seabed mineral resources beyond a broadly extended area of coastal state resource control are placed under limited control of an international authority – and this was necessary to establish the exclusive property rights needed by mining firms for minerals otherwise owned by no nation. Further, the International Seabed Authority, as renegotiated, adopts free market principles as its core and is itself a rejection of the "New International Economic Order." And the negotiations rejected any effort to stray into arms control as urged by some. In reality the Convention is a triumph for both national sovereign rights and free market principles.

G. Myths Concerning the National Decision Process and the Views of President Reagan

- **Myt h: President Reagan would oppose moving forward with this Convention.** Again, the actions of the Reagan Administration show

this to be false. At the urging of one of us as a former United States Ambassador to the negotiations, and that of others, President Reagan wisely refused to accept the provisions on deep seabed mining then set out in Part XI of the Convention and he approved instructions for the United States delegation to reengage in the negotiations to achieve a series of critical access and institutional changes in Part XI. After a full and careful interagency review of the then draft Convention *President Reagan had no changes to suggest to the remainder of the Convention, including the most important security provisions that had been sought by the United States*. The reason for this is simple; the United States had superbly achieved its security objectives in the negotiations under Presidents Nixon and Ford. Further, in 1983 *President Reagan issued orders to the Executive Branch to act in accordance with the substantive provisions of the Convention, other than Part XI, as though the United States were a party to the Convention.* While the Reagan conditions for changes in Part XI were not achieved in the negotiations under his tenure, when subsequently negotiations were resumed during the Clinton Administration, President Clinton accepted the Reagan conditions as the basis for United States adherence. And the Clinton Administration negotiators were successful by 1994 in achieving *all* of the Reagan conditions and then some. They also achieved all of the conditions that had been earlier set out by the Congress as requirements for a deep seabed mining regime. Only then did the United States indicate total acceptance, and submit the Convention to the Senate for advice and consent.

- **Myth: If the Convention is a treaty about the Navy's conflict m obility and national security, why is the ratification effort being led by State Department environmentalists?** This disingenuous statement simply ignores the reality that the United States Navy and the Joint Chiefs have been the principal proponents of the Convention since negotiations began in the 1970s. When the Convention sat before the Senate Foreign Relations Committee for a decade because of opposition from the then Chairman of the Committee it was the Chiefs and the Navy who worked tirelessly to move the Convention. This statement further ignores the strong support of *every* United States ocean agency, all United States oceans industry (e.g. oil and gas, fishing, etc.), and the unanimous support of the Congressionally established United States Commission on Ocean Policy. Further, the United States position on law of the sea reflected in this Convention, was developed in an

eighteen agency interagency task force under the White House National Security Council mechanism.

- **Myt h: There has been inadequate consideration of the Law of the Sea Treaty and we need more time to study it.** Nonsense! Those who espouse this view fail to note that this is the second round of Senate hearings on the Convention. The first round was held in 1994 just before the Convention was initially submitted to the Senate. The Senate, and the Country, has had a decade to study the Convention, and for several decades, since 1983, we have lived under the legal regime of everything but Part XI. We have an especially hard time in finding any sympathy for this position urging delay when it comes from spokesmen who were not heard calling for more consideration of the Convention for the full decade while the treaty languished before the Senate Foreign Relations Committee. Rarely has any Convention to come before the Senate been more fully studied and debated – and, in real effect, lived under.

- **Myt h: President Bush is urging Senate advice and consent to the Convention for little better than "go-along, get-along multilateralism."** Give us a break! Among presidents prepared to take the heat internationally for actions they believe in, as Afghanistan and Iraq surely demonstrate, this president is near the top. Is it too much to understand that after lengthy and careful review this president has urged Senate advice and consent because it is in the national interest of the United States? Further, does anyone really believe Ronald Reagan was a "go-along, get-along" president?

H. MYTHS CONCERNING LEGAL EFFECTS

- **Myth: 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. It is an option explicitly provided by Article 298 of the Convention. Other parties to the Convention that have already made such declarations exercising this option include the United Kingdom, Russia, France, Canada, Mexico, Argentina, Portugal, Denmark, Ukraine, and Norway.

- **Myth: The 1994 Agreement doesn't even pretend to amend the C onvention; it merely establishes controlling interpretive**

provisions. Nonsense! The Convention could only have been formally "amended" if it had already entered into force. The 1994 Agreement was negotiated 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. Indeed, the International Seabed Authority has been operating under the changes for a decade and has incorporated them article-by-article into the treaty in its compilation of basic documents. *See* "The Law of the Sea: Compendium of Basic Documents," 48-89, 206-226 (International Seabed Authority, 2001). A letter personally endorsed by all living former Legal Advisers of the U.S. Department of State, representing both Republican and Democratic Administrations, confirms the legally binding nature of the changes to the Convention effected by the 1994 Agreement. Their letter states that "[T]he Reagan Administration's objection to the LOS Convention, as expressed in 1982 and 1983, was limited to the deep seabed mining regime. The 1994 Implementing Agreement that revised this regime, in our opinion, satisfactorily resolved that objection and has binding legal effect in its modification of the LOS Convention." Moreover, the proposed resolution of advice and consent does not simply accept the 1982 Convention but rather the Convention with the 1994 Agreement implementing Part XI (Section 1 of the Text of Resolution of Advice and Consent to Ratification).

- **Myt h: Most of the benefits are available without the treaty.** A major error in this assertion is that it misses altogether the ongoing struggle for navigational freedom in the world's oceans – a struggle requiring active United States engagement and leadership. Such engagement and leadership is simply not possible if we are the only permanent member of the Security Council not to adhere to the Convention. It also fails to address the cost to the United States of being excluded from the principal institutions created by the Convention – including the loss of a U.S. veto over major decisions concerning deep seabed mining. And it is wrong in ignoring the permanent loss of a U.S. deep seabed mining industry that would be a cost of non-adherence. And, among other reasons, it further ignores the cost to the United States and its international negotiating credibility of holding out requests for renegotiation of a major international agreement – having those requirements met – and then turning our back on the renegotiated agreement that met all of our stated requirements.

- **Myt h: We do not need to adhere to the Convention because it already represents customary international law binding on the United States.** This argument urges that our navigational interests are already protected. Curiously, those who advance this argument fail to note that if the United States is already bound to the Convention as customary international law it is also bound by provisions they may object to in the Convention. The critics cannot have it both ways. More importantly, the argument misses the reality that the United States is legally disenfranchised as a non-adherent and will not receive the full benefits of the Convention without acceding to it. Further, customary international law is subject to change, which can be abrupt, such as how the customary international law of outer space was changed overnight when Sputnik was launched.

I. MISCELLANEOUS MYTHS

- **Myt h: Adhering to the Convention will come with substantial financial obligations.** U.S. financial obligations under the Convention will be modest. Had we been a full party throughout 2001, our contribution to the Seabed Authority would have been approximately $1.3 million computed at the 25% rate, and this reduced to a 22% rate in 2002. Our contribution to the International Tribunal is estimated to be approximately $2 million per year. This total level of contribution is less than the United States pays each year for membership in the U.S./Canada Great Lakes Fish Commission.

- **Myt h: The Convention purports to govern claims of rising sea level and melting ice caps.** More nonsense! These issues are neither dealt with in the Convention nor were they featured in the negotiations.

IV.
Are There Accurate Reasons to Oppose the Law of the Sea Convention?

While we strongly support immediate Senate advice and consent – and seek to rebut false arguments being made against senate advice and consent – we present below a list of arguments against advice and consent we do *not* support – but which are at least accurate in stating the effect of non-adherence. Thus, you should oppose Senate advice and consent:

- If you favor a gradual loss of United States' sovereign rights over naval and commercial navigation on the world's oceans;
- If you believe the United States should substitute the lives of service men and women for the stability of the rule of law;
- If , at this time of high oil prices, you want to greatly delay development of the oil and gas on the United States continental margin beyond 200 nautical miles with its associated jobs in the United States;
- If you want to kill the United States seabed mining industry, permanently lose U.S. mine sites staked out as the best in the world, and prevent the development of seabed mining jobs in the United States;
- If you do not want American fishermen and merchant mariners to have legal protection against corporal punishment and imprisonment in jails around the world;
- If you do not want the United States to participate in assessing continental margin claims, such as that of Russia in the Arctic Ocean;
- If you believe it wrong for the Convention to confirm for the United States the most extensive exclusive economic zone in the world;
- If you oppose stable expectations and the rule of law in the world's oceans;

- If you believe that the United States should have a diminished voice in protecting our oceans interests worldwide;

- If you believe that providing a guaranteed permanent seat and veto right for the United States on the Governing Council of the Seabed Authority – the only guaranteed seat for any nation – is a bad precedent;

- If you oppose protection of fish stocks and the ocean environment;

- If you believe the United States should no longer lead in the development of oceans law and policy; and

- If you believe that advice from non-Law of the Sea experts on oceans security issues is more reliable than that from the Joint Chiefs of Staff, the Navy, presidents of both parties, all United States oceans industries, and the unanimous opinion of the Congressionally established U.S. Commission on Ocean Policy.

ANNEX I

LIST OF MYTHS

(WITH PAGE NUMBERS FOR MYTHS AND RESPONSE)

A. MYTHS CONCERNING NATIONAL SOVEREIGNTY

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SENATE ADVICE AND CONSENT TO THE LAW OF THE SEA CONVENTION

Testimony delivered by

John Norton Moore*

"The day is within my time as well as yours, when we may say by what laws other nations shall treat us on the sea."

Thomas Jefferson

CHAIRMAN RICHARD G. LUGAR AND HONORABLE MEMBERS OF THE FOREIGN RELATIONS COMMITTEE --

Senate advice and consent to the 1982 Law of the Sea Convention is strongly in the national interest of the United States. Ratification of the Convention will restore United States oceans leadership, protect United States oceans interests, and enhance United States foreign policy. For these reasons the Convention is broadly supported by United States oceans organizations, including the United States Navy (one of the strongest supporters over the years), the National Ocean Industries Association[1], the United States Outer Continental Shelf Policy Committee[2], the American Petroleum Institute[3], the Chamber of Shipping of

[1]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."

[2]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 . . . ."

[3]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, Oct. 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

America[4], The Center for Seafarers' Rights[5], the Chemical Manufacturers Association[6], and the congressionally established National Commission on Ocean Policy.[7] This testimony will briefly explore reasons for United States adherence to the Convention. First, however, it will set out a brief overview of the Nation's oceans interests and history of the Convention.

Background of the Convention

As the quote by Thomas Jefferson 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

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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."

[4] 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."

[5] 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."

[6] 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."

[7] On November 14, 2001, the National Commission on Ocean Policy adopted a resolution – 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."

continental margin, fishing, freedom to lay cables and pipelines, 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 1960's 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.[8] And the result was outstanding in protecting our vital

[8] 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

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.[9]

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 Convention to the Senate for advice and consent.[10] Since that time no Administration, Democratic or Republican, has opposed Senate advice and consent – and United States ratification.

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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 either favor extending national jurisdiction beyond 200 nautical miles nor permitting interference with navigational freedom in the 200 nautical mile economic zone.

[9] 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.

[10] 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).

At present the Convention is in force; and with 143 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, Denmark and Canada – and Canada is expected to join in the immediate future as soon as the European Union formally adopts an important fisheries agreement implementing the 1982 Convention. 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 during the 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 Senate 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 on the formulation of the mining code for manganese nodules of the deep seabed; we have missed participating 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 important forum of Convention States Parties.

Why should the United States give advice and consent to the Law of the Sea Convention? I will summarize the most important reasons under three headings:

I.
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.

Not to 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.

II.
Protecting United States Oceans Interests

A second set of important reasons for United States adherence to the Law of the Sea Convention relate to the particularized protection of United States oceans interests. Some of the more important and immediate of these 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.[11] 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 ratifying 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.[12] 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 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

[11] 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).

[12] United States "understandings" under Article 310 could either be formulated and attached to the Convention by the Executive Branch at the time the United States ratifies the Convention or they could be attached to the Resolution of Senate Advice and Consent. I believe the second of these alternatives would have the greatest effect in the ongoing "struggle for law" as to the correct interpretation of the Convention. Given the highly technical nature of these understandings I would be pleased to work with the Committee to provide a draft of understandings for your consideration. It should be clearly understood that these 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.

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 15% 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;[13]

[13] 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 – and the importance of the United States participating in the resulting approval process in the Commission on the Limits of the Continental Shelf – 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

- 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 four 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 these 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 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,

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.

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 importantly be noted in protecting United States oceans interests that no U.S. oceans interest is better served by non-adherence than adherence. This is an highly unusual feature of the 1982 Convention. Most decisions about treaty 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.

III.
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 their puzzlement to me 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 which 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 was 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 Treaty even if you renegotiate with them and meet all their concerns?"; and 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.[14]

Conclusion

Senate advice and consent 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 restoring U.S. oceans leadership, protecting U.S. oceans interests, and enhancing U.S. foreign policy. I would urge the Senate to support advice and consent to the 1982 Convention at the earliest possible time.

[14] 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).

WRITTEN TESTIMONY OF
CAITLYN L. ANTRIM
TO THE SENATE COMMITTEE ON FOREIGN RELATIONS
ON THE
ACCESSION TO THE 1982 LAW OF THE SEA CONVENTION AND
RATIFICATION OF THE 1994 AGREEMENT RELATING TO THE IMPLEMENTATION
OF PART XI OF THE LAW OF THE SEA CONVENTION

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* and the 1994 *Agreement Relating to the Implementation of Part XI of the Convention.* In this testimony I will address the topic of exploration and exploitation of the mineral resources of the deep seabed beyond the limits of national jurisdiction.

I have worked in the field of deep seabed mining since I was introduced to the subject in 1973 in a joint ocean engineering and law course at MIT and Harvard Law School. I completed my graduate studies with a thesis titled "Effects of Regulatory Constraints on the Deep Ocean Mining Industry." I went on to serve as the ocean mining technical expert on the US Delegation to the Law of the Sea Conference in 1979 and 1980, then helped establish the Office of Ocean Minerals and Energy in NOAA that was responsible for the implementation of the Deep Seabed Hard Mineral Resources Act of 1980. In 1982, I was advanced under the Reagan Administration to serve as a Deputy US Representative to the Conference and Representative of the Secretary of Commerce on the US delegation. After the conclusion of the negotiations I joined the Congressional Office of Technology Assessment where I directed an assessment of strategic materials policy. I later served as project officer for the National Materials Advisory Board study of "Competitiveness of the Domestic Minerals and Metals Industry." Since that time I have served as a consultant on seabed mining technology and economics and on the legal and regulatory regime under both US law and the Law of the Sea Convention. I have published on these topics in book chapters, technical magazines and professional journals.

As a point of reference for my discussion, deep seabed mining refers to the exploration and exploitation of hard mineral resources from the deep ocean floor beyond the limits of the Exclusive Economic Zone and the Extended Continental Shelf. Having been nothing more than a scientific curiosity since their discovery in the 19th century, deep seabed minerals finally caught the public eye and the attention of industry in the 1960s, leading to corporate research and development into the technology necessary to profitably recover these minerals. Interest peaked in the decade

beginning in 1975, but as the growth of metal demand slowed after 1980, commercial interest faded and industry activity, at least in the United States, slowed to almost nothing. Recently, however, conditions have changed and interest in deep seabed mining is beginning to stir, most recently with the registration by a German group of a former US site with the International Seabed Authority.

My testimony draws in part from a paper that I prepared for the *Oceans 2005* conference convened by the Marine Technology Society and IEEE. I have included a copy of that paper with this testimony and request that it be entered into the written record with my testimony.

Before going on in detail, I would like to capture the essence of my findings and conclusions:

- The deep seabed has deposits of ores of strategic and critical minerals that are essential to the US economy and national security
- Increasing demand by China and soon by India, combined with increasing demand for high energy density batteries containing nickel and cobalt and limited opportunities to expand land-based production, has and will continue to result in tight supplies and rising prices for the next decade and may well continue for up to 40 years.
- Land based supplies of nickel and cobalt rely on a small number of suppliers, with central Africa and Russia having the greatest influence in production and pricing. Even copper, in which the US was once nearly self-sufficient, is coming increasingly from overseas.
- There are very few opportunities to increase supplies at current metal prices, making deep seabed sources increasingly competitive, particularly since processing technologies for land based ores appear transferable to processing of polymetallic nodules and cobalt crusts.
- Given that security of tenure, exclusive right to a deposit and international recognition of title to recovered minerals are essential conditions for the financing of the $1 billion or more investment required for deep seabed mining, the lack of a domestic metal processing industry with experience in the oxide ores of polymetallic nodules and the prohibition against nationals of states that are party to the LOS Convention from engaging in seabed mining other than through the Convention, there will be no opportunity for US firms to participate in the development of deep seabed mineral deposits unless and until the US becomes party to the Law of the Sea Convention.
- The Senate has the power to renew prospects for a domestic deep seabed mining industry that can both be competitive in the international market place and ensure uninterrupted supplies of metals critical to US industries and consumers through increased diversity of supply. To achieve this end, the Senate must give its advice and consent to join the Law of the Sea Convention.

Deep Seabed Mineral Resources

There are three known types of deep seabed deposits of hard minerals that may be of economic interest. The first are polymetallic nodules. These are lumps of iron and manganese oxide enriched in nickel, cobalt and copper. Nodules are found in many parts of the world, but economic

concentrations of nickel, copper and cobalt have only been found in the southeast region of the north Pacific Ocean and in the Indian Ocean. The second type of deposit is the Cobalt Crust. Similar to polymetallic nodules, these crusts coat the slopes of some seamounts and are enriched particularly in cobalt. The third type of deposit is composed of polymetallic sulphides right in copper, zinc and lead, and sometimes enriched in gold. These deposits are located along the edges of the tectonic plates that underlie the oceans. Of these three, polymetallic nodules are most promising for development on the deep seabed, though polymetallic sulphides are under development within the exclusive economic zone of countries in the southwest Pacific Ocean.

Land Based Production of Seabed Minerals

Economically, nickel is the most important metal in polymetallic nodules. Major land based producers of nickel are: Russia, 20% of world production, Canada 15%, Australia 12%, Indonesia 9%, and France 7%. Other production comes from developing countries, including 5% of world production from Cuba.

The largest copper producer is Chile at 35% of world production, The United States is second at only 8%, followed by Peru, Australia, Indonesia, China and Russia, each with between 5% and 7% of world production.

Cobalt production is dominated by a few suppliers: The Democratic Republic of the Congo alone accounts for 38% of world production and neighboring Zambia another 15%, with these two countries accounting for more than half of world cobalt production. Australia and Canada account for another 10% each, with Russia accounting for 9% and Cuba another 7%, Thus, over two thirds of world production of this strategic and critical metal come from central Africa, Russia and Cuba.

By contrast, a single deep seabed mine recovering 3 million tonnes of ore per year could contribute a quarter of a percent of world copper production, 2.7 percent of world nickel production and 12.4 percent of world cobalt production.

Markets for Deep Seabed Minerals

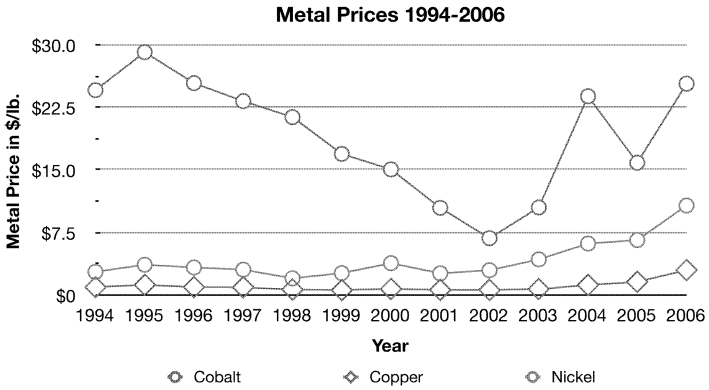
The metals to be obtained from early deep seabed mining are nickel, copper and cobalt contained in polymetallic nodules. All three metals are critical to the economy and both nickel and cobalt have vital strategic uses. Copper is essential not only in electrical applications, but in copper tubing, building materials and in brasses and bronzes. Nickel is an essential constituent of most stainless steel, which in turn is used in chemical production, food production and processing, medical applications and machinery used in corrosive environments. It is also a major constituent of many superalloys used in jet and gas turbine engines. Cobalt is used in the most demanding superalloys, as a binder in carbide tools, in magnets and in chemicals. Both nickel and cobalt are seeing rapid growth in battery applications, with nickel metal hydride batters being used in hy-

brid vehicles and cobalt-containing lithium-ion batteries under consideration for the next general of hybrid and electric automobiles.

Forecasting markets and prices for mineral and metal commodities is a difficult task, particularly for the three metals of commercial interest in the development of polymetallic nodules and crusts. Estimates of market behavior made in the late 1970s proved to be overoptimistic (from a producer's perspective) both for consumption levels and prices. In hindsight, the actual market behavior is understandable but it wasn't foreseen at that time. The factors involved include:

- Tight markets, rising prices and extreme price variability in the early 1980s led to substitution and conservation efforts that slowed growth in demand other than in unique and essential applications;
- Development of improved processing technologies, expansion of existing mines and development of nickel laterite deposits in Australia expanded supplies more effectively than anticipated;
- Financial attractiveness of investment in Chile rose sufficiently to significantly increase copper production capacity, more than compensating for a temporary reduction of copper production from the Democratic Republic of the Congo, and a subsequent increase in Congolese production after the new government to power stabilized the economy;
- Delays in anticipated growth of developing country economies and reduced growth of demand for metals in industrialized economies as service industries increased their share of the industrial economy;
- The 1991 breakup of the former Soviet Union and the subsequent decline of industrial activity in the successor states resulted in a significant reduction in domestic metal demand and corresponding increase in the availability of Russian nickel to the world market.

Production capacity that had been developed under the expectations of earlier growth forecasts resulted in overcapacity that forced prices for metals downward and kept them low for two decades. Development of improved processing technologies allowed mines and processors to continue to operate even when metals prices measured in constant terms dropped below prices of the late 1970s. This state of affairs continued until 2002 when demand for nickel, copper and cobalt outstripped supply and forced metal prices sharply upwards. With a lack of large undeveloped deposits available, prospects are strong that prices of these metals will remain high for years to come.



Prospects for the Future

Investors in the development of the mineral resources of the deep seabed will require the best understanding possible of how markets may behave over the next decade and beyond.

The conditions that ensured availability of sufficient quantities of low cost nickel, copper and cobalt will not continue indefinitely. Changing patterns of economic growth, new demands in response to growth of the electronics sector and developments in automotive technology, and long lead times for the development of new mines and processing facilities all contribute to a long term outlook for tighter supplies and rising prices.

Current trends provide insight into the outlook for the metal markets that suggests that mineral demand in the rest of this decade will be affected by:

- Low cost nickel and cobalt production in Australia and New Caledonia and application of 'Pressure Acid Leach' technology to reduce operating costs for both land-based and deep seabed ores;
- Continued growth of stainless steel and copper consumption in developing countries undergoing industrialization, particularly in China and India.
- Recovery of the economies of Russia and other former Soviet republics that will result in a significant reduction of exports of metals that will be needed by the domestic industries;
- Development of Voisey's Bay nickel-cobalt deposits in Canada;
- Increased economic stability of the Democratic Republic of the Congo and return to production of the copper and cobalt mines;
- Increased acceptance of hybrid and electric vehicles that require rechargeable batteries ; and,
- Competition between nickel and cobalt in the market for rechargeable batteries.

Land based deposits of copper, nickel and cobalt are anticipated to meet demand for the next decade. Over a longer period, the outlook for development of seabed hard minerals is likely to improve. Increasing demand for nickel and copper to support the industrialization of China, India and other advanced developing countries will enhance the outlook for development of both crusts and nodules. Recovery of the Russian economy will redirect Russian nickel production from the export market to domestic consumption, further increasing the need for new production.

Mineral Demand Outlook

Near term projections suggest that copper demand will increase at approximately 4 percent annually, nickel between 4 percent and 4.5 percent, and cobalt at 6 percent. By the end of the decade the outlook for nickel and cobalt becomes more difficult to predict in part due to the increasing importance of the battery sector to both metals. Demand growth may accelerate if hybrid and electric vehicles make significant inroads into the automobile market. The allocation of the effects of growth in the battery sector will depend on the competitive advantages presented between high-nickel and high-cobalt batteries, or even on the development of energy storage systems based on other technology.

The Seabed Regime

Beyond the identification of seabed mineral deposits, the development of the technology to exploit them and the investment of huge sums of capital (likely between $1 and $2 billion), prospective ocean miners need fair and stable regulations governing their operations, exclusive rights to exploit the site and clear title to the recovered metals.

Presently there are two regimes governing development of deep seabed minerals that address these requirements. The *Convention on the Law of the Sea* established the regime that applies to 154 countries and the European Community. For American firms, the regime for seabed mining is defined by the *Deep Seabed Hard Mineral Resources Act of 1980*. This law provides the necessary fair and predictable regulatory structure under the National Oceanic and Atmospheric Administration. In addition, the US government is directed to pursue an acceptable international regime for deep ocean mining. If a widely accepted convention cannot not be achieved, the government is directed to negotiate a reciprocal recognition arrangement with governments of other deep seabed mining firms to meet the requirements for exclusive access and title to recovered minerals.

When President Reagan determined that the 1982 LOS Convention did not meet US requirements he directed the Department of State to pursue a reciprocal agreement among seabed mining states. This regime initially issued licenses to four deep seabed mining consortia that conferred exclusive rights against any other US firm and against any firm from a country that was party to the reciprocal agreement. By the mid-1990s, the US deep seabed mining industry, which depended upon multinational consortia for both capital and technology, faltered, first in the face

of stagnant prices and then as their international partners withdrew because of the prohibition against their operating outside the LOS Convention once their home nation became party to it. The table below summarizes the membership of the four consortia and the status of their claims. Kennecott, one of the original pioneers in deep seabed mining research, gave up its site in 1993 (it was then picked up by Lockheed). Ocean Mining Associates, which had made the first mining claim in 1974, abandoned its site in 1997. Ocean Management Inc. closed operations and left the site in the care of its German partners, who in 2005 submitted the claim to the International Seabed Authority. Lockheed now holds the last US-issued licenses for two sites, but the sites have not yet been renewed as required by the DSHMRA.

Status of Deep Seabed Exploration Licenses Under Domestic Legislation
(note: all outstanding foreign participants left the consortia after their governments became party to the 1994 Agreement and the 1982 Convention

US Site Number	Company or Consortia	Pre-1994 Participants (owners of participants/ nationality)	Status of License
1	Ocean Minerals Company (OMCO)	• Lockheed • Billiton (Royal Dutch Shell/Netherlands) • Bos Kalis (Netherlands) • Amoco (US) replaced by Cyprus Minerals	Issued a license to explore a deep seabed minesite in 1984. There have been repeated extensions of this license, and Lockheed has updated its exploration plan. Currently, the license is technically lapsed. The company requested an extension, but NOAA has not acted on the request due to a lack of appropriated funds to conduct the necessary work.
2	Ocean Management Inc. (OMI) (Dissolved, site transferred to German partners))	• INCO Inc. (INCO Ltd-Canada • Schlumberger (US) • AMR(Metallgesellschaft AG & Preussag AG, both Germany) • Deep Ocean Mining Co. Ltd (25 Japanese firms)	Issued an exploration license 1984. OMI filed dissolution papers with the Delaware Secretary of State on January 14, 1999. Control of the data was transferred to the German partners who submitted a plan of work for exploration to the International Seabed Authority in 2005. The plan of work has been approved and a contract for exploration has been issued.
3	Ocean Mining Associates (OMA) (Abandoned site in 1997)	• Essex Minerals (US Steel/ US) • Sun Ocean Venture (Sun CO./US)) • Union Seas (Union Miniere/ Belgium) • Samin Ocean Inc. (ENI/Italy)	Was built upon the original ocean mining applicant, Deep Sea Ventures. OMA obtained a license for exploration in 1984. In 1997, OMA formally relinquished its license and the company has been dissolved.
4	Kennecott (Dissolved 1993)	• Kennecott Copper (US) • Noranda (Canada) • Consolidated Gold Field (UK) • Rio Tinto Zinc (UK) • BP Petroleum Development (UK) • Mitsubishi (Japan)	Surrendered its license in 1993, after which OMCO applied for and was granted a license for that site.

The system for deep seabed mining established by the LOS Convention has a long negotiating history during which the system alternately reflected free market, capitalist approaches and central planning models. An effort to reconcile these approaches in what was called the "Parallel

System" was incorporated into the Draft Convention, but when this was reviewed by the incoming Reagan Administration it was found unacceptable. After nearly 18 months of review and renegotiation, President Reagan concluded on June 29th, 1982 that the seabed mining system would remain unacceptable and, since the convention had been negotiated as a "Package Deal" that did not allow reservations, he decided not to sign the Convention.

A combination of declining economic prospects for deep seabed mining and a belief by both developing and industrialized countries that the Convention could be modified to meet President Reagan's requirements for an acceptable Convention led in 1990 to the beginning of informal consultations on how to make those changes. Once a satisfactory outcome appeared likely, the consultations became the negotiations that led in 1994 to the *Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea*. The Convention and the Agreement came into force together on November 16, 1994. The changes made in the agreement and the criteria that they address are shown in the table below.

Summary of the Responses to the Six Reagan Criteria Contained in the 1994 Agreement on Implementation

Issue	Solution
Not Deter Development	• Provision for production limits is void; • Prohibition of subsidies or burdens for seabed mining relative to land-based mining; • Authority must develop rules for exploration and development of new mineral resource within two years of request.
Assure National Access	• Contract approval based on clearly specified criteria; • Contractor has access to commercial arbitration of contract disputes and Applicant has access to commercial arbitration to challenge denial of contract; • Provision for financing first Enterprise operation the deleted; • Enterprise is required to operate under same contracts as private firms; Initial operation of the Enterprise is required to be in joint ventures with contractors.
Decision Making Role	• Guaranteed Permanent Council Seat for United States; • Council concurrence is required for Assembly decisions on matters of substance; • Consensus in the Council is required for the most critical decisions, particularly amendments to the regime, rules, regulations and procedures and distribution of revenues; • Chambered Voting with majority required in each chamber required for other substantive decisions in Council.
Allow US to Block Amendments	• Amendments to the Convention are not binding on US without Senate approval and US Ratification; • Amendments to Seabed Mining provisions must be approved by consensus of the Council, allowing US to block them.
Not Set Undesirable Precedents	• Creation of Finance Committee to approve budget and recommend financial decisions; • Requirement for secretariat of minimum size.
Issues identified as threatening Senate approval	• Technology Transfer; The provisions that permitted mandatory technology transfer have been voided; • National Liberation Movements: Only states have role in the organs of the Authority; Distribution of revenues is subject to consensus of both the Finance Committee and the Council, giving US a veto.

A more extensive analysis of the 1994 Agreement on Implementation may be found in the American Journal of International Law, "The 1994 Agreement and the Convention", Vol 88 (1994), pp 687-696. by Bernard Oxman.

The Agreement on Implementation was signed in 1994 and the International Seabed Authority was established in 1996. Regulations governing exploration for polymetallic nodules were issued in 2000. Contracts of Exploration were signed with six of the pioneer investors in 2001 and the seventh in 2002. The first plan of work submitted under the new regulations was submitted and approved in 2005 and a contract for exploration was signed in 2006.

At the present time, there are eight firms or consortia with Contracts for Exploration with the Authority. These are (from the descriptions provided by the International Seabed Authority):

- The Government of India (registered on 17 August 1987). The contract between the Authority and the Government of India was signed on 25 March 2002 at the Authority's Headquarters in Kingston by the Secretary-General and Mr. H. K. Gupta, Secretary of the Department of Ocean Development.
- Institut français de recherche pour l'exploitation de la mer / Association française pour l'´tude et la recherche des nodules (IFREMER/AFERNOD), of France (registered on 17 December 1987). The contract between the Authority and IFREMER/ AFERNOD was signed on 20 June 2001 in Kingston by the Secretary-General and Ambassador Pierre- Antoine Berniard on behalf of Mr. Jean-Francois Minster, President of IFREMER.
- Deep Ocean Resources Development Company (DORD) of Japan (registered on 17 December 1987). The contract between the Authority and DORD was signed on 20 June 2001 in Kingston by the Secretary-General and Mr. Toshio Takada, President of DORD.
- State Enterprise Yuzhmorgeologiya of the Russian Federation (registered on 17 December 1987). The contract between the Authority and Yuzhmorgeologiya was signed on 29 March 2001 in Kingston by the Secretary-General and Mr. Ivan F. Gloumov, Deputy Minister – State Secretary of the Ministry of Natural Resources, Russian Federation.
- China Ocean Mineral Resources Research and Development Association (COMRA) of the People's Republic of China (registered on 5 March 1991). The contract between the Authority and COMRA was signed in Beijing on 22 May 2001 by the Secretary-General and Mr. Jin Jincai, Secretary-General of COMRA.
- Interoceanmetal Joint Organization (IOM), a consortium formed by Bulgaria, Cuba, Czech Republic, Poland, Russian Federation and Slovakia (registered on 21 August 1991). The contract between the Authority and IOM was signed on 29 March 2001 in Kingston by the Secretary-General and Dr. Ryszard Kotlinski, Director-General of IOM.
- The Government of the Republic of Korea (registered on 2 August 1994). The contract between the Authority and the Government of the Republic of Korea was signed on 29 March 2001 in Kingston by the Secretary-General and on 27 April 2001 in Seoul by the Minister for Maritime Affairs and Fisheries of the Republic of Korea, Mr. Woo-Taik Chung.
- Federal Institute for Geosciences and Natural Resources of the Federal Republic of Germany. The contract between the Authority and the Federal Institute for Geosciences and Natural Resources of the Federal Republic of Germany was signed on 19 July 2006 in Berlin by the Secretary-General and Dr. B. Stribny, President of the Federal Institute for Geosciences and Natural Resources.

I believe that three of these contractors are more likely than others to be in the first wave of seabed development: China and South Korea have strong incentives to develop and control sources of nickel (South Korea imports nickel for the production of stainless steel that is then exported

while China is a major importer of stainless steel and might integrate seabed production into a new domestic stainless steel industry). Germany has knowledge of seabed mining technology, a domestic metals industry and access to metals markets.

Conclusion

In closing, I would like to say that after four decades of research and development, prospecting and exploration, negotiation and implementation, the outlook for a deep ocean mining industry is brighter than it has ever been before. It is unfortunate that US firms, once pioneers in this field, are unable to participate in this new industry because of the lack of international recognition provided by the existing US legislation. Efforts to establish a limited international regime among the ocean mining firms of the industrialized countries failed once those countries became party to the LOS Convention. It is in the power of the Senate to remedy this situation by giving its advice and consent for the United States to accede to the UN Convention on the Law of the Sea and the 1994 Agreement on Implementation. I urge you to take this action and open the door to US participation and renewed leadership in this promising industry.

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