

UNITED NATIONS CONVENTION ON THE LAW  
OF THE SEA

MARCH 11, 2004

Mr. LUGAR from the Committee on Foreign Relations,  
submitted the following

REPORT

[To accompany Treaty Doc. 103-39]

The Committee on Foreign Relations, to which was referred the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI on the United Nations Convention on the Law of the Sea, with Annex (Treaty Doc. 103-39), having considered the same reports favorably thereon with declarations and understandings as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to accession to the Convention and ratification of the Agreement as set forth in this report and the accompanying resolution of advice and consent to ratification.

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I. PURPOSE

The Convention, together with the related Agreement on Implementing Part XI of the Convention, establishes a comprehensive set of rules governing the uses of the world's oceans, including the

airspace above and the seabed and subsoil below. It provides for jurisdiction, rights, and duties among States that carefully balance the interests of States in controlling activities off their own coasts and the interests of all States in protecting the freedom to use the oceans without undue interference. Among the central issues addressed by the Convention and Implementing Agreement are navigation and overflight of the oceans, exploitation and conservation of ocean-based resources, protection of the marine environment, and marine scientific research.

## II. BACKGROUND

The Convention and Implementing Agreement are the product of over two decades of effort, led by the United States, to conclude a universally accepted treaty on the law of the sea. A widely ratified comprehensive law of the sea treaty has been a bipartisan goal of successive U.S. administrations for decades; the Congress endorsed this goal in the 1980 Deep Seabed Hard Mineral Resources Act. The Convention was negotiated under the auspices of the Third United Nations Conference on the Law of the Sea, which opened in 1973 and closed in December 1982 with the conclusion of the Convention.

Upon the adoption of the Convention in 1982, the United States and other industrialized nations declined to sign or to ratify the Convention, though they supported most of its provisions, because they could not accept the regime it established to govern deep seabed mining in areas beyond national jurisdiction. Notwithstanding his decision that the United States would not sign the Convention, President Reagan issued a statement of United States oceans policy in March 1983 indicating that the United States would accept and act in accordance with the Convention's balance of interests relating to the traditional uses of the oceans, and this has remained U.S. policy since that time.

In the early 1990s, efforts were made to renegotiate the deep seabed mining provisions of the Convention that had prevented the United States and others from becoming parties to the Convention. These efforts culminated in the 1994 Implementing Agreement. That agreement restructured the Convention's deep seabed mining regime in ways that met the objections of the United States and other industrialized nations. The United States signed the Implementing Agreement on July 29, 1994, and President Clinton submitted it together with the Convention to the Senate for its advice and consent on October 7, 1994. At present, 145 countries are parties to the Convention and 114 countries are parties to the Implementing Agreement.

## III. SUMMARY OF KEY PROVISIONS OF THE CONVENTION AND IMPLEMENTING AGREEMENT

A detailed article-by-article discussion of the Convention and Implementing Agreement may be found in the September 23, 1994 Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Senate Treaty Document No. 103-39. The Bush administration has confirmed its view that, generally, the Letter of Submittal appropriately analyzes and interprets the Convention, noting that the declarations and understandings in the

resolution of advice and consent reported by the committee and endorsed by the administration further refine the analysis and interpretation contained in the Letter of Submittal, and that these declarations and understandings will prevail in the case of any inconsistency with the Letter of Submittal. The Executive Branch's views on particular provisions of the Convention and the Agreement are also found in testimony and responses to questions for the record at the committee's October 21, 2003 hearing. These are contained in the hearing record included as part of this report.

In general, the Convention reflects a careful balance between the interests of the international community in maintaining freedom of navigation and those of coastal States in their offshore areas. The United States has important interests in both respects. As the world's preeminent maritime power, the United States has a vital interest in freedom of navigation to ensure that our military has the mobility it needs to protect U.S. security interests worldwide, as well as to facilitate the transport of goods in international trade. In 2003, over 28 percent of U.S. exports were shipped on the oceans, amounting to over \$200 billion in exports. As a major coastal State, the United States has substantial interests in developing, conserving, and managing the vast resources of the oceans off our coasts, in protecting the marine environment, and in preventing activity off our coasts that threatens the safety and security of Americans. Preserving the careful balance the Convention strikes ensuring protection of these various interests is of great importance to the United States.

A summary of the key provisions of the Convention and Implementing Agreement is set forth below.

#### MARITIME ZONES

The Convention establishes a jurisdictional regime for the world's oceans based on a series of zones defined by reference to distance from a State's coast. Under Part II of the Convention, a State may claim as its territorial sea an area up to 12 nautical miles (nm) from its coast. A State's territorial sea is subject to the State's sovereignty. Beyond 12 nm and up to 24 nm from its coast, a State may claim a contiguous zone in which the coastal State may exercise the limited control necessary to prevent or punish infringement of its customs, fiscal, immigration, or sanitary laws and regulations in its territory or territorial sea. Beyond its territorial sea, Part V of the Convention provides that a State may claim an area up to 200 nm from its coast as an exclusive economic zone (EEZ) in which it enjoys sovereign rights for the purpose of exploring, exploiting, conserving and managing living and non-living natural resources, as well as jurisdiction as provided for in the Convention with respect to, *inter alia*, marine scientific research and the protection and preservation of the marine environment. Areas beyond 200 nm from a State's coastline are open to all uses and are not subject to the jurisdiction of any State. The Convention establishes rules for drawing baselines to be used in measuring the distances from a State's coast that define these various zones.

#### CONTINENTAL SHELF

Part VI of the Convention provides that a coastal State exercises sovereign rights for the purpose of exploring and exploiting the nat-

ural resources of its continental shelf, which comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nm from the baselines where the outer edge of the continental margin does not extend to that distance. The natural resources of the shelf consist of the mineral and other non-living resources of the seabed and subsoil, together with the living organisms belonging to sedentary species. The Convention establishes rules defining the continental shelf, as well as an expert body, the Commission on the Limits of the Continental Shelf, to consider and make recommendations to coastal States on matters related to the establishment of the outer limit of their continental shelf beyond 200 nm. If the coastal State agrees, the shelf limits set by that State on the basis of the recommendations are final and binding, thus providing important stability and certainty to these claims. Under Part XI of the Convention (see below), the seabed and ocean floor and subsoil thereof beyond national jurisdiction are governed by an international authority established by the Convention, and no State may claim or exercise sovereignty over the resources thereof, though States or individuals may exercise certain rights with regard to minerals in accordance with Part XI and the Implementing Agreement.

#### FREEDOM OF NAVIGATION AND OVERFLIGHT

The Convention provides protections for critical freedoms of navigation and overflight of the world's oceans. These include the prohibition of territorial sea claims beyond 12 nm and the express protection for and accommodation of passage rights through the territorial sea and archipelagic waters, including transit passage through straits and archipelagic sealanes passage. They also include the express protection for and accommodation of the high seas freedoms of navigation, overflight, laying of submarine cables and pipelines, and related uses beyond the territorial sea, including areas where there are coastal State sovereign rights and jurisdiction, such as the EEZ and the continental shelf. United States Armed Forces rely on these navigation and overflight rights daily, and their protection is of paramount importance to U.S. national security.

#### PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

The Convention includes numerous provisions related to protection of the marine environment. For example, Part XII addresses multiple sources of marine pollution, including, for example, pollution from vessels, seabed activities, ocean dumping, and land-based sources, and promotes continuing improvement in the health of the world's oceans. Depending upon the source of marine pollution and the particular maritime zone in question, Part XII sets forth various obligations and authorizations relating to coastal States, flag States, and/or all States (such as to develop international standards). The provisions encourage Parties to work together to address issues of common and pressing concern. Another example is Article 21 which includes important rights for coastal States with regard to protection of the environment and natural resources in the territorial sea.

## LIVING MARINE RESOURCES

Most living marine resources of importance to coastal States are located within 200 nm from coasts. The Convention's authorization of the establishment of EEZs, and provision for the sovereign rights and management authority of coastal States over living resources within such EEZs, bring such living marine resources under the jurisdiction of coastal States. The Convention provides that each coastal State has the sovereign right to make determinations under the Convention related to utilization, conservation and management of living resources within its EEZ. The Convention also includes specific provisions for the conservation of marine mammals. While the Convention preserves the freedom to fish on the high seas, it makes that freedom subject to certain obligations, including the duty to cooperate in the conservation and management of the living resources in high seas areas.

## MARINE SCIENTIFIC RESEARCH

Part XIII of the Convention recognizes the critical role of marine scientific research in understanding oceanic processes and in informed decisionmaking about uses of the oceans. Following a maritime zone approach, it provides coastal States with greater rights to regulate marine scientific research in their territorial seas than in the EEZ and on the continental shelf. All States have the right to conduct such research freely in high seas areas. Part XIII also provides for international cooperation to promote marine scientific research.

## DEEP SEABED MINING

Part XI of the Convention, as fundamentally modified by the Agreement Relating to the Implementation of the Convention, establishes a regime governing the exploration and exploitation of the seabed, ocean floor and subsoil thereof beyond the limits of national jurisdiction. As modified, Part XI meets the objections raised by the United States and other industrialized countries concerning the original Convention. It is expected to provide a stable and internationally recognized framework in which mining can proceed in response to demand in the future for deep seabed minerals. It establishes an international organization, the International Seabed Authority, to administer the regime. The Authority includes a Council, which acts as its principal executive body; an Assembly, made up of all of States that are members of the Authority; and a Secretariat. The Council has primary responsibility for supervising the implementation of the seabed mining regime, including approving plans of work for exploration and exploitation of mineral resources and overseeing compliance with such plans. The Assembly has responsibility, on the basis of recommendations made by other Assembly bodies, to assess contributions, give final approval to rules and regulations and to the budget, and to decide on the sharing of revenues to the Authority from mining.

Responding to a principal U.S. objection to the Convention as it was originally concluded in 1982, the Agreement provides for a decisionmaking structure for the Authority that protects U.S. interests. Under Section 3(15)(a) of the Annex to the Implementing Agreement, the United States is guaranteed a seat on the Council

in perpetuity. As a general rule, the Council and Assembly take all decisions by consensus, though provisions are made for voting in the event consensus cannot be reached. Relevant voting rules prevent the Authority from adopting substantive decisions governing the administration of the deep seabed mining regime, or decisions having financial or budgetary implications, over the objection of the United States. In response to other U.S. objections, the Agreement also eliminates mandatory technology transfer provisions and non-market based controls on the levels of mineral production from the deep seabed that were part of the Convention as originally concluded.

#### IV. IMPLEMENTING LEGISLATION

The United States has acted in accordance with the Convention's balance of interests relating to the traditional uses of the oceans since a 1983 statement issued by President Reagan making this U.S. policy. As explained in the March 1, 2004 letter from State Department Legal Adviser William H. Taft, IV to Chairman Lugar attached as an annex to this report, U.S. law and practice are already generally compatible with the Convention and the United States does not need to enact new legislation upon accession to supplement or modify existing U.S. law. The one area in which implementing legislation would be necessary at some point after U.S. accession is legislation to enforce decisions of the Sea-Bed Disputes Chamber, which is addressed below in connection with understanding 22 of the resolution of advice and consent.

#### V. COMMITTEE ACTION

The committee held public hearings on the Convention and the Implementing Agreement on October 14, 2003 and October 21, 2003, where it heard testimony from experts on oceans law and policy, former U.S. negotiators of the Convention, representatives of the Departments of State, Defense, and the U.S. Coast Guard, and representatives of organizations interested in oceans issues. (A transcript of this hearing and questions and answers for the record may be found in Annex II to this report.) On February 25, the committee considered the Convention and Implementing Agreement and ordered them favorably reported by a vote of 19–0, with the recommendation that the Senate give its advice and consent to accession to the Convention and ratification of the Implementing Agreement, subject to declarations and understandings contained in the resolution of advice and consent.

#### VI. COMMITTEE RECOMMENDATION AND COMMENTS

The committee recommends that the Senate advise and consent to accession to the Convention and ratification of the Implementing Agreement. The committee believes that the Convention advances important U.S. interests in a number of areas. It advances U.S. national security interests by preserving the rights of navigation and overflight across the world's oceans, on which our military relies to protect U.S. interests around the world, and it enhances the protection of these rights by providing binding mechanisms to enforce them. It advances U.S. economic interests by enshrining the right of the United States to explore and exploit the vast natural re-

sources of the oceans out to 200 miles from our coastline, and of our continental shelf beyond 200 miles, and by protecting freedom of navigation on the oceans over which more than 28 percent of all U.S. exports and 48 percent of all U.S. imports are transported. It advances U.S. interests in the protection of the environment by creating obligations binding on all States to protect and preserve the marine environment from pollution from a variety of sources, and by establishing a framework for further international action to combat pollution. Becoming party to the Convention also advances the ability of the United States to play a leadership role in global oceans issues, including by allowing the United States to participate fully in institutions created by the Convention such as the International Seabed Authority, the Commission on the Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea.

The committee also believes it important that U.S. accession to the Convention be completed promptly. The Convention comes open for amendment for the first time in November 2004. As noted above, in negotiating the Convention, the United States was successful in achieving a regime that struck a careful balance in ensuring protection of many important U.S. interests. If the United States is not party to the Convention when it comes open for amendment, our ability to protect the critically important balance of rights that we fought hard to achieve in the Convention will be significantly diminished. In addition, the Convention's Commission on the Limits of the Continental Shelf will soon begin making decisions on claims to continental shelf areas that could affect the United States' own claims. Full U.S. participation in this process requires us to be party to the Convention.

The Bush administration has expressed its strong support for ratification of the Convention, as did the Clinton administration before it. The committee has also received statements in support of U.S. accession to the Convention from, *inter alia*, the U.S. Commission on Oceans Policy (an official body established by Congress), the American Petroleum Institute, the International Association of Drilling Contractors, the National Oceans Industries Association, the National Marine Manufacturers Association, the Chamber of Shipping of America, the U.S. Tuna Foundation, the Ocean Conservancy, the World Wildlife Fund, the Humane Society of the United States, the American Bar Association, the Council on Ocean Law, and the U.S. Arctic Research Commission.

The committee has included a number of declarations, understandings, and conditions in the resolution of advice and consent. Article 309 of the Convention provides that no reservations or exceptions may be made to the Convention unless expressly permitted by other articles (such as with respect to disputes settlement, see below). Article 310 provides that a State may, however, make declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of the Convention, provided they do not purport to modify the effect of the Convention in their application to that State.

Section two of the resolution contains two declarations relating to the dispute settlement procedures under the Convention. The first declaration concerns the forum for dispute settlement. A State,

when adhering to the Convention or thereafter, is able to choose, by written declaration, one or more of the means for the settlement of disputes (i.e., the International Tribunal for the Law of the Sea, the International Court of Justice, arbitration under Annex VII, or special arbitration under Annex VIII for certain disputes, such as fisheries and marine scientific research). The declaration states that the United States chooses special arbitration for all the categories of disputes to which it may be applied and arbitration for other disputes.

The second declaration concerns the exclusion of certain categories of disputes from dispute settlement procedures. The Convention permits a State to opt out of binding dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the UN Security Council is exercising the functions assigned to it by the UN Charter. The declaration states that the United States elects to exclude all three of these categories of disputes from binding dispute settlement. With respect to disputes concerning military activities, the declaration further states that U.S. consent to accession 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.

Section three of the resolution contains a series of understandings and declarations addressing specific issues raised by the Convention. The first five understandings relate principally to freedoms of navigation and overflight and related uses of the sea under the Convention. As noted above, these rights and freedoms are of critical importance to the U.S. military, and in particular its need for global mobility.

The first understanding states that nothing in the Convention impairs the inherent right of self-defense or rights during armed conflict, including any Convention provisions referring to “peaceful uses” or “peaceful purposes.” This understanding underscores the importance the United States attaches to its right under international law to take appropriate actions in self-defense or in times of armed conflict, including, where necessary, the use of force.

The second, third, and fourth understandings address navigational rights and freedoms in various maritime zones under the Convention. The second understanding focuses on innocent passage in the territorial sea, the third focuses on transit passage and archipelagic sea lanes passage under Parts III and IV of the Convention, and the fourth focuses on high seas freedoms of navigation and overflight in the exclusive economic zone. Collectively, these understandings confirm that various activities historically undertaken by the U.S. Armed Forces in these zones are consistent with the rights and freedoms set forth in the Convention.

Several points are worth noting in particular in connection with the second understanding regarding innocent passage.

- Paragraph 2(B) states that article 19(2) of the Convention contains an exhaustive list of activities that render passage non-innocent. The committee understands that the list of activities in no way narrows the right of innocent passage the United



States currently enjoys under the 1958 Territorial Sea Convention and customary international law. On the contrary, the Convention improves upon the 1958 Convention's innocent passage regime from the perspective of U.S. navigational mobility by establishing a more objective standard for the meaning of "innocent" passage based on specifically enumerated activities, and by setting forth an exhaustive list of those activities that will render passage not "innocent." (Article 20 provides that submarines and other underwater vehicles are required to navigate on the surface and to show their flag in order to enjoy the right of innocent passage; however, failure to do so is not characterized as inherently not "innocent.") The committee further understands that, as in the case of the 1958 Convention, the innocent passage provisions of the Convention set forth conditions for the enjoyment of the right of innocent passage in the territorial sea but do not prohibit or otherwise affect activities that are not entitled to that right.

- Paragraph 2(A) states the U.S. understanding that, among other things, the "purpose" of a ship is not relevant to the enjoyment of innocent passage, and paragraph 2(C) states the U.S. understanding that a determination of non-innocence cannot be made, among other things, on the basis of a ship's "purpose." The reference to "purpose" is intended to make clear, for example, that a ship navigating for the sole purpose of exercising its right of innocent passage is entitled to the right of innocent passage but that would not preclude a ship's purpose from being taken into account in assessing whether that ship posed a threat to use force within the meaning of article 19(2)(a).
- Understanding 2(D) reiterates the longstanding U.S. position that the Convention does not authorize a coastal State to condition the exercise of the right of innocent passage by any ships, including warships, on the giving of prior notification to or the receipt of prior permission from the coastal State. The Convention, and this understanding, do not, however, affect the ability of Parties to the Convention to agree among themselves to a prior notification regime. For example, such regimes have been negotiated under the auspices of the International Maritime Organization. In this regard, regulation V/11 (ship reporting systems) and regulation V/19.2.4 (automatic identification systems) of the regulations annexed to the International Convention for the Safety of Life at Sea, 1974, as amended should be noted.

The fifth understanding concerns marine scientific research. Part XIII of the Convention addresses the rights of coastal States to require consent for marine scientific research undertaken in marine areas under their jurisdiction. The understanding indicates that the term "marine scientific research" does not include certain activities, such as military activities, including military surveys. It is an illustrative list; therefore, there are other activities, such as operational oceanography, that are also not considered marine scientific research.

The sixth understanding expresses the U.S. view that those declarations and statements of other States Parties that purport to

limit navigation, overflight, or other rights and freedoms in ways not permitted by the Convention (such as those not in conformity with the Convention's provisions relating to straits used for international navigation) contravene the Convention (specifically article 310, which does not permit such declarations and statements). While it is not legally necessary for the United States to comment on declarations and statements that are inconsistent with the Convention, given that reservations are not permitted under the Convention, the committee believes it appropriate and desirable to make clear the U.S. position on such declarations and statements.

The resolution next contains a series of understandings addressing principally environment-related aspects of the Convention, including provisions of the Convention addressing marine pollution enforcement. Over the past decade or more, the Executive Branch has vigorously enforced U.S. marine pollution laws consistent with the Convention's provisions relevant to foreign flag vessels. In light of substantial experience gained, the Executive Branch has proposed, and the committee agrees, that it would be desirable to highlight certain aspects of the Convention's provisions, including to harmonize certain terminology as between the Convention and U.S. law.

The seventh understanding addresses an unmeritorious assertion that has occasionally been made in relation to various U.S. laws that restrict the import of goods to promote observance of a particular environmental or conservation standard, such as the protection of dolphins or sea turtles. It confirms that the Convention in no way limits a State's ability to prohibit or restrict imports in order to, among other things, promote or require compliance with environmental and conservation laws, norms, and objectives.

The eighth understanding states that certain Convention provisions apply only to a particular source of marine pollution (namely, pollution from vessels, as referred to in article 211) and not other sources of marine pollution, such as dumping. The ninth understanding harmonizes the Convention's "clear grounds" standard in articles 220 and 226 with the U.S. "reasonable suspicion" standard. The tenth understanding concerns article 228(2), which provides for a three-year statute of limitations concerning certain marine pollution proceedings. The understanding sets forth the limits of the applicability of the provision. As under current U.S. law, fraudulent concealment from an officer of the United States of pertinent information tolls the statute of limitations.

The eleventh understanding addresses the scope of article 230, which governs the use of monetary penalties in cases involving pollution of the marine environment by foreign vessels. The understanding harmonizes aspects of article 230 with U.S. law and practice for the enforcement of pollution laws. The reference to "corporal punishment" in the understanding is not addressed to any U.S. laws authorizing such punishment with regard to ship master and sailors (the committee is unaware of any such laws); rather it is aimed at other States that may provide for such punishment. The article thus provides certain protections for U.S. ship masters and sailors abroad.

The twelfth understanding clarifies that the marine pollution provisions of the Convention, specifically sections 6 and 7 of Part XII, do not limit a State's authority to impose penalties, among

other things, for non-pollution offenses (such as false statement violations under 18 U.S.C. 1001) or for marine pollution violations that take place in a State's ports, rivers, harbors, or offshore terminals.

The thirteenth understanding provides that the Convention confirms and does not constrain the longstanding right of a State to impose and enforce conditions for the entry of foreign vessels into its ports, rivers, harbors, or offshore terminals. This sovereign right enables States to address important concerns, such as security and pollution, regardless of whether action to address such concerns has been or will be taken at the international level and regardless of whether or not the condition is directly related to the ports, rivers, harbors, or offshore terminals. These conditions might also apply as a matter of port departure and compliance with such conditions can be considered in approving subsequent port entries. The understanding contains illustrative examples of an environmental nature, namely a requirement that ships exchange ballast water beyond 200 nautical miles from shore and a requirement that tank vessels carrying oil be constructed with double hulls. Another example of the U.S. exercise of this right is the requirement for prior notice of arrival in port of foreign vessels.

The fourteenth understanding relates to article 21(2) of the Convention, which provides that the laws that a coastal State may adopt relating to innocent passage through the territorial sea shall not apply to the "design, construction, manning or equipment" of foreign ships unless they are giving effect to "generally accepted international rules or standards." This understanding makes clear that certain types of measures would not constitute measures applying to "design, construction, manning or equipment" of foreign ships and would therefore not be limited by this provision. The list is illustrative, not exhaustive.

The fifteenth understanding addresses the issue of potential marine pollution from industrial operations (such as seafood processing) on board a foreign vessel. This understanding makes clear that the Convention supports a coastal State's regulation of discharges into the marine environment resulting from such operations. A variety of provisions in the Convention might be applicable depending upon the circumstances. It should be noted that the United States currently regulates discharges from seafood processing operations on board foreign vessels in its territorial sea and EEZ.

Similarly, the sixteenth understanding addresses the issue of invasive species, which is a major environmental issue facing many States in the United States. This understanding affirms that the Convention supports the ability of a coastal State, such as the United States, to exercise its domestic authority to regulate the introduction into the marine environment of alien or new species. A variety of Convention provisions might be applicable, depending upon the circumstances, for example, articles 21, 56, 196, or 211. The ability to rely on various authorities is important to assure that the United States and other coastal States have appropriate flexibility to fully address this problem.

The seventeenth understanding addresses fisheries management issues. The United States implements the living marine resource provisions of the Convention through a variety of domestic laws.

For fisheries issues, these provisions are implemented primarily through the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq. (Magnuson-Stevens Act). Article 56(1)(a) of the Convention establishes that, in the exclusive economic zone, a coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living. In the United States, such measures have included fisheries management pursuant to the Magnuson-Stevens Act, the establishment of no-anchoring areas to protect coral reefs, and the creation of marine sanctuaries under the National Marine Sanctuaries Act. This provision also provides authority to address such threats as ship strikes of cetaceans.

The Magnuson-Stevens Act provides a national framework for conserving and managing marine fisheries within the U.S. EEZ. The Act is completely consistent with the Convention and enables the United States to exercise its rights and implement its fisheries conservation and management obligations under articles 61 and 62 of the Convention. The Magnuson-Stevens Act provides the United States with the authority to make determinations related to utilization, conservation and management of living resources within its EEZ, including defining optimum yield and allowable catch, considering effects on non-target species, and determining what, if any, surplus may exist. Articles 61 and 62 provide that the coastal State has the exclusive right to make these determinations. In particular, under both the Magnuson-Stevens Act and article 62(2), the United States has no obligation to give another State access to fisheries in its EEZ unless, after determining the optimum yield and allowable catch under the Act, the United States has determined both that there is surplus over and above the allowable catch and that the coastal State does not or will not have the capacity to harvest that surplus. In such event, access may be provided under reasonable terms and conditions established by the coastal State. The Magnuson-Stevens Act and other legislation provide the United States with the authority to cooperate with other States in managing fisheries resources that are highly migratory or that straddle jurisdictional lines, in order to comply with obligations under articles 63, 64, 118, and 119. Consistent with article 297(3), binding dispute settlement does not apply to disputes relating to a coastal State's discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its conservation and management laws and regulations.

The eighteenth understanding concerns article 65, which addresses marine mammals. In part, article 65 provides that the Convention does not restrict the right of a coastal State or the competence of an international organization to take stricter measures than those provided in the Convention. With respect to this provision, the understanding notes that it lent direct support to the establishment of the international moratorium on commercial whaling that is in place and that it lends current support to the creation of sanctuaries and other conservation measures. Article 65 also provides that, in the case of cetaceans, States shall work through appropriate international organizations for their conservation, management and study. The understanding indicates, with respect

to this provision, that such cooperation applies not only to large whales but to all cetaceans.

The nineteenth understanding makes clear that the term “sanitary laws and regulations” in article 33 is not limited to the transmittal of human illnesses, but may include, for example, laws and regulations to protect human health from pathogens being introduced into the territorial sea. This example is non-exhaustive.

The next five understandings and declarations generally address procedural and constitutional matters.

The twentieth understanding relates to decisionmaking in the Council, the executive organ of the International Sea-Bed Authority that has substantial decisionmaking authority. Article 161(8)(d) provides for certain decisions of the Council to be taken by consensus. The United States will, by virtue of the 1994 Agreement, have a permanent seat on the Council. As such, the United States will be in a position to block consensus in the Council on decisions subject to consensus decisionmaking. The Convention, as modified by the Agreement, is structured to ensure consensus decisionmaking for the most significant decisions, including decisions resulting in binding substantive obligations on States Parties. The understanding reinforces the negotiated agreement that decisions adopted by procedures other than the consensus procedure in article 161(8)(d) will involve administrative, institutional or procedural matters and will not result in binding substantive obligations on the United States.

The twenty-first understanding addresses certain decisions of the Assembly, the primary body of the International Sea-Bed Authority. Specifically, the Assembly, under article 160(2)(e), assesses the contributions of members to the administrative budget of the Authority until the Authority has sufficient income from other sources to meet its administrative expenses. Section 3(7) of the Annex to the 1994 Agreement provides that “[d]ecisions of the Assembly . . . having financial or budgetary implications shall be based on the recommendations of the Finance Committee.” Under Section 9(3) of the Annex to the 1994 Implementing Agreement seats are guaranteed on the Finance Committee for “the five largest contributors to the administrative budget of the Authority” until the Authority has sufficient funds other than assessed contributions to meet its administrative expenses. Because such contributions are based on the United Nations scale of assessments (and because the United States is the largest contributor on that scale), the United States will have a seat on the Finance Committee so long as the Authority supports itself through assessed contributions. The understanding ties these related provisions together to make clear that no assessed contributions could be decided by the Assembly without the agreement of the United States in the Finance Committee.

The twenty-second declaration addresses article 39 of Annex VI of the Convention, which provides for decisions of the Sea-Bed Disputes Chamber to be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought. Because of potential constitutional concerns regarding direct enforceability of this provision in U.S. courts and because article 39 does not require any particular manner in which Chamber

decisions must be made enforceable, the declaration provides that, for the United States, such decisions shall be enforceable only in accordance with procedures established by implementing legislation and that such decisions shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States. Given the current undeveloped state of deep seabed mining, such legislation would not be necessary before U.S. accession to the Convention.

The twenty-third understanding focuses on the adoption of amendments to section 4 of Annex VI of the Convention, which relates to the Sea-Bed Disputes Chamber, which is established under the Convention to resolve certain disputes arising in connection with deep sea bed mining. The basic rules for amending Annex VI are set forth in section 5 of that Annex. It is clear from article 41 of that Annex, with respect to amendments to Annex VI other than to section 4, that the United States could block adoption of such an amendment (either through the ability to block afforded by article 313(2) or through the consensus procedure at a conference of the States Parties). Regarding amendments to section 4 of Annex VI, related to the Sea-Bed Disputes Chamber, article 41(2) of Annex VI provides that such amendments may be adopted only in accordance with article 314, which in turn requires that such amendments be approved by the Assembly following approval by the Council. Article 314 does not specify the decisionmaking rule by which the Council must approve the amendment before the Assembly may adopt it; article 161(8), which lists certain categories of decisions and their corresponding decisionmaking rules, also does not specifically address adoption of amendments to section 4 of Annex IV. Turning to article 161(8)(f) to determine the default rule for decisions within the authority of the Council for which the decisionmaking rule is not specified, the Council is to decide "by consensus" which subparagraph of article 161(8) will apply. Section 3 of the Annex to the 1994 Agreement conflates subparagraphs (b) and (c) of article 161(8), but it does not affect situations where the Convention, as in the case of 161(8)(f), provides for decision by consensus in the Council. Because the analysis reaches the same result as, but is not as straightforward as, the case of amendments to section 4 of Annex VI as it is for other amendments to Annex VI, the committee agrees with the Executive Branch that an understanding on this point is desirable.

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). As stated in the March 1, 2004 letter from State Department Legal Adviser William H. Taft, IV to Chairman Lugar attached as an annex to this report, the United States,

as a party, would be able to implement the Convention through existing laws, regulations, and practices (including enforcement practices), which are consistent with the Convention and which would not need to change in order for the United States to meet its Convention obligations. Except as noted in connection with declaration twenty-two above, the United States does not need to enact any new legislation to supplement or modify existing U.S. law.

Section four of the resolution contains five conditions that relate to procedures within the United States for considering amendments proposed to be made to the Convention. The first three conditions provide for the President to inform and consult with the Foreign Relations Committee about proposed amendments to the Convention. The fourth condition provides that all amendments to the Convention, other than amendments under article 316(5) of the Convention of a technical or administrative nature, shall be submitted by the President to the Senate for its advice and consent. The committee expects that any such technical or administrative amendments would not impose substantive obligations upon the United States.

The fifth condition relates to article 316(5) of the Convention, which provides for any amendment relating exclusively to activities in the Area (which is defined in article 1(1)(1)) and any amendment to Annex VI to enter into force for all States Parties one year following the deposit of instruments of ratification or accession by three fourths of the States Parties. There is thus a possibility that such an amendment, if adopted (which would require the consent or acquiescence of the U.S. Executive Branch via the U.S. representative on the Council), could enter into force for the United States without U.S. ratification. The declaration provides that the United States will take all necessary steps under the Convention to ensure that amendments subject to this procedure are adopted in conformity with the treaty clause in Article 2, Section 2 of the Constitution. This might involve not joining in consensus if an amendment were of such a nature that it was constitutionally imperative that it receive Senate advice and consent before binding the United States. The declaration highlights the amendment procedure but does not specifically address under what circumstances a constitutional issue might arise.

VII. TEXT OF RESOLUTION OF ADVICE AND CONSENT TO  
RATIFICATION

*Resolved (two-thirds of the Senators present concurring therein),*

**SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO DECLARATIONS AND UNDERSTANDINGS.**

The Senate advises and consents to the accession to the United Nations Convention on the Law of the Sea, with annexes, adopted on December 10, 1982 (hereafter in this resolution referred to as the "Convention"), and to the ratification of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with annex, adopted on July 28, 1994 (hereafter in this resolution referred to as the "Agreement") (T.Doc.103-39), subject to the declarations of section 2, to be made under articles 287 and 298 of the Convention, the declarations and understandings of section 3, to be made under article 310 of the Convention, and the conditions of section 4.

**SEC. 2. DECLARATIONS UNDER ARTICLES 287 AND 298.**

The advice and consent of the Senate under section 1 is subject to the following declarations:

(1) The Government of the United States of America declares, in accordance with article 287(1), that it chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention:

(A) a special arbitral tribunal constituted in accordance with Annex VIII for the settlement of disputes concerning the interpretation or application of the articles of the Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping; and

(B) an arbitral tribunal constituted in accordance with Annex VII for the settlement of disputes not covered by the declaration in subparagraph (A).

(2) The Government of the United States of America declares, in accordance with article 298(1), that it does not accept any of the procedures provided for in section 2 of Part XV (including, inter alia, the Sea-Bed Disputes Chamber procedure referred to in article 287(2)) with respect to the categories of disputes set forth in subparagraphs (a), (b), and (c) of article 298(1). 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.

**SEC. 3. OTHER DECLARATIONS AND UNDERSTANDINGS UNDER ARTICLE 310.**

The advice and consent of the Senate under section 1 is subject to the following declarations and 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.

(2) The United States understands, with respect to the right of innocent passage under the Convention, that—

(A) all ships, including warships, regardless of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose, enjoy the right of innocent passage;

(B) article 19(2) contains an exhaustive list of activities that render passage non-innocent;

(C) any determination of non-innocence of passage by a ship must be made on the basis of acts it commits while in the territorial sea, and not on the basis of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose; and

(D) the Convention does not authorize a coastal State to condition the exercise of the right of innocent passage by any ships, including warships, on the giving of prior notification to or the receipt of prior permission from the coastal State.

(3) The United States understands, concerning Parts III and IV of the Convention, that—

(A) all ships and aircraft, including warships and military aircraft, regardless of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose, are entitled to transit passage and archipelagic sea lanes passage in their “normal mode”;

(B) “normal mode” includes, *inter alia*—

(i) submerged transit of submarines;

(ii) overflight by military aircraft, including in military formation;

(iii) activities necessary for the security of surface warships, such as formation steaming and other force protection measures;

(iv) underway replenishment; and

(v) the launching and recovery of aircraft;

(C) the words “strait” and “straits” are not limited by geographic names or categories and include all waters not subject to Part IV that separate one part of the high seas or exclusive economic zone from another part of the high seas or exclusive economic zone or other areas referred to in article 45;

(D) the term “used for international navigation” includes all straits capable of being used for international navigation; and

(E) the right of archipelagic sea lanes passage is not dependent upon the designation by archipelagic States of specific sea lanes and/or air routes and, in the absence of such designation or if there has been only a partial designation, may be exercised through all routes normally used for international navigation.

(4) The United States understands, with respect to the exclusive economic zone, that—

(A) all States enjoy high seas freedoms of navigation and overflight and all other internationally lawful uses of the

sea related to these freedoms, including, inter alia, military activities, such as anchoring, launching and landing of aircraft and other military devices, launching and recovering water-borne craft, operating military devices, intelligence collection, surveillance and reconnaissance activities, exercises, operations, and conducting military surveys; and

(B) coastal State actions pertaining to these freedoms and uses must be in accordance with the Convention.

(5) The United States understands that “marine scientific research” does not include, inter alia—

(A) prospecting and exploration of natural resources;

(B) hydrographic surveys;

(C) military activities, including military surveys;

(D) environmental monitoring and assessment pursuant to section 4 of Part XII; or

(E) activities related to submerged wrecks or objects of an archaeological and historical nature.

(6) The United States understands that any declaration or statement purporting to limit navigation, overflight, or other rights and freedoms of all States in ways not permitted by the Convention contravenes the Convention. Lack of a response by the United States to a particular declaration or statement made under the Convention shall not be interpreted as tacit acceptance by the United States of that declaration or statement.

(7) The United States understands that nothing in the Convention limits the ability of a State to prohibit or restrict imports of goods into its territory in order to, inter alia, promote or require compliance with environmental and conservation laws, norms, and objectives.

(8) The United States understands that articles 220, 228, and 230 apply only to pollution from vessels (as referred to in article 211) and not, for example, to pollution from dumping.

(9) The United States understands, with respect to articles 220 and 226, that the “clear grounds” requirement set forth in those articles is equivalent to the “reasonable suspicion” standard under United States law.

(10) The United States understands, with respect to article 228(2), that—

(A) the “proceedings” referred to in that paragraph are the same as those referred to in article 228(1), namely those proceedings in respect of any violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels committed by a foreign vessel beyond the territorial sea of the State instituting proceedings; and

(B) fraudulent concealment from an officer of the United States of information concerning such pollution would extend the three-year period in which such proceedings may be instituted.

(11) The United States understands, with respect to article 230, that—

(A) it applies only to natural persons aboard the foreign vessels at the time of the act of pollution;

(B) the references to “monetary penalties only” exclude only imprisonment and corporal punishment;

(C) the requirement that an act of pollution be “wilful” in order to impose non-monetary penalties would not constrain the imposition of such penalties for pollution caused by gross negligence;

(D) in determining what constitutes a “serious” act of pollution, a State may consider, as appropriate, the cumulative or aggregate impact on the marine environment of repeated acts of pollution over time; and

(E) among the factors relevant to the determination whether an act of pollution is “serious,” a significant factor is non-compliance with a generally accepted international rule or standard.

(12) The United States understands that sections 6 and 7 of Part XII do not limit the authority of a State to impose penalties, monetary or nonmonetary, for, inter alia—

(A) non-pollution offenses, such as false statements, obstruction of justice, and obstruction of government or judicial proceedings, wherever they occur; or

(B) any violation of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment that occurs while a foreign vessel is in any of its ports, rivers, harbors, or offshore terminals.

(13) The United States understands that the Convention recognizes and does not constrain the long-standing sovereign right of a State to impose and enforce conditions for the entry of foreign vessels into its ports, rivers, harbors, or offshore terminals, such as a requirement that ships exchange ballast water beyond 200 nautical miles from shore or a requirement that tank vessels carrying oil be constructed with double hulls.

(14) The United States understands, with respect to article 21(2), that measures applying to the “design, construction, equipment or manning” do not include, inter alia, measures such as traffic separation schemes, ship routing measures, speed limits, quantitative restrictions on discharge of substances, restrictions on the discharge and/or uptake of ballast water, reporting requirements, and record-keeping requirements.

(15) The United States understands that the Convention supports a coastal State’s exercise of its domestic authority to regulate discharges into the marine environment resulting from industrial operations on board a foreign vessel.

(16) The United States understands that the Convention supports a coastal State’s exercise of its domestic authority to regulate the introduction into the marine environment of alien or new species.

(17) The United States understands that, with respect to articles 61 and 62, a coastal State has the exclusive right to determine the allowable catch of the living resources in its exclusive economic zone, whether it has the capacity to harvest the entire allowable catch, whether any surplus exists for allocation to other States, and to establish the terms and conditions under which access may be granted. The United States further

understands that such determinations are, by virtue of article 297(3)(a), not subject to binding dispute resolution under the Convention.

(18) The United States understands that article 65 of the Convention lent direct support to the establishment of the moratorium on commercial whaling, supports the creation of sanctuaries and other conservation measures, and requires States to cooperate not only with respect to large whales, but with respect to all cetaceans.

(19) The United States understands that, with respect to article 33, the term “sanitary laws and regulations” includes laws and regulations to protect human health from, *inter alia*, pathogens being introduced into the territorial sea.

(20) The United States understands that decisions of the Council pursuant to procedures other than those set forth in article 161(8)(d) will involve administrative, institutional, or procedural matters and will not result in substantive obligations on the United States.

(21) The United States understands that decisions of the Assembly under article 160(2)(e) to assess the contributions of members are to be taken pursuant to section 3(7) of the Annex to the Agreement and that the United States will, pursuant to section 9(3) of the Annex to the Agreement, be guaranteed a seat on the Finance Committee established by section 9(1) of the Annex to the Agreement, so long as the Authority supports itself through assessed contributions.

(22) The United States declares, pursuant to article 39 of Annex VI, that decisions of the Seabed Disputes Chamber shall be enforceable in the territory of the United States only in accordance with procedures established by implementing legislation and that such decisions shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States.

(23) The United States—

(A) understands that article 161(8)(f) applies to the Council’s approval of amendments to section 4 of Annex VI;

(B) declares that, under that article, it intends to accept only a procedure that requires consensus for the adoption of amendments to section 4 of Annex VI; and

(C) in the case of an amendment to section 4 of Annex VI that is adopted contrary to this understanding, that is, by a procedure other than consensus, will consider itself bound by such an amendment only if it subsequently ratifies such amendment pursuant to the advice and consent of the Senate.

(24) The United States declares that, with the exception of articles 177-183, article 13 of Annex IV, and article 10 of Annex VI, the provisions of the Convention and the Agreement, including amendments thereto and rules, regulations, and procedures thereunder, are not self-executing.

#### SEC. 4. CONDITIONS.

(a) IN GENERAL.—The advice and consent of the Senate under section 1 is subject to the following conditions:

(1) Not later than 15 days after the receipt by the Secretary of State of a written communication from the Secretary-General of the United Nations or the Secretary-General of the Authority transmitting a proposal to amend the Convention pursuant to article 312, 313, or 314, the President shall submit to the Committee on Foreign Relations of the Senate a copy of the proposed amendment.

(2) Prior to the convening of a Conference to consider amendments to the Convention proposed to be adopted pursuant to article 312 of the Convention, the President shall consult with the Committee on Foreign Relations of the Senate on the amendments to be considered at the Conference. The President shall also consult with the Committee on Foreign Relations of the Senate on any amendment proposed to be adopted pursuant to article 313 of the Convention.

(3) Not later than 15 days prior to any meeting—

(A) of the Council of the International Seabed Authority to consider an amendment to the Convention proposed to be adopted pursuant to article 314 of the Convention, or

(B) of any other body under the Convention to consider an amendment that would enter into force pursuant to article 316(5) of the Convention,

the President shall consult with the Committee on Foreign Relations of the Senate on the amendment and on whether the United States should object to its adoption.

(4) All amendments to the Convention, other than amendments under article 316(5) of a technical or administrative nature, shall be submitted by the President to the Senate for its advice and consent.

(5) The United States declares that it shall take all necessary steps under the Convention to ensure that amendments under article 316(5) are adopted in conformity with the treaty clause in article 2, section 2 of the United States Constitution.

(b) INCLUSION OF CERTAIN CONDITIONS IN INSTRUMENT OF RATIFICATION.—Conditions 4 and 5 shall be included in the United States instrument of ratification to the Convention.

## VIII. ANNEX I

THE LEGAL ADVISER  
DEPARTMENT OF STATE  
*Washington, March 1, 2004*

The Honorable RICHARD G. LUGAR,  
*Chairman,*  
*Senate Committee on Foreign Relations,*  
*United States Senate.*

DEAR MR. CHAIRMAN:

I would like to take this opportunity to reiterate and elaborate upon some of the matters addressed in my testimony to the Committee regarding the 1982 Law of the Sea Convention ("the Convention").

Given that the United States is a party to the 1958 law of the sea conventions, that the United States heavily influenced the development of the Convention, and that U.S. policy since 1983 has been to act in accordance with the Convention's provisions governing traditional uses of the oceans, U.S. law and practice are already generally compatible with the Convention. Except as noted below regarding deep sea-bed mining, the United States does not need to enact new legislation to supplement or modify existing U.S. law, whether related to protection of the marine environment, human health, safety, maritime security, the conservation of natural resources, or other topics within the scope of the Convention. The United States, as a party, would be able to implement the Convention through existing laws, regulations, and practices (including enforcement practices), which are consistent with the Convention and which would not need to change in order for the United States to meet its Convention obligations. For example, U.S. law and practice for managing its natural resources, including its fishery resources, are consistent with the Convention's provisions with respect to the exploration, utilization, conservation, and management of natural resources.

The one area in which implementing legislation would be necessary at some point after U.S. accession is legislation to enforce decisions of the Sea-bed Disputes Chamber, with respect to which the Administration proposed a declaration for inclusions in the Senate's resolution.

Finally, I note that, consistent with another declaration proposed by the Administration, the Convention would not create private rights of action or other enforceable rights in U.S. courts, apart from its provisions regarding privileges and immunities to be accorded to the Convention's institutions.

Sincerely,

WILLIAM H. TAFT, IV

## IX. ANNEX II

**HEARINGS ON  
THE U.N. CONVENTION ON THE LAW OF THE SEA  
(TREATY DOC. 103-39)**

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## THE U.N. CONVENTION ON THE LAW OF THE SEA (TREATY DOC. 103-39)

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TUESDAY, OCTOBER 14, 2003

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

The committee met, pursuant to notice, at 9:30 a.m. in room SD-419, Dirksen Senate Office Building, Hon. Richard G. Lugar (chairman of the committee), presiding.

Present: Senator Lugar.

The CHAIRMAN. This hearing of the Senate Foreign Relations Committee is called to order. The committee meets today to begin consideration of the U.N. Convention on the Law of the Sea. This treaty represents the culmination of decades of work to produce a comprehensive international framework governing the use of the world's oceans. The Law of the Sea Convention has great potential to advance United States interests related to the navigation of the seas, the productive use of their resources, and the protection of the marine environment.

The United States played a leading role in negotiating the convention in the 1970s and the early 1980s. Because of concerns about its deep sea mining provisions, however, the United States declined to sign the convention when it was initially concluded in 1982. Subsequently the United States led a successful effort to revise the deep sea mining provisions of the convention. As a result, the United States signed the convention in 1994.

Congress had expressed its support, stating in the Deep Seabed Hard Mineral Resources Act of 1980 that: "It is in the national interest of the United States and other nations to encourage a widely acceptable Law of the Sea Treaty which will provide a new legal order for the oceans covering a broad range of ocean interests."

Although the convention was submitted to the Senate for its advice and consent in October 1994, the Foreign Relations Committee has not held a hearing on it since that time. I am pleased the committee will now have that opportunity.

Today's hearing is the first step in that process. We will hold a second hearing to examine the treaty on October 21. Following these hearings, it is my intention to work on a resolution of advice and consent, with the hope that the committee can mark up such a resolution early next year.

More than 140 nations are party to the Law of the Sea Convention, including all other permanent members of the U.N. Security Council and all but two other NATO members. The absence of American leadership in the convention diminishes its effectiveness and our own influence over international ocean policy. As a maritime state and the world's only superpower, the United States has vital economic and security interests in preserving freedom of navigation of the oceans and in preventing piracy, smuggling, terrorism, and other criminal activity from occurring off our shores.

Our ability to import goods from abroad and to sell our goods to other countries depends on transporting these goods by sea.

As a coastal state, we also have important interests in protecting the marine environment while managing and making productive use of the resources off our coasts. These include petroleum and mineral resources as well as fishery resources.

We are fortunate today to have two extremely knowledgeable panels of witnesses to discuss the convention. First we will have the privilege of hearing from our distinguished colleague Senator Ted Stevens, Chairman of the Senate Appropriations Committee, who has long been interested in the convention and its ratification. Although our schedule did not permit the attendance of Senator John McCain, he similarly expressed his desire to speak on behalf of the convention.

Thus, we begin our inquiry with the knowledge that Senate consideration of the convention is supported by the chairmen of the Appropriations and Commerce Committees of the Senate. This underscores the active interest that Members of the Senate have taken in the Law of the Sea Convention during the long course of its negotiation.

I want also to take this opportunity to recognize the commitment and leadership of a former chairman of this committee, Senator Claiborne Pell. Senator Pell brought passion and expertise to his work on the Law of the Sea and our current examination of the treaty benefits greatly from his contributions.

In our second panel we will also welcome four witnesses with exceptional expertise on the convention and related maritime issues: Admiral James Watkins, Admiral Joseph Prueher, Professor John Norton Moore, and Admiral William Schachte. I will introduce this panel in greater detail after we have heard from Senator Stevens. I thank all of you for joining us today and we look forward to your insights.

[The opening statement of Senator Lugar follows:]

#### OPENING STATEMENT OF SENATOR RICHARD G. LUGAR

The committee meets today to begin consideration of the U.N. Convention on the Law of the Sea. This treaty represents the culmination of decades of work to produce a comprehensive international framework governing the use of the world's oceans. The Law of the Sea Convention has great potential to advance U.S. interests related to the navigation of the seas, the productive use of their resources, and the protection of the marine environment.

The United States played a leading role in negotiating the Convention in the 1970s and early 1980s. Because of concerns about its deep sea mining provisions, however, the United States declined to sign the Convention when it was initially concluded in 1982. Subsequently, the United States led a successful effort to revise the deep sea mining provisions of the Convention. As a result, the United States signed the Convention in 1994.

Congress had expressed its support for these efforts, stating in the Deep Seabed Hard Mineral Resources Act of 1980 that: "it is in the national interest of the United States and other nations to encourage a widely acceptable Law of the Sea Treaty, which will provide a new legal order for the oceans covering a broad range of ocean interests."

Although the Convention was submitted to the Senate for its advice and consent in October 1994, the Foreign Relations Committee has not held a hearing on it since that time. I am pleased that the committee will now have the opportunity to consider this treaty. Today's hearing is the first step in that process. We will hold a second hearing to examine the treaty on October 21. Following these hearings, it is my intention to begin work on a resolution of advice and consent, with the hope that the committee can mark up such a resolution early next year.

More than 140 nations are party to the Law of the Sea Convention, including all other permanent members of the U.N. Security Council and all but two other NATO members. The absence of American leadership from the Convention diminishes its effectiveness and our own influence over international ocean policy.

As a maritime state and the world's only superpower, the United States has vital economic and security interests in preserving freedom of navigation on the oceans and in preventing piracy, smuggling, terrorism, and other criminal activity from occurring off our shores. Our ability to import goods from abroad and to sell our goods to other countries depends on transporting these goods by sea. As a coastal state, we also have important interests in protecting the marine environment while managing and making productive use of the resources off our coasts. These include petroleum and mineral resources, as well as fisheries resources.

We are fortunate to have two extremely knowledgeable panels of witnesses with us this morning to discuss the Convention. First, we will have the pleasure of hearing from our distinguished colleague Senator Stevens, who has long been interested in the Convention and its ratification. Although our schedule did not permit the attendance of Senator McCain, he similarly expressed his desire to speak on behalf of the Convention. Thus, we begin our inquiry with the knowledge that Senate consideration of the Convention is supported by the chairmen of the Appropriations and Commerce Committees. This underscores the active interest that Members of the Senate have taken in the Law of the Sea Convention during the long course of its negotiation.

I also want to take this opportunity to recognize the commitment and leadership of a former chairman of this committee, Senator Claiborne Pell. Senator Pell brought passion and expertise to his work on the Law of the Sea, and our current examination of the treaty benefits greatly from his contributions.

We also welcome five witnesses with exceptional expertise on the Convention and related maritime issues: Admiral James Watkins, Admiral Joseph Prueher, Professor John Norton Moore, Admiral William Schachte, Jr., and Professor Bernard Oxman.

First we will hear from Admiral James Watkins. Admiral Watkins served from 1982 to 1986 as Chief of Naval Operations. From 1989 to 1993 he was U.S. Secretary of Energy. Currently, Admiral Watkins is the Chairman of the U.S. Commission on Ocean Policy.

Our second witness on the panel is Admiral Joseph Prueher. Admiral Prueher served for 35 years in the U.S. Navy. From 1996 to 1999, he was Commander-in-Chief of the U.S. Pacific Command. From 1999 to 2001, he served as U.S. Ambassador to China.

Next we will hear from Professor John Norton Moore. From 1973 to 1976, Professor Moore served as Ambassador and Deputy Special Representative of the President to the Third U.N. Conference on the Law of the Sea. He also was Chairman of the National Security Council's Interagency Task Force on the Law of the Sea. Currently he is the Walter L. Brown Professor of Law at the University of Virginia School of Law and Director of the University's Center for Oceans Law and Policy.

Finally we will hear from Admiral William L. Schachte, Jr. During his Navy career, Admiral Schachte served in many capacities related to ocean policy. He was a member of the U.S. Delegation to the Third U.N. Conference on the Law of the Sea. He is currently special counsel to Tetra Tech, Inc. Welcome to each of you.

We were to hear from a fifth witness, Professor Bernard Oxman. Unfortunately, Professor Oxman has fallen ill and is not able to be heard today. If there are no objections, his prepared written statement will be included in the record in full. Professor Oxman served as United States Representative and Vice-Chairman of the U.S. Delegation to the Third U.N. Conference on the Law of the Sea. He is also a former Assistant Legal Adviser for Oceans, Environment, and Scientific Affairs in the Office of the Legal Adviser at the Department of State. Professor Oxman is currently a Professor at the University of Miami Law School and serves as a Judge Ad Hoc on the International Tribunal for the Law of the Sea.

#### [The prepared statement of Senator McCain follows:]

PREPARED STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA,  
CHAIRMAN, SENATE COMMERCE COMMITTEE

I am pleased to testify, today in support of the Senate's ratification of the U.N. Convention on the Law of the Sea. As Chairman of the Senate Committee on Commerce, Science, and Transportation, which has jurisdiction over oceans, and maritime and ocean navigation, I believe ratification of this important Convention would help strengthen our national security, promote the free and unimpeded flow of inter-

national trade and commerce, and protect our vital natural resources. Its ratification would enable the United States to regain its leadership role in promoting the rule of law for the oceans and encouraging respect for traditional navigational freedoms.

Throughout our nation's history, our security and economic well-being have long been dependent on our free access to the world's seas. The oceans have helped to protect us against potential adversaries, facilitate the transportation and trade of our products, and provided abundant fish and natural resources in the waters off our shores.

The United States has historically been a global leader in advocating the Law of the Sea. After World War II, the United States was at the forefront in calling for a formal Law of the Sea and was one of its champions during the two decade struggle to draft this Convention. However, when the Convention was opened for signature in 1982, much of the developed world, led by the United States, refused to sign it over concerns with the provisions related to deep seabed exploitation.

In the early 1990s, the United States helped craft an important compromise which satisfied the many objections to the deep seabed mining provisions. Yet despite removing this impediment, we still have not ratified this Convention, which to date has been ratified by 143 countries.

The U.N. Convention on the Law of the Sea provides a comprehensive regime of law and order in the world's oceans and seas and it serves as an umbrella convention under which rules governing all uses of the oceans and their resources are established. As a global power, the United States depends on ready and unrestricted access to the world's oceans and international airspace. The navigational rights and freedoms codified by the Convention would ensure our military continues to have the mobility it needs to maintain a military presence around the world and move military forces where needed. Additionally, these rights and freedoms will ensure our nation's ability to ship goods and materials throughout the world using the most expeditious routes.

Support for Convention ratification within the United States is widespread and diverse, including environmental groups, the maritime industry, the oil and natural gas industry, and the oceanographic research community. The Clinton Administration previously supported ratifying the Convention and now the U.S. State Department has indicated its support of ratification. Additionally, in one of its first official acts, the U.S. Commission on Ocean Policy publicly called for ratification of the Convention.

As a result of our failure to ratify the Convention, our national interests have suffered. We are now barred from membership on the Law of the Sea Tribunal and the Continental Shelf Commission as well as the right to name members to special arbitration panels which are responsible for settling interstate disputes. In these bodies, the United States has been relegated to observer status. Furthermore, the United States is barred from membership in the International Seabed Authority where parties to the Convention organize and direct ventures to exploit the mineral resources of the deep seabed.

The importance of the U.S. ratification of the Convention is further compounded by the emerging issues brought about because of Global Climate. For example, as the Arctic icecap around the Canadian Arctic archipelago continues to shrink and thin, some scientists have suggested the Northwest Passage could be open for possible year-round navigable passage within 10 to 15 years. As a result, the contentious issue of whether this passage will be an international strait or considered part of Canadian waters will need to be determined.

It has been more than nine years since the Convention was transmitted to the Senate for ratification, where it has since resided with the Senate Committee on Foreign Relations. Today's hearing is an important step toward finally addressing this critical international issue and I hope it prompts Senate ratification of the Convention in the near future.

The CHAIRMAN. Let me now give a special welcome to my colleague Ted Stevens. We really do appreciate your coming this morning, Ted, on this important issue.

**STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM ALASKA, CHAIRMAN, APPROPRIATIONS COMMITTEE, U.S. SENATE, WASHINGTON, DC**

Senator STEVENS. Thank you very much, Mr. Chairman. We do have our supplemental on the floor at 10 o'clock. I wish I could join

you to listen to these panels. However, I have confidence that they will present substantial testimony in favor of the Law of the Sea Convention.

I do thank you for holding the first of the two hearings on the U.N. Convention on the Law of the Sea. In 1969, Mr. Chairman, my first full year in the Senate, Senator Warren Magnuson, then Chairman of the Commerce Committee, asked me to monitor the Law of the Sea negotiations. As a freshman minority member at that time and assigned to attend all of the negotiations around the world, I learned a great deal from the discussions on the Law of the Sea that took place all over the world, and the work on the Magnuson-Stevens Act was really a product of those negotiations. The concepts embodied in that act I believe were ahead of its time by 20 to 30 years.

Mr. Chairman, I am going to summarize the balance of my statement and ask you to print the full statement in the record if you will.

The CHAIRMAN. It will be published in full in the record.

Senator STEVENS. I am proud that Congress and the President approved Alaskans' suggestions that are now part of the U.N. Convention on the Law of the Sea. These include many of the provisions of the convention that are consistent with the Magnuson-Stevens Act on living resource management, conservation and exploitation. Before the passage of this act, fisheries around the world, including those off our State of Alaska, were being overfished, primarily by distant foreign fleets.

Second, the moratorium on high seas driftnets. In 1987, the Driftnet Impact Monitoring, Assessment, and Control Act directed the Secretary of the Interior to negotiate observer and enforcement agreements with nations whose vessels used large-scale driftnets on the high seas. It also began the process that eventually led to the U.S. recommendation that the U.N. adopt our suggestion for a global moratorium on large-scale driftnet fishing on the high seas.

Third, the agreement on conservation and management of straddling fish stocks and highly migratory species. The Convention on Conservation and Management of Pollock Resources in the Central Bering Sea, otherwise known as the Donut Hole and the 1995 U.N. Fish Stocks Agreement, attempted to better define the obligations and redress for countries where highly migratory species and straddling fish stocks originate.

The Donut Hole agreement was the model for the global treaty that became the 1995 U.N. Fish Stocks Agreement. I carried the commitment to ratify this agreement to the United Nations General Assembly and the U.S. did the right thing by ratifying it in August 1996.

I believe the Donut Hole and the U.N. Fish Stocks Agreement cleared up many concerns that had been voiced about the efficacy of enforcing living marine resource laws internationally under this convention. The agreements have proven to be critical first steps toward cooperative international management of transboundary stocks.

I do recommend ratification of the Convention on the Law of the Sea and related agreements, provided the following concerns are adequately addressed: First, potential surpluses of U.S. fish stocks

must not lead to arguments by foreign nations to gain access to these marine resources. The quotas for all groundfish contained in the Bering Sea and Aleutian Islands are capped at a maximum of 2 million metric tons annually, which include pollock, Pacific cod, yellowfin sole, turbot, arrowtooth flounder, rock sole, Alaska plaice, sablefish, Pacific Ocean perch, northern rockfish, rougheye, atka mackerel, and squid. This is the most bountiful place I think in the world for fisheries today that are under sound management.

This cap is enforced regardless of the maximum recommended acceptable biological catch level. This is one of the longest standing conservation measures in the North Pacific.

The pollock biomass is now at an all-time high, with 2002 over-fishing levels at 3.54 million metric tons. As you know, article 62 of the convention is consistent with the Magnuson-Stevens Act for authorizing the allocation of any surplus to foreign States and provides terms and conditions for any foreign fishing in the U.S. exclusive zone.

Apparently, recent changes or proposals to the Law of the Sea have not changed this and I hope we will be vigilant, if we ratify this convention, to assure that strong conservation measures to protect species in U.S. waters do not lead to claims by foreign fleets to gain access to our living marine resources.

Mr. Chairman, it is very important, because we do not allocate to maximum availability. We allocate so that the stocks are constantly increasing in biomass, and we have proven that with our pollock. It is growing substantially.

Third, next, the deep seabed claims by Russia on the Arctic shelf. It is my understanding that the United States successfully negotiated favorable terms on the deep sea mining agreement which should guarantee us a seat on the decisionmaking body of the International Seabed Authority and eliminate mandatory transfer of technology provisions. Further, it scales back the administrative structure for the mining regime. I do believe, from the mining point of view, that this convention is now acceptable if that understanding is correct, Mr. President.

The Arctic continental shelf extends beyond the U.S. 200-mile exclusive economic zone and is of great interest to Alaska. As a matter of fact, two-thirds of the United States continental shelf is off Alaska. Article 76 of the convention allows member States to lay claim to all bottom resources on their continental shelves beyond 200 miles. It is my understanding that Russia has recently proposed claims to a large area of the Arctic shelf to the International Seabed Authority. Aggressive claims such as these raise a question of whether the U.S. would be better situated if it became a party to the convention and had a seat on the authority that oversees these claims.

In addition, if we ratify the convention pursuant to article 76 the U.S. could lay claim to an area of about 62,000 square kilometers north and east of the Bering Strait. I recommend that this committee closely review the agreement on deep seabed mining with regard to the outer continental shelf off our State. I strongly recommend this committee work closely with our Commerce Committee on the various issues that I raised today and I know the

Chairman, Senator McCain, will raise, and others that are very much within our committee's jurisdiction.

We believe that the provisions of the convention must be specific to avoid future misinterpretation. Proponents of ratifying the Law of the Sea argue that active U.S. participation in the convention and agreements will guarantee that the protections and restrictions are applied in a fair and commensurate manner. I urge caution. The Law of the Sea Convention and other related agreements must not be open-ended and some of them are, Mr. Chairman. But these provisions must be specific and precise to prevent future misinterpretation. I do believe your committee has a real task ahead of itself to find out how we might make certain that these future interpretations do not enlarge the scope of foreign invasion of our basic 200-mile limit. If those determinations are not clear, later interpretations will seriously erode the U.S. policy that I have described.

The U.S. Commission on Oceans Policy is expected to release its report on oceans policy next month, and I see Admiral Watkins is here, who has done a magnificent job with the Commission. Their report, I am told, will include a recommendation for the United States to become a party to the convention.

The Senate should seriously consider their recommendation. The Law of the Sea Convention has benefited from the laws that originated here in the United States that I have recited. This convention now embodies the 200-mile exclusive economic zone, provisions to prevent destructive fishing practices, and conservation and management of shared living resources. But Congress needs further assurance that the Law of the Sea will not undermine future conservation and management initiatives or security measures.

In this and future centuries, Mr. Chairman, demands on the world's oceans will only increase, as we all know. If properly managed, oceans will become an even more important and bountiful source of food as well as a place of commerce, communication, and resource development. The Law of the Sea can provide us with the comprehensive legal framework that we need to maximize our utilization of the ocean resources while ensuring their healthiness and productivity for generations to come.

Again, I congratulate you for holding these hearings and look forward to working with you as this convention comes to the floor. I thank you for your courtesy, Mr. Chairman.

[The prepared statement of Senator Stevens follows:]

PREPARED STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM ALASKA,  
CHAIRMAN, SENATE APPROPRIATIONS COMMITTEE

Chairman Lugar, thanks for holding this first of two hearings on the U.N. Convention on the Law of the Sea. In 1969, my first full year in the Senate, Senator Warren Magnuson asked me to monitor the Law of the Sea negotiations. As a freshman minority member then, and assigned to attend all of those negotiations, I learned a great deal from the discussions on the Law of the Sea that took place all over the world, and work on the Magnuson-Stevens Act was really a product of those negotiations. The concepts embodied in that Act were ahead of its time by 20 or 30 years.

Many of the provisions in the Law of the Sea Convention are consistent with the Magnuson-Stevens Act on living resource management, conservation and exploitation. Before passage of our Act fisheries around the world, including those off the coast of Alaska, were being overfished, primarily by distant foreign fleets. These fleets engaged in "pulse fishing" in U.S. waters. "Pulse fishing" exploits one fishery

until its collapse and then move on to another fishery and decimate those stocks. This practice was devastating for our fisheries, and until the 200-mile exclusive economic zones were established there was very little international cooperation to manage or to protect shared fisheries.

After the 200-mile Exclusive Economic Zone for U.S. waters was implemented, attention turned to the fishing practices on the high seas and the adverse effects on straddling fish stocks and highly migratory species. Addressing this problem was extremely important for Alaska because of the high seas interception of Alaska salmon by foreign fleets. Wild salmon prices were strong at the time, and high seas fishing was damaging the resource by reducing the overall sustainability of the stocks. In response to this problem, the Driftnet Impact Monitoring, Assessment, and Control Act was introduced in 1987. That Act directed the Secretary of State to negotiate observer and enforcement agreements with nations whose vessels used large scale driftnets on the high seas. It also began the process that eventually led to the U.S. recommendation that the U.N. adopt our suggestion for a global moratorium on large-scale driftnet fishing on the high seas.

The Law of the Sea Convention incorporated the 200-mile exclusive economic zones and placed substantive restrictions, such as the moratorium on large-scale driftnets, on the freedom of fishing on the high seas under Article 87. These are real protections that will allow for conservation and management of the world's shared living marine resources. They establish a precedent that, particularly on the high seas outside the jurisdiction of any country, destructive fishing practices will not be tolerated. These important provisions make the Law of the Sea Convention a much better body of international law.

From 1990 to 1994, the U.S. participated in consultations designed to remedy the problems with the deep seabed provisions of the Law of the Sea Convention. President Clinton signed the 1994 Agreement on the revised deep seabed mining provisions, which was referred to this committee in October of that year. It is my understanding that the U.S. successfully negotiated favorable terms on the deep seabed mining Agreement, which should guarantee the U.S. a seat on the decision-making body of the International Seabed Authority and eliminates mandatory transfer of technology provisions. Further it scales back the administrative structure for the mining regime.

The Arctic continental shelf extends beyond the U.S. 200-mile exclusive economic zone and is of great interest to Alaska, in fact 2/3rds of the continental shelf off the U.S. is off Alaska. Article 76 of the Convention allows member States to lay claim to all bottom resources on their continental shelves beyond 200-miles based on the appropriate charting and relevant geodetic data. It is my understanding that Russia has recently proposed claims to large areas of the Arctic shelf to the International Seabed Authority. These claims may be of little consequence to the U.S. because we are not a party to the Agreement on deep seabed mining and would likely not respect or recognize these claims. However, it does raise a question of whether we would be better situated if the U.S. became a party to the Convention and were represented on the Authority that oversees these claims. In addition, if we ratify the convention, pursuant to Article 76 the U.S. could lay claim to an area of about 62,000 square kilometers, an area roughly larger than West Virginia, north and east of the Bering Strait. I recommend that this committee closely review the Agreement on deep seabed mining.

Around the same time the agreement on deep seabed mining was completed, work was being done on two other important agreements. Those agreements attempt to better define the obligations and redress for countries where highly migratory species and straddling fish stocks originate. They were titled the "Convention on Conservation and Management of Pollock Resources in the Central Bering Sea" otherwise known as the Donut Hole, and the 1995 U.N. Fish Stocks Agreement. The Donut Hole agreement restricted the U.S., Russia and the four former high seas fishing states—Japan, South Korea, China and Poland—from fishing for pollock within an area in the Central Bering Sea until those stocks recovered.

The Donut Hole agreement was important because it effectively coordinated international fishing efforts on certain pollock straddling stocks, and it also was the model for the global treaty that became the 1995 U.N. Fish Stocks Agreement. I carried the commitment to ratify this agreement to the United Nations General Assembly, and the U.S. did the right thing by ratifying it in August of 1996. I believe the Donut Hole and U.N. Fish Stocks Agreements cleared up many concerns that had been voiced about the efficacy of enforcing living marine resource laws internationally under the Convention. To this date to my knowledge none of the countries party to the Donut Hole agreement have permitted fishing in the restricted area and those stocks continue to rebuild. The agreements have proven to be critical first steps to-



ward cooperative international management of transboundary stocks. Because of good management practices the biomass of pollock off Alaska continues to grow.

The international agreements on shared stocks, especially those in the Bering Sea, demonstrates an important issue on conservation and management under the Convention. The quotas for all groundfish combined (which include pollock, Pacific cod, yellowfin sole, turbot, arrowtooth flounder, rock sole, Alaska plaice, sablefish, Pacific Ocean perch, northern rockfish, rougheye, atka mackerel, and squid) in the Bering Sea and Aleutian Islands are capped at a maximum of 2 million metric tons annually, regardless of the maximum recommended acceptable biological catch levels. This is one of the longest standing conservation measures in the North Pacific. For the past 25 years, annual catch limits for groundfish have been set at or below the acceptable biological catch levels recommended by fishery scientists. The pollock biomass is currently near all-time high levels, with a 2002 overfishing level of 3.54 million metric tons and an acceptable biological catch level of 2.1 million metric tons—this is for pollock alone, not combining the rest of the groundfish species in the Bering Sea, and still the Council conservatively does not allow harvesting over the cap. The North Pacific presently has large surpluses of pollock because of the conservative and science-based management by the Regional Council. As you know, Article 62 of the Convention is consistent with the Magnuson-Stevens Act for authorizing the allocation of any surplus to foreign States and provides terms and conditions for any foreign fishing in the U.S. exclusive economic zone.

Apparently, recent changes or proposals to the Law of the Sea have not changed this, but we must be vigilant if we ratify this Convention, to assure that strong conservation measures to protect species in U.S. waters do not lead to arguments by foreign fleets to gain access to our living marine resources.

I would also recommend this committee look closely at the provisions in the Convention relating to freedom of navigation in territorial seas. As a result of the *Exxon Valdez* oil spill, tankers operating in U.S. waters must be double-hulled. There should be a clarification in Part II, Article 21 pertaining to laws and regulations of the coastal State relating to innocent passage. Section 2 of this Article specifies that such laws and regulations of a coastal State shall NOT apply to the design or construction of foreign ships. Therefore, foreign ships carrying toxic materials would be allowed to move freely in the territorial seas of coastal States and not have to meet certain design requirements, such as double-hulls. The spills of the past, such as that off the coast of Spain and Portugal last year should have taught us that some foreign fleets do not meet even basic maintenance and structural integrity requirements. We should not permit this Convention to erode the stringent environmental standards required in the U.S.

I strongly recommend that this committee work closely with the Commerce Committee on the various issues I have raised today, as they are very much within that committee's jurisdiction.

Proponents of ratifying the Law of the Sea argue that active U.S. participation in the Convention and Agreements will guarantee the protections and restrictions are applied in a fair and commensurate manner. I urge caution: the Law of the Sea Convention and other related agreements must not be open ended; provisions must be specific and precise to prevent future misinterpretation. If those determinations are not clear, later interpretations will seriously erode U.S. policy.

Finally, the U.S. Commission on Ocean Policy is expected to release its report on Ocean Policy next month. It is my understanding their report will include a recommendation for the U.S. to become a party to the Convention. The Senate should consider seriously their recommendation. The Law of the Sea Convention has benefited from the laws that originated in the U.S. This Convention now embodies the 200-mile exclusive economic zone, provisions to prevent destructive fishing practices, and conservation and management of shared living resources. But Congress needs assurance that the Law of the Sea will not undermine future conservation and management initiatives or security measures.

In this and future centuries, demands on the world's oceans will only increase. And, if properly managed oceans will become an even more important and bountiful source of food as well as a place of commerce, communication and resource development. The Law of the Sea can provide us with the comprehensive legal framework we need to maximize our use of the oceans' resources, while ensuring their healthiness and productivity for generations to come.

The CHAIRMAN. Thank you very much, Senator Stevens. I thank you again, as you have recited the many ways over decades in which you have participated in this public policy issue. My background is not nearly as extensive as yours, but I was impressed at

an Aspen Institute conference in Rome this year about the conservation and security issues that you have mentioned and the fact that we must not undermine those. These are a very important part of the heritage that you have brought to this and that we hope to continue. I would think that we would want to work carefully with the Commerce Committee, and likewise with yourself, given your background, as we get the advice and consent resolution prepared after our hearings are concluded.

We look forward to working with you and we appreciate your strong testimony.

Senator STEVENS. Thank you very much. Matt Paxton of my staff has worked with me on this matter and I would urge that he be permitted to stay as long as he can as an observer of these hearings.

The CHAIRMAN. We welcome him with you today and we welcome his continuing as an observer working with our committee. Thank you very much. Good luck on the floor.

I would like to welcome now our second panel. We are pleased this morning to have four outstanding witnesses to discuss the implications of the Law of the Sea Convention. First we will hear from Admiral James Watkins. Admiral Watkins served from 1982 to 1986 as Chief of Naval Operations. From 1989 to 1993 he was United States Secretary of Energy. Currently Admiral Watkins is the Chairman of the United States Commission on Ocean Policy, and the report which Senator Stevens referenced will be forthcoming shortly and of benefit to our committee.

Our second witness on the panel is Admiral Joseph Prueher. Admiral Prueher served for 35 years in the United States Navy. From 1996 to 1999 he was Commander-in-Chief of the United States Pacific Command. From 1999 to 2001 he served as the United States Ambassador to China.

Next we will hear from Professor John Norton Moore. From 1973 to 1976 Professor Moore served as Ambassador and Deputy Special Representative of the President to the Third United Nations Conference on the Law of the Sea. He also was Chairman of the National Security Council's Inter-Agency Task Force on the Law of the Sea. Currently he is the Walter L. Brown Professor of Law at the University of Virginia School of Law and director of the University's Center for Oceans Law and Policy.

Finally, we will hear from Admiral William Schachte. During his Navy career, Admiral Schachte served in many capacities related to ocean policy. He was a member of the United States Delegation to the Third U.N. Conference on the Law of the Sea. He is currently special counsel to Tetra Tech, Inc.

We welcome each of you. I would indicate that we were to hear from a fifth witness, Professor Bernard Oxman. Unfortunately, Professor Oxman has fallen ill and is not able to be here today. If there are no objections, and the Chair hears none, his prepared statement will be included in the record in full.

Professor Oxman has served as United States Representative and Vice Chairman of the U.S. Delegation to the Third U.N. Conference on the Law of the Sea. He is also the former Assistant Legal Advisor for Oceans, Environment, and Scientific Affairs in the Office of the Legal Advisor at the Department of State. Pro-

fessor Oxman is currently a professor at the University of Miami Law School and serves as a judge ad hoc on the International Tribunal for the Law of the Sea.

[The prepared statement of Professor Oxman follows:]

PREPARED STATEMENT OF PROF. BERNARD H. OXMAN,<sup>1</sup> UNIVERSITY OF MIAMI  
SCHOOL OF LAW

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 Implementing Agreement Regarding Part XI of the Convention.

I must begin by begging your indulgence. I returned to the United States from Hamburg only last Friday after serving for several weeks on the International Tribunal for the Law of the Sea as a judge ad hoc appointed by one of the states party to the case. One unfortunate consequence is that my statement today is less polished and thorough than I would have liked. In this respect I fortunately had the luxury of relying on what I anticipated to be the comprehensive statements of others here today.

Whatever the utility of my remarks, 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 and are unquestionably regarded throughout the world as among the small handful of individuals singularly responsible for the ultimate shape of the Convention.

Mr. Chairman, it is my strongly held opinion that it is in the interests of the United States to become party to the Convention as soon as possible. We are, and have been since the founding of the Republic, a seafaring nation that relies on the right to move off distant shores. Our security is dependent upon the unchallenged global mobility of our armed forces to respond to any threat, whatever its nature, emanating from any part of the world; our prosperity is dependent upon the unimpeded global movement of goods and persons to and from our shores; and our future well-being may increasingly depend on the uninterrupted global carriage of telecommunications by submarine cable.

Ambassador Stevenson and I put it this way:

From the perspective of international security, the basic question is whether forces may be moved from one place to another without the consent or interference of states past whose coasts they proceed. Global mobility is important not only to naval powers but to other states that rely on those powers to maintain stability and deter aggression, directly or through the United Nations. As the size of major navies is reduced after the Cold War, the adverse impact on their ability to perform their primary missions will increase if they must divert scarce resources to challenging coastal state claims that prejudice global lines of communication or set adverse precedents. Enhancing the legal security of navigation and defense activities at sea maximizes the efficient use of defense resources.

From the perspective of trade and communications, the basic question is whether two states may communicate with each other by sea without interference by a third state past whose coast they proceed. Restrictions imposed by a coastal state along the route may well result in increased costs for industries dependent upon trade and communications and for countries whose exports or imports are affected.<sup>2</sup>

The historic tension in the law of the sea has been a struggle between the freedom of the seas and coastal state sovereignty over the seas. The two are, in their purest forms, directly contradictory. The duty of all states to respect the freedoms of the seas is in principle equal. If one coastal state can impose a limitation, all can.

Thus, when in 1945 President Truman claimed the natural resources of the continental shelf beyond the territorial sea of the United States, we willingly ceded the same exclusive control to other coastal states that we claimed for ourselves. The difficulty is that we were unable to control the process. We were emulated, so to speak, beyond our wildest expectations. It was plausibly argued that since, as the uncontested global maritime power at the time, we had the greatest interest in preventing coastal state incursions on freedom of the seas, any claims of exclusive coastal state control that we made were the minimum, not the maximum, that

might be regarded as reasonable. Where we limited our claim to the seabeds, others claimed the waters and even the airspace over vast areas as well. Where we limited our claim to natural resources, others claimed sovereignty and with it control over all activities, including navigation and overflight.

Our official position that coastal state sovereignty ended at the three-mile limit, and therefore that the free high seas began at that limit, became increasingly untenable. What was emerging was a sense that any coastal state could claim what it wished and might well get away with it; in opposing those claims, the United States and other maritime nations were regarded as hypocritical because they too claimed what they wished off their own coasts. If the United States could unilaterally try to strike the right balance between its coastal interests in control of foreign uses of the sea off its own coast, and its maritime interests in the free use of the sea off foreign coasts, why couldn't others strike a balance that suited them better? That very process ironically made it harder for the United States to protect its interests off its own coast, for fear that new assertions of right would abet a process that would further degrade what remained of the platform of principle upon which the U.S. operated off foreign shores. In short, the interests of the United States in both global mobility and in protection of its interests off its own shores were caught in a stultifying conundrum.

Needless to say, the United States had the ability to challenge foreign states that interfered with its perceived rights. But to physically challenge every coastal state that made a claim contrary to our view of our rights would have required far greater resources than we were prepared to divert to such a project, and would have come at a significant cost to other U.S. interests in the various countries concerned. Moreover, both domestic and international public opinion demanded a platform of principle for such overt assertions of right off foreign shores that was substantially more legitimate than nostalgic invocation of what once may have been the law.

As stated in a study by the Panel on the Law of Ocean Uses, of which I was rapporteur at the time,<sup>3</sup> the United States was faced "with three expensive choices when confronted with a foreign state's claim of control over our navigation or military activities off its coast in a manner inconsistent with our view of the law:

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."

The fundamental truth is that the most difficult and potentially costly policy decisions made by the President and the Congress regarding activities at sea turn not on what our own lawyers say our rights are under the law of the sea, but what foreign states perceive our rights to be. And what we saw in the 1960's was an accelerating collapse of any semblance of consensus on the fundamental question: Where is there freedom and where is there sovereignty?

This is the setting in which President Nixon made his historic decision in 1970 to launch a new oceans policy. The challenge was to devise a political strategy for stabilizing and enhancing our ability to influence the perceptions of foreign coastal states as to their rights and duties, and hence their perceptions as to our rights and duties, off their coasts. The key to that policy was a new multilateral elaboration of the law of the sea. The object was a widely ratified convention of highly legitimate pedigree that, by balancing the conflicting interests not only between but within states, stabilized the law of the sea over the long term and protected our fundamental interests in global mobility. This in turn would provide us a common platform of principle to influence foreign perceptions of their rights and duties as well as our rights to operate off foreign coasts and to regulate activities off our own coast.

Ambassador Richardson put the objective in the following way:

A Law of the Sea treaty creating a widely accepted system of international law for the oceans would—if the rules it contains adequately meet U.S. needs—be the most effective means of creating a legal environment in which our own perception of our rights is essentially unchallenged. We would then, for the first time since the Grotian system began to disintegrate, be assured rights of navigation and overflight free of foreign control, free of substantial military risk, and free of economic or political cost.<sup>4</sup>

It took another thirteen years of hard continuous negotiations among the nations of the world before President Reagan was finally able to declare the underlying substantive effort launched by President Nixon a success: President Reagan concluded that the provisions of the Convention with respect to traditional uses of the sea “fairly balance the interests of all states” and expressly stated 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.”

The policy declared by President Reagan aligns our position regarding customary international law with the substantive provisions of the Convention dealing with all the traditional uses of the sea. What then are the advantages of becoming a party?

President Reagan expressly recognized that the rules set forth in the Convention constitute the platform of principle on which we operate. There is indeed no plausible alternative for the foreseeable future. The interpretation and application of these rules, like all rules, is a dynamic process that evolves with time. It is going on in countless venues even as we speak. As a practical matter, our rights and duties will be affected by that process whether or not we are party. What we gain by becoming party is increased influence over that process.

In particular:

- we gain the ability to speak authoritatively as a party to the Convention in setting forth our views regarding its interpretation and application;
- we gain the enhancement of our credibility when we insist that other states respect the Convention; as the world’s principal maritime power, we are already the most active in noting and protesting foreign legislation and other measures that we believe may not be fully consistent with the Convention;
- we gain the right to participate in the organs established by the Convention and the meetings of states parties; one example is the review by the Commission on the Limits of the Continental Shelf of Russian continental shelf claims that immediately abut our own and implicate our own interests in the Arctic; another is the permanent seat on the Council of the Seabed Authority accorded the United States by the 1994 Implementing Agreement.

With respect to the underlying objective of promoting stability in the law of the sea, the 1994 Study of the Panel on the Law of Ocean Uses suggests four main advantages of widespread, including U.S., ratification:

1. *Treaties are perceived as binding.* Legislators, administrators, and judges are more likely to feel bound to respect treaty obligations. . . . Even nonparties are more likely to be cautious about acting a manner contrary to a widely ratified Convention; if they do, they are more likely to be isolated when their claims are challenged.

2. *Treaty rules are written.* Treaty rules are easier to identify and are often more determinate than customary law rules. Even if one argues that a customary law rule is identical to a treaty rule, that argument in and of itself is elusive and hard to prove. Even a nonlawyer reading the text of a binding treaty knows he or she is reading a binding legal rule, and can often form some appreciation of what the rule may require.

3. *Compulsory arbitration.* Parties to the Law of the Sea Convention are bound to arbitrate or adjudicate most types of unresolved disputes regarding the interpretation or application of the Convention. This can help forestall questionable claims in the first place. Perhaps more importantly, it provides an option for responding to unilateral claims the may well be less costly than either acquiescence or confrontation. Because states are not bound to arbitrate or adjudicate disputes absent express agreement to do so, this benefit of the Convention . . . is dependent upon ratification.

4. *Long-term stability.* Experience in the [twentieth] century has shown that the rules of the customary law of the sea are too easily undermined and changed by unilateral claims of coastal states. Treaty rules are hard to change unilaterally. At the same time, the Law of the Sea Convention establishes international mechanisms for ordered change that promote rather than threaten the long-term stability of the system as a whole.<sup>5</sup>

To these I might add that other coastal states, that have yet to become party to the Convention are more likely to follow suit once we do, beginning with our Canadian friends. This may even include states with whose governments we are not on intimate terms, but whose experts have a sophisticated understanding of the law of the sea, and whose decision-makers might regard the subtle reciprocal gesture of becoming party to the Convention as providing a rational basis for avoiding un-

necessary conflict with the United States over navigation and overflight as well as offering other benefits.

Senate approval of the Convention at this time may also be roughly contemporaneous with the anticipated approval by the European Union of the 1995 Agreement on the Implementation of the Provisions of the Law of the Sea Convention regarding Straddling Fish Stocks and Highly Migratory Fish Stocks, to which the United States is already party but which is not as widely ratified as the Convention. With both Europe and the United States firmly aligned on the essential elements of the superstructure of the modern law of the sea, it is more likely that others can be encouraged to come along soon.

Mr. Chairman, there is insufficient time for me to even begin to outline all of the specific benefits to the United States of ratification of the Convention. With your permission, I would like to submit for the record a copy of Ambassador Stevenson's and my published observations on The Future of the United Nations Convention on the Law of the Sea from which I have already quoted;<sup>6</sup> these observations were prepared at the time the future of the Convention was still very much in doubt and new arrangements were beginning to emerge that ultimately became the 1994 Implementing Agreement regarding Part XI of the Convention.

That said, I must make special note that Ambassador Stevenson and I specifically observed that, "The Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."<sup>7</sup> I am delighted to see that former Secretary of State Warren Christopher agreed with this appraisal in his Letter of Submittal of the Convention. I would only add that the statement remains true today. The protection and preservation of the marine environment is of fundamental importance to the American people and to people throughout the world. No one country can achieve this on its own. Both environmental and economic objectives point in the same direction, namely international standards that states have the right and duty to implement, supplemented by measures taken by states individually and jointly to control access to their own ports and to regulate seabed activities, offshore installations, and similar matters. One of the greatest contributions made by the Convention is to be found in its extensive provisions mandating this approach.

Mr. Chairman, this Committee has before it a Convention that reflects a conscious decision by the United States that multilateralism was and is in its best interests with respect to the law of the sea. It has before it the most comprehensive and ambitious lawmaking convention ever negotiated, a Convention that makes a significant contribution to the rule of law in international affairs because strengthening the rule of law at sea was and remains important to American interests. It has before it a powerful Convention on protection and preservation of the marine environment precisely because this Convention seeks to achieve a reasonable balance between environmental protection and other interests.

Senate approval of the Convention and the 1995 Implementing Agreement would suggest that there is every reason to ensure that the international agenda is pursued carefully and that, as long as it may take, at the end of the day relevant interests are reasonably accommodated. It would announce that when that is done, America will stand second to none in joining to strengthen multilateralism, to strengthen the rule of law in international affairs, and to strengthen protection of the environment.

Mr. Chairman, it is of particular importance that many of the 143 parties to the Convention worked painstakingly with us over many years to produce a Convention that we as well as they could ratify. From the perspective of much of the rest of the world, a great deal of the negotiation of the Law of the Sea Convention revolved around accommodating the interests and views of the United States regarding:

- the 12-mile maximum limit for the breadth of the territorial sea,
- the retention of many provisions drawn from the 1958 Conventions on the Territorial Sea and the Contiguous Zone, the Continental Shelf and the High Seas, to which the United States is party,
- the more detailed and objective provisions on innocent passage,
- the extension of the contiguous zone to 24 miles from the coastal baselines in order to strengthen enforcement of smuggling and immigration laws,
- the new regime of transit passage through, over and under straits,
- the new regime of archipelagic waters and archipelagic sea lanes passage,
- the detailed and carefully balance of the provisions regarding the regime of the 200-mile exclusive economic zone and its status, including express enumeration of the rights of the coastal state and express preservation of the freedoms of navigation, overflight, laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms,

- the immunities of and exemptions for warships and military aircraft,
- the precision of the texts on artificial islands, installations and structures,
- the extension of the limit of the continental shelf to the outer edge of the continental margin,
- the inclusion, in addition to coastal state control over fisheries in the 200-mile exclusive economic zone, of a ban on salmon fishing beyond the zone, a reference to regional regulation of tuna fisheries, and a special provision protecting marine mammals,
- the avoidance of a separate legal regime for enclosed and semi-enclosed seas,
- the limitations on coastal state authority with respect to marine scientific research,
- the elaborate detail on environmental rights and obligations,
- the inclusion of compulsory arbitration or adjudication with important exceptions (e.g. for military activities),
- the limitation of the regulatory functions of the Seabed Authority to mining activities, and
- most dramatically, the extensive revision of Part XI of the Convention in the 1994 Implementing Agreement to accommodate the objectives articulated by President Reagan.<sup>8</sup>

These and many more provisions are widely regarded as having been designed to respond positively to U.S. requirements and interests.

Mr. Chairman, I respectfully recommend that the United States take yes for an answer and assume its rightful place as a party to the Convention and the Implementing Agreement.

Thank you.

#### FOOTNOTES

<sup>1</sup>Professor of Law, University of Miami School of Law. Formerly United States Representative and Vice-Chairman of the U.S. Delegation to the Third U.N. Conference on the Law of the Sea, and Chairman of the English Language Group of the Conference Drafting Committee.

<sup>2</sup>John R. Stevenson and Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AJIL 488, 493 (1994).

<sup>3</sup>Panel on the Law of Ocean Uses, *United States Interests in the Law of the Sea Convention*, 88 AJIL 167, 171 (1994) (hereinafter Panel Study). The panel was chaired by Louis Henkin and included James M. Broadus, Jonathan I. Charney, Thomas A. Clingan, Jr., John L. Hargrove, Jon L. Jacobson, Terry L. Leitzell, Edward L. Miles, J. Daniel Nyhart, Bernard H. Oxman, Giulio Pontecorvo, Horace B. Robertson, Jr., Louis B. Sohn and James Storer. Other contributions of the Panel include *U.S. Interests and the United Nations Convention on the Law of the Sea*, 21 Ocean Dev. & Int'l L. 373 (1990); *Deep Seabed Mining and the 1982 Convention on the Law of the Sea*, 82 AJIL 363 (1988); *U.S. Policy on the Settlement of Disputes in the Law of the Sea*, 81 AJIL 438 (1987); and *Exchange Between Expert Panel and Reagan Administration Officials on Non-Seabed Mining Provisions of LOS Treaty*, 79 AJIL 151 (1985).

<sup>4</sup>Elliot L. Richardson, *Power, Mobility and the Law of the Sea*, 58 Foreign Affairs 902 (1980).

<sup>5</sup>Panel Study, *supra* note 3, at 172.

<sup>6</sup>See *supra* note 2.

<sup>7</sup>*Id.* at 496.

<sup>8</sup>A comparison of the changes effected by the Implementing Agreement with the objectives identified by President Reagan may be found in Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AJIL 687 (1994).

The CHAIRMAN. Gentlemen, we greet you and we ask that you testify in the order that I have introduced you. First of all, Admiral Watkins, we look forward to hearing from you.

#### **STATEMENT OF ADMIRAL JAMES D. WATKINS, U.S. NAVY (RET.), CHAIRMAN, U.S. COMMISSION ON OCEAN POLICY, WASHINGTON, DC**

Admiral WATKINS. Thank you very much, Mr. Chairman, and thank you for inviting me to testify before your committee today.

The Oceans Act of 2000 specifically charged the Commission on Ocean Policy, of which I am the chairman, with developing recommendations for a national ocean policy that will, among other objectives, "preserve the role of the United States as a leader in ocean and coastal activities." With this charge in mind and after hearing compelling testimony, our commissioners unanimously

adopted a resolution in support of United States accession to the Law of the Sea Convention and provided that resolution to the President, senior government officials, and the leadership of this committee in November 2001.

In response, Secretary of State Colin Powell wrote that he “shared our views on the importance of the convention” and then Admiral Vernon Clark, Chief of Naval Operations, stated that he “strongly believed that acceding to this convention will benefit the United States by advancing our national security interests and ensuring our continued leadership in the development and interpretation of the Law of the Sea.” Copies of this important correspondence exchange are attached to my more lengthy written statement which I ask to be entered into the record.

The CHAIRMAN. Let me just state at this point, all of the statements that you have prepared will be entered in the record in full, so there will be no need to ask for permission, and proceed as each of you will in summarization.

Admiral WATKINS. Thank you, Mr. Chairman.

Now I would like to share with you some of the reasons that our commissioners unanimously support United States accession to the Law of the Sea Convention. First, there are a series of issues currently being considered under the convention which would have tremendous economic implications for the United States. The Law of the Sea Convention’s Commission on the Limits of the Continental Shelf is charged with reviewing claims and making recommendations on the outer limits of the continental shelf. Identification of these outer limits will help establish a degree of certainty crucial to capital-intensive deepwater oil and natural gas development. This is particularly important to the United States, which is one of the only few nations in the world with broad continental margins.

The Continental Shelf Commission’s future actions on claims such as Russia’s claims in the Arctic will directly impact U.S. interests. If we do not become a party to the convention, we will be unable to participate directly in resolution of these issues of importance to U.S. economic interests.

Acceding to the Law of the Sea Convention will also allow the United States to play an active leadership role in dealing with a host of other issues with economic ramifications. As a party to the convention, the United States will be able to participate fully in International Seabed Authority efforts to develop rules and practices that will govern future commercial activities on the deep seabed. We will also be in a much stronger position to protect navigational freedoms specified in the convention, which are of particular importance to the United States given the critical role maritime commerce plays in our international trade and economic health.

Second, there is a security issue. The Law of the Sea Convention provides core navigational rights through foreign territorial seas, international straits, and archipelagic waters and preserves critical high seas freedoms of navigation and overflight seaward of the territorial sea, including in the exclusive economic zone. The navigational freedoms guaranteed by the convention allow timely movement by sea of U.S. forces throughout the world and provide recognized navigational routes which can be used to expeditiously trans-



port the United States' military cargo, 95 percent of which moves by ship.

However, there have been several instances of unilateral assertions of jurisdiction which seem to disregard the convention's clear meaning and intent relative to freedom of navigation and overflight. The United States has challenged some of the more excessive coastal State claims, relying on the navigational freedom reflected in the convention.

There are also emerging issues that may affect the balance of interests between navigational freedoms and coastal State authority. The United States has important interests both as a coastal State and as a major maritime power. We will be in a much stronger position and a more credible position to challenge excessive claims and to shape the future of issues and outcomes that impact our interests if we are a party to the convention.

Third, the Law of the Sea Convention provides a comprehensive framework for protection of the marine environment. The convention includes articles mandating global and regional cooperation, technical assistance, monitoring and environmental assessment, and establishes a comprehensive enforcement regime. The United States is party to international agreements which rely directly on this environmental protection framework. The Coast Guard, which has played a lead role in developing international agreements on maritime safety, security, and environmental protection at the International Maritime Organization, IMO, told our commission that a failure to accede to the convention materially detracts from its credibility when its representatives seek to rely on convention principles and leaves important questions of implementation and interpretation to others who may not share our views. Former Coast Guard Commandant Admiral James Loy and the current Commandant Admiral Thomas Collins told us that they strongly support U.S. accession to the Law of the Sea Convention.

Mr. Chairman, there are many other examples of benefits that would be derived from U.S. accession to the Law of the Sea Convention. For instance, provisions in the convention could be used by our researchers to expedite the approval process for research in foreign maritime jurisdictions. Also, the U.S. could participate in member selection, including the nomination of U.S. candidates for the International Law of the Sea Tribunal as well as the Continental Shelf Commission and the various organs of the International Seabed Authority.

U.S. accession to the Law of the Sea Convention has received bipartisan support from past and the current administration. This administration is on record both before the United Nations and at the recent G-8 meeting supporting U.S. accession to the convention.

Mr. Chairman, the input received by our commission reflects a broad consensus among many diverse groups in favor of ratification. As you stated in your early statement today, 140 nations are already party to the convention.

There has been some suggestion that we simply continue to rely selectively on the convention's provisions without ratification. However, until we become a party to the convention we cannot participate directly in the many bodies established under the convention

that are making decisions critical to our interests. While we remain outside the convention, we lack the credibility and position we need to most effectively influence the evolution of ocean law and policy.

There is little doubt that the framework provided by the convention will evolve through clarification, interpretation, and implementation decisions. It is interesting to note in this regard that the convention will be open for amendment for the first time beginning in 2004. In short, if we want to be a leader in the continuing development of ocean law and policy, a development that will have very substantial impacts on U.S. vital interests, we first have to be in the game.

The Ocean Commission was asked to make recommendations to preserve the role of the United States as a leader in ocean activities. For the reasons I have outlined here this morning, I renew our commission's unanimous call for the United States' accession to the Law of the Sea Convention.

Thank you, Mr. Chairman, and I stand ready to answer questions.

[The prepared statement of Admiral Watkins follows:]

PREPARED STATEMENT OF ADMIRAL JAMES D. WATKINS, USN (RET.), CHAIRMAN, U.S. COMMISSION ON OCEAN POLICY

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

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

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

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

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

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

The LOS Convention was described by those who appeared before the Ocean Commission as the “foundation of public order of the oceans” and as the “overarching framework governing rights and obligations in the oceans.” The United States was involved in all aspects of the development of the Convention, including reshaping

the seabed mining provisions in the early 1990's. As a consequence, the Convention contains many provisions favorable to U.S. interests.

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

For example, there are a series of issues currently being considered by parties to the Convention which could have tremendous economic implications for the United States.

Of particular importance is the work of the Convention's Commission on the Limits of the Continental Shelf, which is charged with reviewing claims and making recommendations on the outer limits of the Continental Shelf. This determination will in turn be used to establish the extent of coastal state jurisdiction over Continental Shelf resources. There are several reasons why direct U.S. participation in this process would be beneficial, namely:

- The LOS Convention sets up the ground rules by which coastal nations may assert jurisdiction over exploration and exploitation of natural resources beyond 200 miles to the outer edge of the continental margin. This is particularly important to the United States, which is one of only a few nations in the world with broad continental margins.
- The continental margins beyond the United States' Exclusive Economic Zone (EEZ) are rich not only in oil and natural gas, but also appear to contain large concentrations of gas hydrates, which may represent an important potential energy source for the future.
- The work of the Continental Shelf Commission in establishing clear jurisdictional limits creates a degree of certainty crucial to capital-intensive deepwater oil and natural gas development projects. Industry representatives stressed to us the importance of this certainty not only for potential investment in energy resource development beyond our own EEZ, but in U.S. industry participation in approved development projects undertaken on other nation's Continental Shelves.

The work of the Continental Shelf Commission is now at a critical stage. All current parties to the LOS Convention must submit their Continental Shelf claims prior to 2009. The Commission's action on these submissions will directly impact U.S. jurisdictional interests, particularly in the Arctic. If we do not become a party to the LOS Convention, we are in danger of having the world leave us behind on issues of Continental Shelf delimitation because we will continue to be ineligible to participate in the selection of members of the Commission or nominate U.S. citizens for election to that body.

Acceding to the LOS Convention will also allow the United States to play an active leadership role in a host of other issues of economic importance. As a party to the Convention, the U.S. can participate fully in International Seabed Authority efforts to develop rules and practices that will govern future commercial activities on the deep seabed. Currently, the U.S. is relegated to observer status.

As a party to the Convention, the United States will also be in a much stronger position to ensure the preservation of the balance between coastal state authority and freedom of navigation. The United States, whose international trade and economic health relies so heavily on maritime commerce, cannot afford to remain on the sidelines while parties to the LOS Convention make decisions that directly impact navigational rights and maritime commerce.

Further, the LOS Convention provides a comprehensive framework for protection of the marine environment. The Convention includes articles mandating global and regional cooperation, technical assistance, monitoring and environmental assessment, and establishing a comprehensive enforcement regime. The Convention specifically addresses pollution from a variety of sources, including land-based pollution, ocean dumping, vessel and atmospheric pollution, and pollution from offshore activities. The principles, rights and obligations outlined in this framework are the foundation on which more specific international environmental agreements are based.

The United States is party to many international agreements—including conventions pertaining to vessel safety, environmental protection and fisheries management—which are based directly on the LOS framework. Those United States rep-

representatives who participate in the negotiation of these agreements are among the strongest advocates for accession to the LOS Convention.

For example, the Coast Guard, which has played a lead role in developing international agreements on maritime safety, security and environmental protection at the International Maritime Organization (IMO), and also participates in fisheries negotiations, told our Commission that: “[A] failure to accede to the Convention materially detracts from United States credibility when we seek to advance our various ocean interests based upon Convention principles. Also, as a non-party, we risk losing our ability to influence international oceans policy by leaving important questions of implementation and interpretation to others who may not share our views.” In testimony before our Commission, then-Commandant Admiral James Loy, and more recently the current Commandant, Admiral Thomas Collins, both strongly supported United States accession to the LOS Convention.

From a security perspective, the LOS Convention provides a balance of interests that protect freedom of navigation and overflight in support of United States’ national security objectives. The provisions were carefully crafted during negotiation of the LOS Convention, and reflect the substantial input that the United States had in their development. In particular, the Convention provides core navigational rights through foreign territorial seas, international straits and archipelagic waters, and preserves critical high seas freedoms of navigation and overflight seaward of the territorial sea, including in the EEZ. The navigational freedoms guaranteed by the Convention allow timely movement by sea of U.S. forces throughout the world, and provide recognized navigational routes which can be used to expeditiously transport U.S. military cargo—95 percent of which moves by ship.

The Convention’s law enforcement provisions establish a regime that has proven to be effective in furthering international efforts to combat the flow of illegal drugs and aliens by vessel—efforts which directly impact our nation’s security. The Convention establishes the rights and obligations of flag states, port states, and coastal states with respect to oversight of vessel activities, and provides an enforcement framework to expeditiously address emerging maritime security threats.

However, there have been several instances of unilateral assertions of jurisdiction which seem to disregard the Convention’s clear meaning and intent relative to freedom of navigation and overflight. The United States has unilaterally challenged some of the more excessive coastal state claims, relying on the navigational freedoms reflected in the Convention. There are also emerging issues that address the balance of interests between navigational freedoms and coastal state authority. The United States has important interests both as a coastal state and as a major maritime power. We will be in a much stronger and more credible position to challenge excessive claims, and to shape the future of issues and outcomes that impact our interests, if we are a party to the Convention.

There are many other examples of benefits that would be derived from U.S. accession to the LOS Convention. For example, the U.S. research fleet frequently suffers costly delays in ship scheduling when other nations fail to respond in a timely manner to our research requests. Currently, we are not in a position to rely on articles in the Convention that address this issue, such as the “Implied Consent” article (Article 252) that allows research to proceed within 6 months if no reply to the request has been received, and other provisions that outline acceptable reasons for refusal of a research request. Also, as a party to the Convention, the U.S. could participate in the member selection process, including nominating our own representatives, for the International Law of the Sea Tribunal, as well as the Continental Shelf Commission and the various organs of the International Seabed Authority that I have previously mentioned.

U.S. accession to the LOS Convention has received bipartisan support from past and current Administrations. On November 27, 2001, Ambassador Sichan Siv, U.S. Representative on the United Nations Economic and Social Council, in his statement in the General Assembly on Oceans and Law of the Sea, said: “Because the rules of the Convention meet U.S. national security, economic, and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the [LOS] Convention.” More recently the G-8 Summit held in June, 2003, produced a G-8 Action Plan for Marine Environment and Tanker Safety which stated: “Specifically, we commit to: [1.1] The ratification or acceding to and implementation of the United Nations Convention on the Law of the Sea, which provides the overall legal framework for oceans.”

Mr. Chairman, the input received by the U.S. Commission on Ocean Policy reflects a broad consensus among many diverse groups in favor of ratification of the LOS Convention. Over 140 nations are party to the Convention. As I have described, there are many important decisions being made right now within the framework of the Convention which will impact the future of the public order of the oceans and

directly impact U.S. interests. Until we are a party to the Convention, we cannot participate directly in the many bodies established under the Convention that are making decisions critical to our interests.

While we remain outside the Convention, we lack the credibility and position we need to influence the evolution of ocean law and policy. That law and policy is evolving as the provisions of the Convention are interpreted and implemented. It is interesting to note, in this regard, that the Convention will be open for amendment for the first time beginning in 2004. The Ocean Commission was directed by our enabling legislation to make recommendations to preserve the role of the United States as a leader in ocean activities. We cannot be a leader while remaining outside of the process that provides the framework for the future of ocean activities. For this reason, I renew our Commission's unanimous call for United States accession to the United Nations Law of the Sea Convention.

Thank you, Mr. Chairman. I stand ready to answer any questions that the Committee may have.

[Attachments to statement.]

#### COMMISSION ON OCEAN POLICY

*November 28, 2001*

The President  
The White House  
Washington, D.C. 20500

Dear Mr. President:

On behalf of all 16 Members of the Commission on Ocean Policy, I respectfully transmit a copy of the Commission's recently adopted Resolution urging the accession of the United States to the United Nations Law of the Sea Convention. Also enclosed is a copy of a cover letter sent to the Chairman and Ranking Minority Member of the Senate Committee on Foreign Relations providing the background and reasons for the Commission's action.

As the letter makes clear, the Commission heard powerful testimony in support of the Convention from a broad range of witnesses at two days of hearings earlier this month. Additionally, a number of Members have studied various provisions of this complex Convention prior to being appointed to the Commission and have been convinced for some time that there are compelling national security, jurisdictional, environmental, and economic interests reasons for the U.S. to accede to this international agreement. The enclosed letter also makes clear that time is of the essence in such accession because of certain important institutions established by the Convention in which U.S. participation is critically important.

Mr. President, I urge your expeditious, special attention and support for the Convention on the Law of the Sea and I have taken the liberty of providing the Resolution and the letter to the Senate to the Secretaries of Defense and State, with an identical request.

Respectfully,

JAMES D. WATKINS, *Chairman*  
*Admiral, U.S. Navy (Retired)*

[Enclosures.]

#### RESOLUTION OF THE COMMISSION ON OCEAN POLICY

The National Commission on Ocean Policy unanimously recommends that the United States of America immediately accede to the United Nations Law of the Sea Convention. Time is of the essence if the United States is to maintain its leadership role in ocean and coastal activities. Critical national interests are at stake and the United States can only be a full participant in upcoming Convention activities if the country proceeds with accession expeditiously.

Adopted by Voice Vote  
November 14, 2001  
Washington, D.C.

## COMMISSION ON OCEAN POLICY

November 26, 2001

Hon. JOSEPH R. BIDEN, JR., *Chairman*  
 Hon. JESSE HELMS, *Ranking Member*  
*Committee on Foreign Relations*  
*United States Senate*  
 Washington, D.C. 20510-6225

DEAR MR. CHAIRMAN AND RANKING MEMBER:

This is to bring to your attention a policy resolution recently adopted by the Commission on Ocean Policy urging ratification of the United Nations Law of the Sea (LOS) Convention. The Commission is a 16-member congressionally established body that is directed to submit to Congress and the President a report recommending a coordinated and comprehensive national ocean policy to promote a number of noteworthy objectives.

One of those objectives is "the preservation of the role of the United States as a leader in ocean and coastal activities, and, when it is in the national interest, the cooperation by the United States with other nations and international organizations in ocean and coastal activities" (Section 2(8), P.L. 106-256). In this regard, the Commission strongly believes that immediate accession to the LOS Convention is in the national interest of the U.S. and one of the most important steps that we can take to demonstrate such leadership and cooperation.

At the second meeting of the Commission in Washington, D.C. on November 13-14, 2001, the Commissioners heard testimony on a broad range of ocean and coastal issues from Members of Congress, Federal agencies, trade associations, conservation organizations, the scientific community, and coastal states. Some of the most powerful presentations were made in support of ratification of the LOS Convention, particularly from the American Bar Association and the offshore oil and gas industry. The Department of State representative addressed the effects of our current non-party status and the benefits of the Convention to the U.S.

A stable international legal framework for the determination of the rights and responsibilities of nations with respect to adjacent oceans and their resources is a necessary prerequisite for the Commission to be able to assess the place of the U.S. in the community of coastal states. The LOS Convention provides that framework for a whole host of jurisdictional issues including the 12 mile territorial sea, the 200 mile Exclusive Economic Zone, and the continental shelf through its full prolongation including those areas where it extends beyond 200 miles.

Although there are many more matters addressed by the Convention that are in the economic and environmental interest of the United States, there are some issues of immediate concern that call for the expeditious consideration of the Convention by your Committee. Specifically, the Continental Shelf Commission established by the Convention has the responsibility to review submissions from coastal states that have continental shelves extending beyond 200 miles to establish the outer limits of their shelves. The U.S. has one of the broadest continental margins in the world and our oil and gas industry operates not only on our shelf but on the continental shelves of other nations. Thus, a place on the Commission is critical to the protection of our jurisdictional, resource management, and economic interests. Elections to the 21 member Continental Shelf body are scheduled in April of next year. To be in a position to nominate someone to the Continental Shelf Commission, we must be a party to the Convention by February, 2002. This situation also applies to the primary dispute settlement institution of the Commission, the Law of the Sea Tribunal. Seven of the Tribunal's judges will be elected in April and the U.S. must be a party to the Convention if we want to nominate a candidate.

For these and many other reasons stated by officials from all walks of American life, the Commission on Ocean Policy unanimously passed the enclosed resolution in support of ratification of the Law of the Sea Convention. I would note that the 16 members of the Commission were appointed by the President, 12 from a list of nominees submitted by the leadership of Congress, and represent a broad spectrum of ocean interests.

As the president of the American Bar Association stated in his testimony before the Commission, the LOS Convention is the "foundation of public order for the oceans." The interests of the United States in the world community of coastal states and the work of our Commission in recommending a comprehensive ocean policy is dependent on the stability of that foundation. We urge that, notwithstanding the short legislative calendar that remains this year, the Committee on Foreign Relations consider and report out favorably the Convention on the Law of the Sea prior to adjournment.

A copy of this letter is being forwarded to the President of the United States and the Secretaries of State and Defense, urging their special attention and support.

Sincerely,

JAMES D. WATKINS, *Chairman,*  
*Admiral, U.S. Navy (Retired).*

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THE SECRETARY OF STATE

WASHINGTON

DECEMBER 12, 2001

Admiral JAMES D. WATKINS, USN (Ret.),  
*Chairman, Commission on Ocean Policy,*  
*1120 20th Street NW, Suite 200 North,*  
*Washington, DC 20036.*

DEAR ADMIRAL WATKINS:

Thank you for sending me a copy of the unanimous resolution urging accession of the United States to the United Nations Convention on the Law of the Sea, adopted by the Commission on Ocean Policy at its second meeting November 13-14, 2001.

The Commission's distinguished members were charged with developing a national ocean policy to promote objectives that include preserving the United States' role as a leader in ocean and coastal activities. The resolution conveys a real sense of urgency, both through its words and through its timing, as the Commission's first policy pronouncement.

Deputy Assistant Secretary Mary Beth West testified before your Commission on November 14, explaining the detrimental effects of our non-party status. You may be aware that Ambassador Sichan Siv, two weeks later, announced at the UN General Assembly that the Bush Administration supports U.S. accession to the Convention.

I am aware of the elections scheduled for April 2002 for members of the Commission on the Limits of the Continental Shelf and for judges of the International Tribunal for the Law of the Sea, and the benefits the United States could expect from representation on those bodies. Please be assured that we share your views on the importance of this Convention and are working actively on it.

I extend best wishes as you undertake leadership of this important Commission, whose report in the spring of 2003 will help to shape national ocean and coastal policy for the 21st century.

Sincerely,

COLIN L. POWELL

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CHIEF OF NAVAL OPERATIONS

5 December 2001

Admiral JAMES D. WATKINS, USN (Ret.)  
*Commission on Ocean Policy*  
*c/o Ocean.US*  
*2300 Clarendon Boulevard, Suite 1350*  
*Arlington, VA 22201-3367*

DEAR ADMIRAL WATKINS,

Thank you for your letter of November 29, 2001, advising that the Commission on Ocean Policy unanimously adopted a resolution supporting United States accession to the United Nations Law of the Sea Convention.

Like you, I strongly believe that acceding to this convention will benefit the United States by advancing our national security interests and ensuring our continued leadership in the development and interpretation of the law of the sea.

I appreciate your continued strong support of this convention and the Navy.

Sincerely,

VERN CLARK,  
*Admiral, U.S. Navy.*

The CHAIRMAN. Thank you very much, Admiral Watkins.

Admiral Prueher.

**STATEMENT OF ADMIRAL JOSEPH PRUEHER, U.S. NAVY (RET.),  
FORMER U.S. COMMANDER-IN-CHIEF PACIFIC AND FORMER  
U.S. AMBASSADOR TO CHINA, VIRGINIA BEACH, VA**

Admiral PRUEHER. Good morning, Mr. Chairman. It is a pleasure to be here with you this morning. Before I start I would like to thank you for your sustained and level-headed efforts for our national well-being.

As U.S. CINCPAC in 1998, I had written a letter to the chairman of the Senate Foreign Relations Committee reflecting then the DOD view, asking the committee to bring the U.N. Convention on the Law of the Sea forward for ratification or, at a minimum, to bring it forward for discussion. I hold the same view now as a private citizen, only more so. My comments today will reflect what I believe is a balanced view in support of U.S. security, economic, and also diplomatic interests. I trust I can be succinct and I will try not to overlap too much.

My perspective, as I have said, is of a private citizen. But as a former U.S. CINCPAC, when that term was in vogue, there were responsibilities for security interests in the Asia Pacific region. Incorporated in those were the sea lanes, the archipelagoes of Indonesia and the Philippines, the associated sea lines, the South China Sea, the East China Sea, the Sea of Okhotsk up near Japan, as well as those mentioned earlier by Senator Stevens and by Admiral Watkins. We spent much time in discussions on how to work these sealane issues.

A second perspective was as U.S. Ambassador to China in a period encompassing some times of strained relationships between us and China where negotiating required a solid and well-founded U.S. position. Something like the U.N. Convention on Law of the Sea would offer much in this area. From our Nation's perspective, it is self-evident. We are the world's greatest sea power, we are the world's greatest military and economic power, and we rely on the world's oceans and our own policies in order to maintain that position.

In addition to the military and the economic ventures, there are also the environmental and conservation issues which are so important, and increasingly so. So our policies must be wise, far-sighted, effective, and as intellectually sound as we can make them.

Turning to the legal issues, on which I lack expertise, there seem to be three foremost issues to which the answer must be yes for us to ratify this convention. One is, "Will accession to the convention better protect U.S. interests than continued reliance on our customary international laws?" The second question is, "Does the military activities exception adequately protect U.S. interests?" And third, "Do the legal implications of the convention strengthen or at least maintain our ability to conduct our proliferation strategy initiative and maritime interdiction operations?"

As I said, the answer to these questions should be yes. My looking at this subject tells me the answer is so, but the legal ramifications are outside any area of expertise that I might have.

So what would be the benefits of U.S. accession? Admiral Watkins has covered these quite well, I think, but I would say that



there are five. One is to codify and reinforce our navigational freedoms. Second is to provide the U.S. Government a strong legal foundation to deter and in fact defeat encroachment efforts by nations that oppose our views. Third is to enhance maritime interception ops and the PSI efforts. And fourth is to allow the U.S. Government participation in key institutions that will shape future activities. Some of these activities and institutions are amendments to the U.N. convention, dispute settlement tribunals, limits on the continental shelf, and participation in the Commission on the International Seabed Authority. The urgency, of course, is that amendments come open for review in 2004 and our Nation needs to be a player at that time.

The fifth item that is a benefit is it strengthens the authoritative force of the U.N. Convention on the Law of the Sea by virtue of having our Nation be a participant in it.

There are perhaps some risks to non-accession and they are also fairly well known, but I would like to list four of them. First is that walking away from the convention from our Nation's point of view, sends, in my opinion, a needless contentious signal to our partners in the nations with whom we deal. If we walk away from it, we also lose a forum for dispute resolution.

Third, reliance on the uncoded customary international law would be more difficult than reliance on the U.N. Convention on the Law of the Sea for resolution of disputes; and possibly a walking away from the convention would increase our difficulty in global mobility, both economically and militarily.

To summarize, my view is that the benefits are strong in the military, the economic, as well as in the political and in the environmental sectors. Second, remaining outside of the convention limits the U.S. ability to shape and prevent changes that are inimical to our national interest and may encourage excessive reliance on force for dispute resolution. Third, the known risks of not acceding outweigh the possible risks of accession.

Thank you very much for your courtesy.

The CHAIRMAN. Thank you very much, Admiral Prueher.  
Professor Moore.

**STATEMENT OF PROFESSOR JOHN NORTON MOORE, DIRECTOR, CENTER FOR OCEANS LAW AND POLICY, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA**

Mr. MOORE. Chairman Lugar, it is a privilege and a pleasure to testify before the Senate Foreign Relations Committee on the Law of the Sea Treaty. My congratulations to you on your leadership in holding these important hearings. I would also like to extend my congratulations to Senator Stevens for a wonderfully important, clear statement and indeed for his important advice to the Law of the Sea negotiators throughout the years of those negotiations.

I had a very special pleasure as one of our LOS negotiators in working with one of this committee's former chairmen, Senator Pell, and I very much join your congratulations to him and note of his great interest in this matter as well.

As you know so well, specific foreign policy problems tend to last and last even beyond the Energizer Bunny. Achieving closure with a recognized victory is rare. The Law of the Sea Treaty is one such

victory for the United States. The Senate should give advice and consent at the earliest possible time.

United States leadership in the 1970s to protect U.S. oceans interests and to establish a rule of law in the oceans was enormously successful. We achieved full protection for our vital security needs, particularly our naval and commercial mobility. We solidified for the United States the largest area of oil and gas and fisheries jurisdiction in the world. And, Mr. Chairman, after President Reagan held firm on the problems that were in the initial draft on deep seabed mining, the United States successfully concluded a renegotiation in 1994 that met every single one of the conditions set by President Reagan and by the Congress of the United States in the 1980 Hard Minerals Act.

Let me say that Senator Stevens again is absolutely correct in his opening statement about how this renegotiation of part 11 met all of the United States' interests and it did indeed do away with the problems, such as the mandatory technology transfer that was a great mistake being pushed at that time by the Group of 77. So I am delighted to say, Mr. Chairman, there were initial problems that were overcome and part 11 ended up consistent with United States national interests and requirements.

Given the scope of the clear United States victory in these negotiations, it is a source of puzzlement to some of us, Mr. Chairman, as to why it has so far been 9 years for the United States to move forward to ratification. Now, on this point, we should make no mistake. Every day that goes by of United States non-adherence inflicts costs on the security and economic interests of this great Nation.

I believe that United States adherence will serve three groupings of goals and I will summarize those and then very briefly go through one or two points on each. The three are: restoring United States oceans leadership, protecting United States oceans interests, and enhancing United States foreign policy.

The United States at the time of the negotiations, Mr. Chairman, was the recognized leader in the world in oceans matters. No other nation in the world has our range of oceans interests. No other nation in the world provided the leadership that we did on oceans matters. However, once the treaty had moved forward and for 9 years we have not adhered, we have, I am sorry to say, lost that leadership role. We can easily regain it simply by moving forward with this treaty. I have no doubt that we will almost instantly become the leader in world oceans matters once again if we move forward with Senate advice and consent.

In addition to that, as the previous witnesses have indicated very effectively, there are a number of important fora out there that the United States by not adhering to the treaty is simply excluding itself from. We are minimizing our voice in all of these different areas. With respect to the International Seabed Authority we will take our seat on the council and on the finance committee as soon as we adhere to the treaty. Without being there, we do not have the ability to cast a veto, for example, if funding were to go to a terrorist "liberation" group that we did not support. We would not have a veto over the now developing mining code for cobalt crusts

and polymetallic sulfides; that is an area that, again, we simply shoot ourselves in the foot by not participating in the authority.

With respect to the International Tribunal for the Law of the Sea, we have no judge at present, so we have no voice. We have no voice in the meeting of States parties that unfortunately is beginning to push to make changes in the treaty, some of which are harmful. The United States can be a powerful voice to prevent bad changes in the treaty if we are permitted to participate actively as a member in the annual meeting of States parties.

Then, of course, there is the Commission on the Limits of the Continental Shelf, which ultimately will decide the crucial matter of the important limits of the United States' continental shelf and which, as Senator Stevens has indicated, is right now considering a critically important Russian claim in the Arctic. The United States by not participating has simply excluded itself from being able to have a voice on issues that are affecting us in a very vital and direct way.

The second general area supporting U.S. adherence is protecting United States oceans interests more specifically. Here let me just suggest that the single greatest risk to United States oceans interests in the future as in the past, is the potential loss of our naval mobility, and our security interest in commercial mobility for the critical trade that comes into and out of the U.S. by ship.

We have one great advantage in this treaty. We won those issues big time and we won them unequivocally. It is a setting where we have every advantage in simply telling other nations that seek to violate the treaty that they must adhere to the most widely adhered convention in the world. But when the United States is not a party to the convention, it quite simply forfeits that enormous advantage which we achieved by winning decisively in the negotiation.

Let me just give you one specific example, Mr. Chairman, from a very fine book by Mr. Roach and Mr. Smith on excessive maritime claims. This comes from a statement by Iran when it was signing the convention back in 1982. It made a declaration, basically disputing our rights to go through the Strait of Hormuz, which is critical for our oil supplies. Here is what it said:

"It seems natural that only States parties to the Law of the Sea Convention shall be entitled to benefits from the contractual rights created therein. The above considerations pertain specifically but not exclusively to the right of transit passage through straits used for international navigation."

You can see very clearly they are using our non-party status to try to challenge our legal ability to go through Hormuz. We now have an opportunity for a very effective response to this extreme position. We simply adhere to the treaty and now their own declaration gets to be used against them to make it clear that they have indicated if you are a party presumably you have every right to the crucial navigational provisions.

Another important issue relates to the fisheries issues that Senator Stevens I think very properly indicated as of great importance here. Under the existing treaty law obligations of the United States, the 1958 conventions, which are terribly outdated, the United States has no rights to control fish stocks beyond the 12

nautical mile territorial sea. The new convention is absolutely clear on coastal State control of its fish stocks within the 200 nautical mile economic zone off its coast and in relation to the continental margin. In those areas we completely control setting the optimal yield. We completely control setting the allowable catch. We completely control setting all of the kinds of requirements for foreign access and for conservation measures.

So I think the Senator is absolutely right, coastal State control of protecting those stocks is critical and the new treaty does that very powerfully.

Further, on the second point, Mr. Chairman, let me point out the great importance economically for the United States in moving forward to develop the continental margin in areas beyond the economic zone. I believe you have a chart up there that has some yellow areas. The yellow areas on it are the areas going beyond the 200 nautical mile zone, and the United States oil and gas industry right now has the ability to begin to move forward with the technology, in those areas, but by not adhering to the treaty that is being held up significantly. Of course, these are the areas in the end also that will be subject at least to consideration in the Continental Shelf Commission and we definitely want a voice in that consideration.

Now, Mr. Chairman, turning to the last set of goals, enhancing U.S. foreign policy, just two very brief comments. As you know so well and have provided such fine leadership toward in this committee, the United States has an enormous interest in promoting the rule of law in the world's oceans. The rule of law creates stable expectations, it reduces the risk of conflict; it is one of our major long-term goals.

The LOS convention is one of the most important rule of law conventions for the 20th century. It is very important for the United States to move forward and to again affirm its leadership, not just in oceans, but in the rule of law more broadly.

Finally, a point that is too infrequently noticed; that is the United States achieved a great success in a renegotiation of this treaty. It was tough. We established our requirements, we held to them, and the international community and our allies eventually agreed and we were able to achieve every one of those conditions.

If the United States in seeking to engage and renegotiate other bad treaties seeks to give a series of conditions that have to be met, unfortunately now we are hearing the refrain: Why should we negotiate with you when we met all of your conditions in the Law of the Sea and you have still not moved forward? I believe, Mr. Chairman, that removing this argument against us in foreign policy negotiations generally is of considerable importance to success of the United States issues going quite beyond the oceans area.

One last point—and that is that I do not know many treaties or proposed legislation that come before the Senate that do not involve some kind of substantial tradeoff. This is not one of them. One of the extraordinary things about this convention is there is not a single United States oceans interest that would be better off by not adhering to the treaty than if we move forward and promptly adhere to this treaty.

I have not said anything, Mr. Chairman, about the proliferation initiative or the exclusion for military activities. But if you would like to pursue any of these subjects, I would be delighted to answer questions on them or anything else. It has been a very special privilege to be here.

[The prepared statement of Professor Moore follows:]

PREPARED STATEMENT OF PROF. JOHN NORTON MOORE, DIRECTOR, CENTER FOR OCEANS LAW AND POLICY, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

*"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<sup>1</sup>, the United States Outer Continental Shelf Policy Committee<sup>2</sup>, the American Petroleum Institute<sup>3</sup>, the Chamber of Shipping of America<sup>4</sup>, The Center for

<sup>1</sup> On June 6, 2001, the National Ocean Industries Association submitted a resolution to the Chairman of the Senate Foreign Relations Committee declaring: "The National Ocean Industries Association (NOIA) is writing to urge your prompt consideration of the Convention on the Law of the Sea. . . . The NOIA membership includes companies engaged in all aspects of the Outer Continental Shelf oil and natural gas exploration and production industry. This membership believes it is imperative for the Senate to act on the treaty if the U.S. is to maintain its leadership role in shaping and directing international maritime policy."

<sup>2</sup> On May 24, 2001, the Outer Continental Shelf (OCS) Policy Committee adopted the following recommendation: "[T]he OCS Policy Committee recommends that the Administration communicate its support for ratification of UNCLOS to the United States Senate. . . ."

<sup>3</sup> See the statement of Ms. Genevieve Laffly Murphy on behalf of the American Petroleum Institute at the recent oceans forum of the Center for Oceans Law and Policy, 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 Senate on the United Nations Convention on the Law of the Sea (UNCLOS). API favors ratification of the revised treaty because it promotes unimpeded maritime rights of passage; provides a predictable framework for minerals developed; and, sets forth criteria and procedures for determining the outer limit of the continental shelf. The latter will be accomplished by the soon-to-be established Commission on the Limits of the Continental Shelf."

<sup>4</sup> In a letter to the Chairman of the Senate Foreign Relations Committee of May 26, 1998, the president of the Chamber of Shipping of America writes: "[t]he Chamber of Shipping represents 14 U.S. based companies which own, operate or charter oceangoing tankers, container ships, and other merchant vessels engaged in both the domestic and international trades. The Chamber also represents other entities which maintain a commercial interest in the operation of such oceangoing vessels. Over the past quarter century, the Chamber has supported the strong leadership role of the United States in the formalization 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."

Seafarers' Rights<sup>5</sup>, the Chemical Manufacturers Association<sup>6</sup>, and the congressionally established National Commission on Ocean Policy.<sup>7</sup> 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 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.<sup>8</sup> And the result

<sup>5</sup> On May 26, 1998, the Director of the Center for Seafarers' Rights wrote the following in a letter addressed to the Chairman of the Senate Foreign Relations Committee: "The 1982 United Nations Convention on the Law of the Sea creates a legal framework that addresses a variety of interests, the most important of which is protecting the safety and well-being of the people who work and travel on the seas. I urge you to support ratification of the 1982 United Nations Convention on the Law of the Sea."

<sup>6</sup> In a July 17, 1998 letter to the Chairman of the Senate Foreign Relations Committee, the President of the Chemical Manufacturers Association wrote the following: "The Law of the Sea Convention promotes the economic security of the United States by assuring maritime rights of passage. More importantly, the Convention establishes a widely-accepted, predictable framework for the protection of commercial interests. The United States must be a full party to the Convention in order to realize the significant benefits of the agreement; and to influence the future implementation of UNCLOS at the international level. On behalf of the U.S. chemical industry, I strongly encourage you to schedule a hearing on UNCLOS, and favorably report the Convention for action by the Senate."

<sup>7</sup> 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."

<sup>8</sup> The reason supporting this is most easily understood as the high cost of organization of those affected by illegal oceans claims; claims which were externalizing costs on the international community. A multilateral strategy of response to such illegal claims, far from being simply a fuzzy effort at cooperation, effectively enabled coordination of nations to promote the common interest

was outstanding in protecting our vital navigational and security interests. Moreover, along the way we solidified for the United States the world's largest offshore resource area for oil and gas and fishery resources over a huge 200 nautical mile economic zone, and a massive continental shelf going well beyond 200 miles.<sup>9</sup>

Despite an outstanding victory for the United States on our core security and resource interests a lingering dispute remained with respect to the regime to govern resource development of the deep seabed beyond areas of national jurisdiction. Thus, when the Convention was formally adopted in 1982, this disagreement about Part XI of the Convention prevented United States adherence. Indeed, during the final sessions of the Conference President Reagan put forth a series of conditions for United States adherence, all of which required changes in Part XI. Following adoption of the Convention without meeting these conditions, Secretary Rumsfeld served as an emissary for President Reagan to persuade our allies not to accept the Convention without the Reagan conditions being met. The success of the Rumsfeld mission set the stage some years later for a successful renegotiation of Part XI of the Convention. In 1994, Part XI, dealing with the deep seabed regime beyond national jurisdiction, was successfully renegotiated meeting all of the Reagan conditions and then some. Subsequently, on October 7, 1994, President Clinton transmitted the Convention to the Senate for advice and consent.<sup>10</sup> Since that time no Administration, Democratic or Republican, has opposed Senate advice and consent—and United States ratification.

At present the Convention is in force; and with 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

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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.

<sup>9</sup>The Convention powerfully supports United States control of its fisheries resources. Indeed, with respect to fisheries, the United States is already a party to the “Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,” a treaty that implements certain fisheries provisions of the Law of the Sea Convention. Senator Ted Stevens provided crucial leadership in Senate advice and consent to this implementing Convention.

<sup>10</sup>For the letter of transmittal to the Senate and official United States Government article-by-article commentary on the Convention, see “Sen. Treaty Doc. 103-39,” *reprinted* in U.S. Department of State Dispatch Supplement, *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary* (Feb. 1995, Vol. 6, Supp. No. 1). For the most authoritative article-by-article interpretation of the Convention, see the multi-volume *Commentary on the United Nations Convention on the Law of the Sea 1982*, prepared under the auspices of the Center for Oceans Law and Policy of the University of Virginia School of Law. “Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: a commentary*” (1985-2003 Martinus Nijhoff Publishers).

the 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.<sup>11</sup> This struggle has been the key historic struggle for the United States over the last half century and gives every indication of continuing. Adhering to the Convention provides numerous ways for the United States to engage more effectively in protecting these interests. An immediate and important effect is that we are able on 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.<sup>12</sup> Moreover, as a party we will be far more effective in multiple fora in protecting the many excellent provisions in the Convention supporting navigational freedom. Indeed, much of the struggle in the future to protect our vital oceans interests will be in ensuring adherence to the excellent provisions in the Convention. Having won in the struggle to protect these interests within UNCLOS we now have a substantial advantage in the continuing struggle—we need only insist that others abide by the nearly universally accepted Convention. Obviously, that is an advantage largely thrown away when we ourselves are not a party. And for our commercial shipping we will be able to utilize the important Article 292 to obtain immediate International Tribunal engagement for the release of illegally seized United States vessels and crew. It should be emphasized that the threat from these illegal claims is that of death from a thousand pin pricks rather than any single incident in response to which the United States is likely to be willing to employ the military instrument. Moreover, some of the offenders may even be allies of the United States, our NATO partners, or even over zealous officials in our own country who are unaware of the broader security interests of the Nation;

- *More effective engagement with respect to security incidents and concerns resulting from illegal oceans claims by others.* Examples include the new law of the People’s Republic of China (PRC) providing that Chinese civil and military authorities must approve all survey activities within the 200 mile economic zone, the PRC harassment of the Navy’s ocean survey ship the USNS *Bowditch* by Chinese military patrol aircraft and ships when the *Bowditch* was 60 miles off the coast, the earlier EP-3 surveillance aircraft harassment, Peruvian challenges to U.S. transport aircraft in the exclusive economic zone, including one aircraft shot down and a second incident in which two U.S. C-130s had to alter their flight plan around a claimed 650 mile Peruvian “flight information area,” the North Korean 50 mile “security zone” claim, the Iranian excessive base line claims in the Persian/Arabian Gulf, the Libyan “line of death,” and the Brazilian claim to control warship navigation in the economic zone;
- *More rapid development of the oil and gas resources of the United States continental shelf beyond 200 nautical miles.* The United States oil and gas industry is poised in its technology to begin development of the huge continental shelf of the United States beyond 200 miles (approximately 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;<sup>13</sup>

<sup>11</sup>The best general discussion of these illegal oceans claims and their effect on United States interests is “J. Ashley Roach & Robert W. Smith, Excessive Maritime Claims,” 66 U.S. Naval War College International Law Studies (1994), and “J. Ashley Roach & Robert W. Smith, United States Responses to Excessive Maritime Claims” (2d ed. 1996).

<sup>12</sup>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.

<sup>13</sup>For a state-of-the-art assessment of the extent of the United States continental shelf beyond the 200 mile economic zone see the work of Dr. Larry Mayer, the Director of the Center for Coastal and Ocean Mapping at the University of New Hampshire. As but one example indicating the great importance of performing this delimitation of the shelf well—and the importance of the United States participating in the resulting approval process in the Commission

- *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 re-acquiring 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, 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

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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 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.

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.<sup>14</sup>

#### 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.

<sup>14</sup>The 1994 submission of the LOS Convention to the Senate recommended that the United States accept “special arbitration for all the categories of disputes to which it may be applied and Annex VII arbitration [general arbitration] for disputes not covered by . . . [this], and that we elect to exclude all three categories of disputes excludable under Article 298.” See U.S. Department of State Dispatch IX (No. 1 Feb. 1995).

The CHAIRMAN. Well, thank you again, Professor Moore, for being here and for your leadership throughout the years on this issue.

Admiral Schachte.

#### **STATEMENT OF REAR ADMIRAL WILLIAM L. SCHACHTE, JR., JAGC, U.S. NAVY (RET.), CHARLESTON, SC**

Admiral SCHACHTE. Thank you very much, Chairman Lugar. I would like to start by echoing what Professor Moore has said, sir, about your leadership in this and other international issues and, I might add from my own observations, your tremendous insight and vision on foreign matters.

The CHAIRMAN. Thank you.

Admiral SCHACHTE. It is an honor to appear before you today and to be on this illustrious panel. I feel strongly that accession to the Law of the Sea Convention is very important from a national security perspective. I addressed this issue in an article that was

published in the Georgetown International Environmental Law Review and I will attach a copy of that article with my full statement.

Accession to the convention will help America reassert and re-assume our rightful place of leadership in these matters relating to the global commons. I was an active participant in Law of the Sea matters for many years. I was particularly active in 1982 and 1983 when we in the Pentagon were confronted with the decision against the seabed mining provisions of the convention. Under those circumstances, we concluded that our best option was to call the non-seabeds provisions of the convention customary international law, although we knew that the straits regime, the archipelagic regime, continental shelf delimitation provisions, the exclusive economic zone, and other provisions were all negotiated articles, articles that benefit and enhance global maritime mobility for all nations, and these articles also provided us with predictability and stability in an otherwise changing environment.

Thus, in President Reagan's 1983 oceans policy statement we in essence said that we were not going to sign or ratify the convention, but that we would abide by and accept the non-seabeds provisions of the convention. We were very careful in saying this as we were somewhat creating an offer to the rest of the world. If other nations would conform their actions to the non-seabed provisions, we would honor those actions and we would likewise conform our actions to those convention articles.

We had fashioned our freedom of navigation program on the convention. As you know, this important program directs our naval and air assets to operate in a manner consistent with the convention while the State Department also diplomatically protested claims that were inconsistent with the convention. I might add that maintaining this program is essential as the convention alone is not enough, even with the United States as a party. The navigational provisions of the convention must continue to be exercised by our operational forces, particularly in the maritime environment of the global commons, an environment that has historically been one of claim and counterclaim.

Accession to the convention would also enhance America's credibility. As has been pointed out here this morning, the world recognized eventually that we were right about seabed mining and they fixed it. I must submit, this was undertaken with the obvious anticipation that the United States would then join our allies and many others who are parties to the convention.

I would now like to briefly address three areas: customary international law and challenges to military activities at sea, mandatory dispute resolution, and the effect of the convention on maritime intercept operations. Customary international law and challenges. Not everyone agreed with our customary international law interpretation 20 years ago, but from 1982 to 1994 we continued to exercise our navigational rights and freedoms consistent with our interpretation of what those rights and freedoms entailed, in an effort to solidify those concepts as customary norms.

However, our ability to influence the development of customary law changed dramatically in 1994 when the convention entered into force. As a nonparty, we no longer had a voice at the table when important decisions were being made on how to interpret and

apply the provisions of the convention. As a result, over the past 10 or so years we have witnessed a resurgence of creeping jurisdiction around the world. Coastal states are increasingly asserting greater control over waters off their coasts and a growing number of States have started to challenge U.S. military activities at sea, particularly in their 200 nautical mile exclusive economic zones.

For example, Malaysia has closed the Strait of Malacca, an international strait, to ships carrying nuclear cargo. Chile and Argentina have similarly ordered ships carrying nuclear cargo to stay clear of their EEZ's. These actions are inconsistent with the convention and customary law. But the question comes, will other nations follow suit and thereby establish a new customary norm that prohibits the transport of nuclear cargo? Will the next step on this slippery slope be one that would exclude nuclear-powered ships from so transiting?

China, India, North Korea have directly challenged U.S. military operations in their EEZ as being inconsistent with the Law of the Sea Convention and customary law. Again, these actions of those countries are inconsistent with the convention and customary law, but will other nations follow suit and establish new customary norms that prohibit military activities in the exclusive economic zone of those States without coastal State consent?

If we are going to successfully curtail this disturbing trend of creeping jurisdiction, we must reassert our leadership role in the development of maritime law and, I submit, join the convention now. The customary norms of the future will be developed, as has been pointed out here this morning, by the parties to the convention and the international forums it creates, such as the International Tribunal on the Law of the Sea, the Commission on the Limits of the Continental Shelf, and the International Seabed Authority.

Unless we participate fully in these forums as a State party, our ability to shape the development of new customary norms in ways that are favorable to our national security and economic interests will be lost.

Mandatory dispute resolution. The first point I would make is that no country would subordinate its national security activities to an international tribunal. No country would subordinate its international security activities to an international tribunal. This is a point that everyone understood, and that is why article 286 of the convention makes clear that the application of Compulsory Dispute Resolution procedures of section 2 of part 15 are subject to the provisions of section 3 of that same part, which includes a provision that allows for military exemptions.

Some may try to argue that article 288 provides that in the event of a dispute as to whether the court or tribunal has jurisdiction that matter shall be settled by a decision of that court or tribunal. However, article 288 is found in section 2 of part 15 and therefore does not apply to disputes involving what the U.S. Government has declared in good faith to be a military activity under section 3 of part 15.

I submit this interpretation is supported by the negotiating history of the convention, which reflects that certain disputes about

military activities are considered in essence to be so sensitive that they are best resolved by diplomatic means.

It is very important that, while depositing an Instrument of Accession, the United States should reemphasize this point by making a declaration or an understanding that clearly states that military activities are exempt from the Compulsory Dispute Resolution provisions of the convention and that the decision regarding whether an activity is military in nature is not subject to review by any court or tribunal.

The effect of the convention on maritime intercept operations. The convention has two particular articles that people cite when they raise this issue as probably an impediment. No. 1 is article 92 of the convention, which we know provides that ships shall sail under the flag of one State only and that basically that ship shall be subject to the exclusive jurisdiction of that State while on the high seas.

One exception to the exclusive flag State jurisdiction over its ships is found in article 110 of the convention, which is the right of approach and visit. Article 110 allows a warship to board a foreign flag vessel without flag State consent if there are reasonable grounds for suspecting several things: One, the ship is engaged in piracy or slave trade; the ship is engaged in unauthorized broadcasting; or the ship is without a nationality, basically; or if the ship is in reality the same nationality of the approaching warship.

However, exclusive flag State jurisdiction and article 110 are not the only legal bases that can be used to interdict vessels on the high seas. Other legal bases for stopping and searching foreign flag vessels beyond the territorial sea include: flag State or master's consent, authorization granted by a U.N. Security Council resolution, as a condition of entering port or internal waters, preexisting bilateral or multilateral agreements or ad hoc arrangements which provide advanced authority to board and inspect and search.

But I think primarily and basically the most important of these rights is the inherent right of self-defense under article 51 of the United States Charter. Additionally, under the law of armed conflict there is the belligerent right of visit and search.

Any one of these above legal bases can be used individually or in combination to interdict suspect vessels on the high seas and thus, I submit, successfully be used to continue our extremely important fight on global terrorism.

That is my statement, Mr. Chairman. Again, it is an honor to be with you. I would conclude by suggesting to Admiral Prueher that I think my answer to your questions, admiral, would be: better protect, yes; military exemption protects, yes; proliferation strategy, yes; I think we are covered.

Admiral PRUEHER. Thank you.

Admiral SCHACHTE. Thank you.

Thank you, Mr. Chairman.

[The prepared statement of Rear Admiral Schachte follows:]

PREPARED STATEMENT OF REAR ADMIRAL WILLIAM L. SCHACHTE, JR., JAGC, USN  
(RET.)

Mr. Chairman, Members of the Committee, it is an honor to be here before you today and to be on this illustrious panel which will address issues related to the 1982 United Nations Convention on the Law of the Sea. While I recognize that the

Convention is beneficial from a number of perspectives—in my opinion, the benefits to national security are paramount. I addressed this issue in an article that was published in the *Georgetown International Environmental Law Review*. I will attach a copy of this article to my full statement.

First, accession to the Convention will be a significant step in reaffirming America's place of leadership in matters relating to the global commons. It was my good fortune as a Navy judge advocate to actively participate in the final stages of the process that produced the Convention, and in the interagency deliberations that followed in 1982-83. At that time, we in the Pentagon were confronted with the decision not to support signature of the Convention because of the deep seabed mining provisions. Under these circumstances we concluded that our best option was to characterize the non-seabed provisions of the Convention as customary international law—although we knew that certain portions of the Convention, such as the straits and archipelagic regimes, the exclusive economic zone, and the continental shelf delimitation provisions, and others, were negotiated articles that benefit and enhance maritime mobility for all nations and provide predictability and stability in an otherwise changing environment.

Thus, in President Reagan's 1983 Oceans Policy Statement we, in essence, said we weren't going to sign or ratify the Convention, but we would abide by and accept the non-seabed provisions. This statement was crafted carefully as we were somewhat creating an offer: if other nations would conform their actions to the non-seabed provisions, we would honor those actions, and we would likewise conform our actions to those Convention articles.

In so doing, we effectively used the Law of the Sea Convention as a basis for maintaining a "persistent objector" status towards excessive maritime claims. Our goal was to prevent coastal nations' maritime claims that were inconsistent with the Convention from ripening into customary international law. This policy was facilitated further by the Freedom of Navigation Program whereby we continued to diplomatically protest excessive claims and conducted operational assertions in conformance with the navigational provisions of the Convention. I might add that maintaining that program is essential. The Convention alone is not enough, even as a party. Our operational forces must continue to exercise our rights under the Convention—particularly in the maritime environment of the global commons, which historically has been one of claim and counter claim.

Accession to the Convention will also enhance America's credibility. The world recognized that we were right about seabed mining and fixed it. This effort was undertaken with the obvious anticipation that the U.S. would then join our allies and many others who are parties to the Convention.

I will now briefly address three areas: customary international law and challenges to U.S. military activity at sea, the effect of the Convention on Maritime Intercept Operations, and Mandatory Dispute Resolution.

#### CUSTOMARY INTERNATIONAL LAW

- Not everyone agreed with our "customary international law" interpretation 20 years ago, but from 1982 until 1994, we continued to exercise our navigational rights and freedoms through international straits, archipelagic waters and the EEZ consistent with our interpretation of what those rights and freedoms entailed in an effort to solidify those concepts as customary norms.

- However, our ability to influence the development of customary law changed dramatically in 1994 when the Convention entered into force. As a non-Party, we no longer had a voice at the table when important decisions were being made on how to interpret and apply the provisions of the Convention.

- As a result, over the past 10 years, we have witnessed a resurgence of creeping jurisdiction around the world.

- Coastal States are increasingly exerting greater control over waters off their coasts and a growing number of States have started to challenge U.S. military activities at sea, particularly in their 200 nautical mile (nm) EEZ.

- For example, Malaysia has closed the strategic Strait of Malacca, an international strait, to ships carrying nuclear cargo. Chile and Argentina have similarly ordered ships carrying nuclear cargo to stay clear of their EEZs. These actions are inconsistent with the Convention and customary law, but will other nations attempt to follow suit and establish a new customary norm that prohibits the transport of nuclear cargo? Will attempts be made to expand such a norm to include nuclear-powered ships?

- China, India, North Korea, Iran, Pakistan, Brazil, Malaysia and others, have directly challenged U.S. military operations in their EEZ as being inconsistent with the Law of the Sea Convention and customary international law. Again, the actions

by those countries are inconsistent with the Convention and customary law, but will other nations follow suit and attempt to establish a new customary norm that prohibits military activities in the EEZ without coastal State consent?

- If we are going to successfully curtail this disturbing trend of creeping jurisdiction, we must reassert our leadership role in the development of maritime law and join the Convention now.

- The Parties to the Convention will develop the customary norms of the future and the international forums it creates—the International Tribunal for the Law of the Sea, the International Seabed Authority and the Commission on the Limits of the Continental Shelf. Unless we participate fully in these forums as a State Party, our ability to shape the development of new customary norms in ways that are favorable to our national security and economic interests will be lost.

#### EFFECT OF ARTICLE 110 ON MARITIME INTERCEPT OPS (MIO'S)

- Some have suggested that becoming a Party to the LOS Convention could impede our ability to engage in Maritime Interception Operations to interdict terrorist and weapons of mass destruction at sea. This is simply not accurate.

- The United States has legally conducted MIO's at sea for over 5 decades. These operations have been conducted using a variety of legal bases that are consistent with customary international law and our treaty obligations as a party to the 1958 Geneva Convention on the High Seas. The provisions of 1958 Convention are mirrored in the 1982 LOS Convention.

- Article 92 of the Law of the Sea (LOS) Convention provides that ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in the Convention, shall be subject to its exclusive jurisdiction on the high seas.

- One exception to exclusive flag State jurisdiction is found in Article 110 of the LOS Convention (right of approach and visit). Article 110 allows a warship to board a foreign flag vessel without flag State consent if there is reasonable grounds for suspecting that

- The ship is engaged in piracy or the slave trade
- The ship is engaged in unauthorized broadcasting (in certain situations)
- The ship is without nationality or has been assimilated to be a ship without nationality (i.e., sailing under the flags of 2 or more States)
- The ship is, in reality, of the same nationality as the approaching warship.
- However, exclusive flag State jurisdiction and Article 110 are not the only legal bases that can be used to interdict vessels on the high seas.
- Other legal bases for stopping and searching foreign flag vessels on the high seas (beyond the territorial sea) include:

- Flag State or master's consent. This was recognized most recently as a proper legal basis to interdict vessels at sea in the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the 2000 The United Nations Convention Against Transnational Organized Crime and its Protocol to Suppress the Smuggling of Migrants by Land, Air and Sea. The U.S. is a signatory to both of these agreements.
- Authorization granted by a UN Security Council Resolution. Examples would be the 1990 UN embargo against Iraq; the 1991 UN embargo against Yugoslavia and the 1993 UN embargo against Haiti.
- As a condition of entering port or internal waters
- Pre-existing bilateral or multilateral agreements or ad hoc arrangements, which provide advance authority to board and inspect/search. The U.S. has some 20-plus bilateral agreements to conduct counter-narcotics operations.
- The inherent right of self-defense under Article 51 of the UN Charter. Examples would be the 1962 Cuban Missile Crisis; the 1990 pre-UN embargo against Iraq (for two weeks by the U.S. and UK as collective self-defense with Kuwait); post-911 terrorist MIO's and the Proliferation Security Initiative.
- The belligerent right of visit and search under the Law of Armed Conflict.
- Any one of these legal bases can be used individually or in combination to interdict suspect vessels on the high seas and successfully continue the fight on the Global War on Terrorism.



## MANDATORY DISPUTE RESOLUTION

- The first point I would make is that no country would subordinate its national security activities to an international tribunal. This is a point that everyone understood. That is why Article 286 of the Convention makes clear that the application of the compulsory dispute resolution procedures of section 2 of Part XV are subject to the provisions of section 3 of Part XV, which includes the provision that allows for the “military” exemption.
- Article 288 provides that in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.
- Some may attempt to argue that Article 288 could be read to authorize a court or tribunal to make a threshold jurisdictional determination of whether an activity is a military activity or not and, therefore, subject to the jurisdiction of the court or tribunal.
- However, Article 288 is found in section 2 of Part XV. It therefore does not apply to a dispute involving what the U.S. Government has declared to be a military activity under section 3 of Part XV.
- This interpretation is supported by the negotiating history of the Convention, which reflects that certain disputes, including military activities, are considered to be so sensitive that they are best resolved diplomatically, rather than judicially.
- When depositing its instrument of accession, the United States could re-emphasize this point by making a declaration/understanding that clearly states that military activities are exempt from the compulsory dispute resolution provisions of the Convention and that the decision regarding whether an activity is “military” in nature is not subject to review by a court or tribunal.

[Attachment.]

[Georgetown International Environmental Law Review—Summer, 1995]

*Symposium Issue: Implementing the United Nations Convention on the Law of the Sea: An International Symposium, January 27, 1995, Georgetown University Law Center*

*Panel 2: International Security and the Law of the Sea Convention*

NATIONAL SECURITY: CUSTOMARY INTERNATIONAL LAW AND THE CONVENTION ON THE LAW OF THE SEA

(William L. Schachte, Jr.)

I. INTRODUCTION

I am grateful for the opportunity this afternoon to provide my views on the importance of becoming a party to the 1982 UN Convention on the Law of the Sea Convention (Convention). Georgetown University Law Center's initiative in providing a forum to discuss the importance of the Convention comes at an opportune time. As Jack has just discussed, the President has forwarded the Law of the Sea Convention to the Senate for its advice and consent. If given, it will fulfill a long-standing commitment shared with previous Republican and Democratic administrations to participate in a stable, widely accepted, and comprehensive legal regime for the world's oceans.

Other speakers will address the key national security interests in the Convention. I would like to focus on what the United States has to gain, in terms of a stable legal order, by becoming a Party to a universally accepted Convention.

II. WHY RATIFY THE CONVENTION?

Opponents to the Convention are asking, “Why accede to a convention we rejected eleven years ago?” “What has changed in those eleven years that makes accession to the Convention acceptable today?” Others are saying, “We’ve been operating outside the Convention all this time; isn’t the status quo acceptable?” “Since the argument is that the Convention, for the most part, reflects customary international law, what do we lose by failing to become a Party to the Convention?”

In general, responses to these questions can be summarized in three basic points. First, valid reasons for the rejection of the Convention have been satisfied by the recent modifications to Part XI of the Convention. Second, stability and predictability on, under, and over the world's oceans is best assured by a universally ac-

cepted comprehensive legal regime. Finally, now that the Reagan Administration objections to the deep seabed mining have been accommodated, if the United States is to re-assume its leadership role in international oceans policy affairs, we must accede to the Convention.

### III. PART XI OBJECTIONS AND THE 1994 AGREEMENT

Let me begin with the first point: what has changed in the last eleven years to make the Convention now acceptable to the United States?

As many of you are aware, our failure to sign the Convention when it was opened for signature in 1982 was based on objections to Part XI deep seabed mining provisions of the Convention. As far as the rest of the Convention was concerned, the U.S. government has long maintained that the United States accepts and will act in accordance with the balance of interests relating to traditional uses of the oceans (such as navigation and overflight) reflected in the Convention.

With regard to Part XI, our objections fell into two broad categories: institutional issues and commercial considerations. On the institutional front, we objected to the lack of adequate voting power for the United States and other industrialized countries within the seabed organization. From an economic and commercial standpoint, we objected to mandatory technology transfer, production limitations, onerous financial obligations on miners, and the establishment of a subsidized international mining organization that would compete unfairly with other commercial enterprises.

For the past several years, the United States and other industrialized nations have been working intensively behind the scenes to address these concerns. As a result of these efforts, an international agreement that modifies Part XI of the Convention was signed by the United States and sixty-nine other states on July 29, 1994. The Part XI Implementing Agreement eliminates the U.S. objections to the deep seabed mining regime and paves the way for Senate action on the Convention.

### IV. WHY THE CONVENTION?

With the recent modifications to the deep seabed mining regime, the United States now has a rare window of opportunity to solidify the vital navigational and resource issues addressed by the Convention. The question is whether accession to the Convention at this time is in the best interest of the United States.

Some opponents to the Convention maintain that the United States already has its navigational rights vested by virtue of customary international law. Therefore, they argue that the status quo is an acceptable way of doing business.

One can certainly argue that we could continue to rely on the protection of U.S. national security interests based on customary international law. The United States, as a maritime power, could press its rights unequivocally and, if necessary, unilaterally, when obstacles to traditional ocean freedoms are encountered. Claims inconsistent with the Convention would continue to be contested by diplomatic protest and by operational challenges under the U.S. Freedom of Navigation Program. However, the posture of relying on customary international law is problematic for a number of reasons.

### V. UNCERTAINTY OF CUSTOMARY INTERNATIONAL LAW

First, customary international law is, by its very definition, a fluid and changing concept. Vague on details, it is a constantly evolving process created by claim and counterclaim. As a result, there is much less agreement on the details of the customary Law of the Sea. Therefore, customary international law does not provide the kind of stability and predictability that we need for an uncertain political landscape. By contrast, the Convention locks in the rules that promote maximum maritime flexibility while at the same time ensures that coastal state interests are accommodated. This balance between maritime and coastal interests enhances the Convention's long term viability as well as its widespread acceptability among diverse interest groups. In short, the Convention will foster the legal stability that the United States and the rest of the international community has sought for so long.

The end of the Cold War has not changed the fact that many of our economic, political, and military interests are located far away from American shores. Recent events in Haiti, the Persian Gulf, the former Yugoslavia, Somalia, and Rwanda serve as important reminders that we still live in an uncertain and potentially dangerous world. While the specific threats and challenges that the United States will face in the years ahead undoubtedly will differ from those that dominated our thinking over the past forty years, capable, vigilant forces will continue to be required to deter aggression and, if deterrence fails, to take necessary action.

The Convention provides the stability and predictability we seek to ensure the flexibility and mobility for our military naval and air forces, as well as our seaborne

and airborne commercial activities around the world. By serving as a source of authority, the Convention guides the behavior of nations, promotes stability of expectations, and provides a framework for issue resolution. In effect, it provides the legal predicate for our armed forces to respond to crises expeditiously and, importantly, at minimal diplomatic and political costs. And while the Convention may not preclude all attempts by coastal and archipelagic states to impede navigational freedoms, it puts the world community on notice that these freedoms have a solid legal basis and enjoy broad support among the major maritime and industrialized nations.

#### VI. CUSTOMARY LAW AND DEVELOPING COUNTRIES

Some states, especially developing nations, do not embrace customary international law to the same extent that the United States and other maritime powers do. Those states view it as a body of law frequently formed without their participation and consent, law that only promotes the interests of developed nations—often former colonial powers. Developing countries prefer the relative certainty of international agreements concluded on the basis of equality of nations.

Similarly, some Convention signatories, a number of whom are near or adjacent to important waterways used for international transit, have asserted that the Convention is a legal contract—and therefore its rights and benefits, such as transit passage and archipelagic sea lanes passage, are not available to non-parties. We do not accept these claimed restrictions on international transit rights, but such issues would be mooted under a universal Convention to which the United States is a Party.

As a recent example of potential difficulties, in July 1994, in the context of their right to exploit seabed resources in the strategic straits of Malacca, Malaysia stated that the “newness” of the transit passage regime casts doubts as to its status as a customary international law principle.

#### VII. POLITICAL AND MILITARY COSTS OF ENFORCEMENT

Customary international law tends to be hard to enforce and maintain. For example, eighteen states continue to claim territorial sea in excess of twelve nautical miles. Thirteen states claim, historic bays inconsistent with international law. More than sixty countries delimit straight baselines along portions of their coast, many of which are drawn inconsistently with international law. Also, more than twenty states attempt to over-regulate their exclusive economic zones (EEZ), contrary to the express provisions of the Convention.

Since 1979, the United States has formally contested excessive coastal state claims, both operationally and diplomatically, through the Freedom of Navigation Program. The program is based entirely on the navigation and overflight provisions of the Convention. While this program is designed to breathe life into the terms of the Convention, Parties to the Convention are likewise capable of defining or refining provisions of the Convention. By remaining outside the Convention, the United States’ only way of confronting attempts by Parties to the Convention to interpret or refine Convention provisions would be by the exercise of our naval and air forces in accordance with the existing terms of the Convention. However, in presenting Admiral Center’s paper, Commander Rosen will discuss that this will be harder to do in the years to come as we downsize. Also, as a nation committed to the rule of law, the use of military force to resolve legal conflicts between Parties and non-Parties to the Convention should not be the preferred method of challenging excessive coastal state claims.

I would note that, in the case of the “Black Sea Bumping Incident,” the United States and Soviet Union approached the legal issues involved as would Parties to the Treaty in relying on the Convention’s rules on innocent passage to amicably resolve the issues raised by the incident.

#### VIII. UNRAVELING REGIME

If the United States and other major maritime and industrialized powers do not become parties to the Convention, there is a real possibility and probability that the delicate balance that the Convention provides in dealing with emerging issues of importance, including environmental protection and resource conservation, would simply begin to unravel. The Convention provides an excellent framework for addressing and resolving contentious issues which, if attended to solely on a bilateral basis, would undoubtedly give rise to increased tensions and conflict elsewhere. Moreover, if the Convention does not receive the support of the major maritime powers, it will lose its restraining influence as law, and the United States will thus be hard pressed to argue that the Convention continues to reflect customary international

law. As a result, insistence upon our navigational freedoms, based on a traditional claim-counterclaim, customary international law approach, would be costly diplomatically and economically and could invite military resistance. It was this reality that led us as a nation to undertake the prolonged negotiations that resulted in the 1982 Convention. Moreover, the Convention's entry into force and its wide acceptance properly forecloses any possibilities of reopening negotiations.

#### IX. DISPUTE SETTLEMENT

Finally, dispute settlement under customary international law can run the gamut from diplomatic intervention to economic sanctions, to arbitration, to bringing an action before the International Court of Justice. Bottom line, it is ad hoc, at best. The Convention, on the other hand, contains an elaborate dispute settlement mechanism that promotes compliance with its provisions and ensures that ocean disputes will be settled in a peaceful manner. This mechanism is both flexible, in that Parties have options as to how and in what fora they will settle their disputes, and comprehensive, in that most of the Convention's rules can be enforced through binding dispute resolution. At the same time, however, the dispute settlement mechanism accommodates matters of vital national concern by excluding certain sensitive categories of disputes, such as fisheries management in the EEZ, from binding dispute settlement. It also allows State Parties to exclude other disputes, such as controversies involving military activities, from the binding dispute settlement procedures.

As a State Party, the United States could enforce its rights and preserve its prerogatives through peaceful dispute settlement under the Convention, as well as encourage compliance with the Convention by other State Parties.

#### X. U.S. LEADERSHIP ROLE IN INTERNATIONAL OCEANS POLICY

The last point I would like to address is that of a resumption of a clear leadership role for the United States in international oceans policy affairs—an area where we have so much at stake.

As the preeminent global power in the 1990s and beyond, the United States is uniquely positioned to assume a more visible leadership role. The United States can lead the movement to the achievement of a widely accepted international order, regulating and safeguarding the diverse activities and interests regarding the world's oceans. The Convention affords us the opportunity to lead in a way that protects and promotes U.S. national security interests. To ensure a leadership role in this important arena, the United States must become a party to the Convention.

By remaining outside the Convention, our long-standing leadership role in international ocean affairs, and in fora such as the International Maritime Organization, would be further eroded. Moreover, as an outsider looking in, we would not be in a position to influence the Convention's further development and interpretation. In effect, as mentioned earlier, by refusing to become a Party to the Convention, the only way we could seek to influence changes in the LOS regime would be through unilateral action, and that could lead to further destabilization and increased international friction.

#### XI. CONCLUSION

In conclusion, a universal regime for the oceans is needed to safeguard U.S. security and economic interests, as well as to establish public order and to defuse situations in which competing uses of the oceans are likely to result in conflict. Remaining outside the Treaty, continuing to rely on customary international law, would be an imprecise approach to the problem, as well as one that would require the United States to put forces into harm's way when principles of law are not universally understood or accepted. The best way to guarantee access to the world's oceans to conduct military naval and air operations and engage in maritime commerce in the years ahead is for the United States to become a Party to the Convention, as modified.

Most industrialized nations have either signed or indicated that they will ratify the Convention, as modified. If we fail to become a Party to the Convention, we will be alone among a few dissenters. This may be our last opportunity to "lock in" those critical navigational and overflight rights so essential to our economic and military security. We may never mine the seabed, but we will, well into the twenty-first century, daily operate under, on, and over the oceans of the world as we meet our commercial and national security obligations. It is those obligations that should drive a U.S. decision to ratify the Convention.

The CHAIRMAN. Well, I thank each one of you. Let me just preface the questions by saying that as the committee began its deliberations this year Senator Biden and I asked our staffs to take a look at work that has been done by able negotiators such as yourselves in the past. A number of treaties have been uncovered. The committee has dealt earlier this year with at least two that dealt with the seas and that were very constructive, I think in filling in gaps of previous negotiations.

In the course of that research the Law of the Sea Convention came to the fore. Many of you have gently raised the question, and I did so as well in my own opening statement, that although the issues that were cleared away in 1994 apparently led to a presumption that the treaty might be forthcoming, it in fact was not. Today is the first day in 9 years or so that the treaty has been before us.

Many Members in the House and the Senate ask: Why now? Or for that matter, what happened in the intervening 9 years? What were the issues? I do not ask you to begin unraveling your testimony by pointing out why for 9 years we were unlikely to see the Law of the Sea before this committee, quite apart from an advice and consent resolution. But can you just from practical experience, for the benefit of those who will clearly ask, please explain what is the down side?

You have touched upon some of the down sides in terms particularly of the military exceptions, the problems of national security. For example, our government has suggested perhaps publicly the interdiction of materials or weapons of mass destruction if they should go to sea on ships that may or may not be from friendly or unfriendly nations. Nevertheless we feel our national security in an age of a war against terrorism could be affected. I know, Admiral Schachte, that you have gone into this very specifically and in some detail. That is important because these are issues that would clearly be raised by the Department of Defense and the Navy in particular.

Senator Stevens has counseled us with regard to the seabed and the amount of stock that grows, and that there ought not to be intrusions, as he saw them, on those efforts of conservation by other nations making claims. He asked the committee to be vigilant in our work with regard to that. So these at least begin to suggest some areas where people have had some skepticism.

But just for the benefit of this hearing, could any of you fill in why you feel there have been problems and why this might have been the first time in 9 years the subject has been raised?

Mr. MOORE. Mr. Chairman, if it is appropriate I might take a first shot at that, which I think is a very important question. I believe that the major problem was an understanding initially when the treaty was completed in 1982 that there were a series of significant problems with part 11 on deep seabed mining. The United States, for example, at that time had no permanent seat on the Council of the Authority and the Soviets had, in contrast, basically three votes on the Council of the Authority at that point. There were also issues concerning mandatory technology transfer and other things.

That negotiation, the renegotiation to resolve that, took 12 years. So you really had a perception from 1982 when the initial conven-

tion was completed down to 1994 of problems with the treaty, a 12-year perception I think, that lingered long after the reasons for it had been removed.

Since that time there seem to be new, different kinds of objections; each gets clearly answered and then others pop up—it seems to me, frankly, to be more ideological after that point than it is relating to any of the specifics in the convention itself. I am prepared to stake my reputation on the very simple point that there is not a single United States oceans interest that is better off by our Nation not adhering than it would be were we to adhere.

If I could for a moment just comment on at least two points of the proliferation initiative and the dispute settlement issue that were raised, which seem to be the sort of questions—I am not sure objection is the right point, but the questions du jour in relation to it. Indeed, Mr. Chairman, I would suggest that it is very revealing that the questions du jour seem to change from time to time and there is nothing constant that anyone can really sink their teeth into here.

But if we were to look for a moment at the proliferation initiative, which is very important—we all support that—that initiative by its own terms clearly states that it is consistent with all of the obligations under international law, which certainly include the law of the sea. And when we concluded the agreement with our 11 allies on this in Paris in 2003, once again the agreement specifically said that it seeks to do nothing that would change the law of the sea, and I think this understanding is something our allies strongly wanted.

The second point, Mr. Chairman, that does not seem to be noticed very much in this discussion with respect to the proliferations initiatives is that if there are any problems whatsoever they are already problems we are bound by in the 1958 High Seas Convention and the Territorial Sea Convention. There is absolutely nothing new as an obligation on the United States in any way, shape, or form in the 1982 convention inhibiting our ability on the proliferation initiative. Indeed, I would say on something like dealing with the North Korean 50-mile illegal military boundary zone, we are much more powerfully able to go forward if we adhere to the treaty.

Finally, Admiral Schachte is absolutely correct, a terribly important point: Nothing in this treaty in any way, shape or form interferes with the right of individual and collective defense of the United States. This is a treaty, like many others, for peacetime settings. It does not govern security settings in relation to the ability to use force lawfully under article 51 or other provisions of the United Nations Charter.

Now with respect to the military exclusion issue du jour that has been raised, article 298 is very clear that every State party has the ability when adhering to the convention to indicate that they seek to exclude military activities altogether from any kind of dispute settlement provision. I was Deputy Head of the U.S. delegation when that was negotiated and I can assure you that it was done absolutely consistent with the views of the Chairman of the Joint Chiefs, the Joint Chiefs, and the United States Navy as to what

we had to do in protecting our security interests, and we were one of the leaders in getting that provision.

I do not believe there is any risk whatsoever on that. In fact Mr. Chairman, if you will permit a simple analogy. I believe the chances of this article being interpreted the way some are arguing and posing a risk to the United States is about like your deciding not to hold this hearing today because of the risk of the hearing room being hit by a meteorite. To be frank, Mr. Chairman, this is a silly objection, and we have heard a variety of silly objections over the years and I do not believe that it is one that in any way takes away from our moving forward.

The CHAIRMAN. When you have used the term "ideological," is that last analogy an example of this? In other words, that one has some faith that these hearings ought not to be held because a meteorite, or something more substantial would come? What is the ideology out there that finds this difficult?

Mr. MOORE. Mr. Chairman, I am not sure that I would be able to talk on behalf of these others; since I do not hold whatever views they may have. I am not challenging that these issues are raised in good faith. I think they are. I just think that there has for some time been a concern perhaps that moving forward in multilateral treaties such as this were perhaps not the way to go.

My own view is that you move forward when a treaty is strongly in your national interest as is this one, and you refrain from moving forward when it is not, just as you would as an individual with freedom to make such decisions. But I do not think I could add much more than that to any of the lingering skepticism I have seen over the years.

The CHAIRMAN. Perhaps that is one of the issues, that is that there are witnesses from time to time who come before us who are opposed to multilateral agreements. In other words, as I understand their point of view, they believe that—notwithstanding any of these agreements that we may have ratified in 2 centuries of our history and so forth—many of them are a mistake. They believe in essence, at least in the current situation of our country in the world, that we ought not to be inhibited by these sorts of agreements, that we ought to simply proceed in our interests.

As I understand your testimony and that of the other witnesses, you believe that our security interests and our conservation or commercial interests and what have you are enhanced by these agreements, by the fora that are presented for resolutions of disputes, and by a sort of general coming together of a lot of parties that otherwise might be at the margins doing each other in all of the time without there being these rules of the game or these margins, as I understand it.

Mr. MOORE. Could I add that there is a powerful theoretical reason for that in this case as well, that perhaps we did not understand as well until the Nobel Prize in Economics was won on something called public choice theory. That is, one of the great problems here in this particular setting in protecting our national interest is a series of unilateral coast State claims. The only way you deal with those is actually to get a multilateral setting where it becomes in the interest of the international community as a whole basically to oppose those.

So this is a setting where you are trying to deal with these coastal States externalizing costs on the community and where you have got a majority of States with you internationally, that you are far better off in a multilateral negotiation, as we proved here by winning what we did.

The CHAIRMAN. Admiral Watkins, do you have any comment in this discussion?

Admiral WATKINS. I could never compete with John Norton Moore on the details of the issue. Let me just say why the commission picked this up in November 2001, 2 months after they held their first hearing. We felt so strongly that the United States needs to be the leader in the world in ocean matters that we felt it would be an absolute oxymoron not to be a signatory to this convention.

Recently, the administration at the G-8 summit in Europe agreed to an Earth Observation summit here in the United States, held a few months ago. You can imagine what it would be like without being a signatory to this convention to establish an international monitoring and observing system for coastal and deep ocean areas. Can you imagine the complications associated with claims that might be imposed upon the United States were we not a signatory to this convention?

So we felt so strongly about it, we came to a conclusion—it is the first conclusion we have come to since, by the way—we are not that ecumenical right now. We are fighting on some issues. But on this issue we were unanimous right off the bat, and this is why we sent you a strong letter, feeling that if we are to gain the respect internationally that we need in the greatest of our natural resources, which is 71 percent of the Earth, and if we do not take that leadership as the most powerful Nation in the world, that we are making a huge mistake.

To the best of my knowledge, all of the urgent issues that were addressed in deep seabed mining aspects of this were clarified, and therefore the expectation was there. Here again, the leadership of the United States not stepping out in front was a tragedy. Why are we doing this? Is it an anti-U.N. feeling?

I was so pleased to see Laura Bush go over to France and say: We are coming back into UNESCO. We need to get positive about some of these international linkages, and I believe this is one step that is a no-brainer. It is a win-win situation for the United States to leap in and say: We are doing something positive for our international leadership role in the world in the most critically important natural resource, regarding global climate change. We have not come to grips with the global climate change issue because we will not do the things that the ocean tells us to do, and those have to be negotiated internationally, with an international body.

The IMO and the existing organizations are not sufficient to deal with this without the leadership on board, in the game. To heck with the umpires. You are only going to get an argument with the umpire if you are in the game, and we need to get in that game.

So we felt so strongly about it that we made this an issue right up front and said this commission is not going to work unless the United States is perceived internationally as a leader in ocean matters. In this case we are talking about ocean matters that happen to link with atmosphere and happen to link with all the terrestrial



observations that give us a handle on what is going on in the planet in a realistic sense so decisionmakers like you can do the right thing here and we are not basing it—we hear words like “scientific decisionmaking,” “scientific-based decisionmaking.” What is the program? There is not any.

We hear about ecosystem-based management, in which all these fisheries issues are linked with human beings who are also in the ecosystem. What is the program? There is not any.

So this is the precursor, I think, of some very important matters that the United States has to deal with on the oceans of the world, terrestrial issues that are linked, and the atmospheric issues that are linked. And we better get on with it, and I consider this to be an urgent first step. While it is not directly associated with everything we are doing on the Ocean Commission, it is so germane to the leadership challenge we were given in Oceans 2000 that we feel it is absolutely essential.

The CHAIRMAN. Admiral, when will the Ocean Commission report be made public or available?

Admiral WATKINS. My executive director is in the room here, Mr. Chairman, and he refuses to give me a date. But I am pushing very hard for November to get it in the Federal Register, which is required by the act under the Federal Advisory Committee Act. That will then go to every Governor, not just the 35 coastal States’ Governors. We are giving it to your Governor at home and every Governor in the Midwest. We are calling the Great Lakes our northern ocean on the northern coast. They believe that, we believe that. We have got all States, all of our territories in the Pacific and so forth, that give us this great, incredible, 200-mile EEZ base to work from. Everybody is involved in the ocean.

The non-point source pollution issue associated with our estuarine and riverine problems are severe and we have got to deal with them. The jurisdictional problems associated with that are tremendous. So it is not just international alone. We have got a national problem of jurisdictional responsibilities that we are not dealing with.

But if we do not have this linkage—and obviously everybody we do in the oceans is co-owned by the other nations of the world, so we have to be a player in that game. We cannot just deal with our own ocean. We have got to deal with oceans like the Arctic, which is very underserved and undertreated, and yet it is critical to the climate change understanding and those kinds of things, the great conveyor belt that moves the waters. The freshening of the water up there is worrisome. Woods Hole has said that within a decade we can lose that conveyor belt just on the freshening of the water. We have lost 40 percent of the ice depth and 3 percent of the ice up there. We know the glaciers are moving.

So we have got to deal—the Defense Department is running a study on what do we do, what is the strategic ramification of an ice-free Arctic? Well, those are real questions, but they are all linked to what we are talking about here—taking a lead role in the driver of so much of the world’s life. This is the source of life, and we better get on with it.

And only the United States can take that leadership role. it will cost us half of the investment, but we do that in everything we do

internationally, so it is nothing new. But the other nations will come aboard. They want us to take this leadership role.

Ideologically, I think it is the right answer. I do not know why we have had this anti feeling about our international relationships, but I have never seen it any worse than this, and I think we have got to turn it around. Here is one mechanism that is a no-brainer. On both sides of the aisle up here on the Hill, we have not found any opposition to what we are doing on the Ocean Commission to bring the international side to bear so that we can get on with really understanding what is going on around us.

The CHAIRMAN. Admiral Prueher, you have heard all of this. Have you been stimulated?

Admiral PRUEHER. I happen to tune in very closely with Admiral Watkins in another hat on the environmental issues and the long-range part. I think, to address the, tactfully phrased, ideological reservations, when we started looking at this from a pragmatic view in 1998 we came at it from the approach that we do not want to ratify what is to our advantage to do this?

As we studied the U.N. Convention on the Law of the Sea as it impacted our ability to do our security interests, and we looked primarily at the military and diplomatic—less so at economic interests, I must admit—but we came up with no advantages to not ratifying the convention. I think the situation, the world situation, has certainly changed since then, but I think the answer to that question is the same, that ratification accrues to our Nation a great many advantages and no significant disadvantages.

The CHAIRMAN. Admiral Schachte.

Admiral SCHACHTE. I want to thank you very much, Mr. Chairman. I have been discussing these issues, as Admiral Watkins passionately and I think quite eloquently pointed out, from the perspective of the global commons. The only thing I can conclude is that we were perhaps hoist on our own petard. When we realized, as I mentioned in my testimony, that we had no options, we needed the non-seabeds articles of the convention, we needed those fleshed out with action, and we put in place a very aggressive program that was actually started under President Carter in 1978 in the Brzezinski memo setting up the Freedom of Navigation Program, under which we would operate consistently with the convention.

We really put a separate emphasis on that, developing a Maritime Claims Manual so we would know where claims were that were not consistent with the convention, and so on and so forth, and we turned up the heat diplomatically, and pursued that aggressively. That kind of took the heat off of what was otherwise a—"despised" is too strong, but a convention that developed some adverse traction because of the seabed mining provisions, which admittedly were the result of, let us say, a capitalist father and a socialist mother. I mean, the original seabeds regime was an incredibly complex thing that never would have worked.

But the convention had that baggage, and it became quickly a litmus test: Where are you on the Law of the Sea Convention? If you are in favor of the convention, well, that is the end of that discussion. And unfortunately I think that hangover stayed with us for quite some time, and the success of our Freedom of Navigation Program—I was involved in the Black Sea bumping incident. We re-

solved that diplomatically. The Northwest Passage, I was also involved in the resolution of that issue.

We resolved all of these things taking then out of a bilateral context by referring to the convention, and we were able to get away with that approach, as I said earlier, until 1994 when the convention entered into force and we were no longer players.

I was also a part of a team that went out to the Pacific—Indonesia, Fiji, Solomon Islands—and then to the Bahamas, and other potential archipelagic claimants, trying to promote this deal that we were making: If you follow the convention, we will honor your claim.

We did it in Indonesia. We had to backdoor it through their tax treaty making reference to the convention. In the Philippine bases renegotiations, we stuck a section in that on the archipelagic regime, knowing that that original concept advocated by Minister Mochtar and others was that you draw lines around their outermost islands and the result would be the equivalent of a land mass, you cannot do anything in there without permission of that island nation; it would have crippled our mobility—it would have been totally unacceptable.

In fact, I was at the signing ceremony in Jamaica when Minister Mochtar came in and met with Tom Clingan, Ambassador Clingan, the head of our delegation. I happened to be in the room. It was at lunchtime, and Mochtar just candidly said: “Tom, how could you do this? We gave you all those navigational articles, all those provisions”—he was much more eloquent than that. “But we did all of that, because we knew you would be there with us as a leader to make the other provision work.”

The only thing Ambassador Clingan could say was: “Give us time; wait it out.” And they did. And they also fixed seabed. And so now I guess these negative arguments continue to abound by those who simply have this sense that was born in the early Reagan days of, the convention was about seabed mining, an awful thing, Third World giveaway, and so on and so forth.

I’m sorry, but that, as simplistic as that is, is an explanation.

The CHAIRMAN. Let me ask: we have discussed the security issues. Those usually come forward first, and properly so. We have had a good number of people, not in talking about Law of the Sea but in other fora, in treaties that we discussed earlier this year, who are deeply concerned about overfishing of the oceans generally. They brought charts and maps illustrating what they were talking about and went through some specific species of fish that have become nonexistent in various parts of our oceans due to overfishing. They spoke about the need to have a time out in some areas so that somehow the stocks can be replenished for the good of humanity generally, as well as for the fishing industries of whatever nations might be involved.

Obviously, the issue of who is allowed to fish where and who is responsible for all of this becomes contentious. But in some cases there is not much dispute over whose waters these are. It is a dispute within the fishing industry itself as to how intensively people go at it and what the effects of all this are going to be.

As you, each one of you, examine the Law of the Sea Treaty, clearly one of the benefits in general is the conservation ethic. We

are an ecosystem and we cannot as human beings overfish the seas and expect to retain an abundance of fish. In fact, a sizable amount of these nutrients may be denied people. Yet there are competing interests: fishermen and various nations that back them, and maybe people who do not have that much sensitivity about the ecosystem and sort of anticipate that the Lord will provide and somehow the fish will still be there.

To what extent is the problem of overfishing, or of these competing rights that I described, more intense or acute now? In your judgment, to what extent do we address this in the Law of the Sea?

Admiral WATKINS. Well, I know, Mr. Chairman, that when we held hearings in Hawaii, for example, the longline fishermen came forward to talk to us about their problems. The United States has taken a strong position on such things as sea turtles and others being caught up as bycatch in the fishing business. Yet the United States adheres to its own rules in deep waters on longline fishing. Other nations do not in the Pacific, and they are free to go into areas south of certain latitudes north and go ahead and use longlines with any bycatch they pick up. There is also some indication—and maybe Admiral Prueher can talk about this a little bit—about how the numbers are adjusted, annual catch and the volume and the tonnage that are picked up in bycatch and other things that do not really reflect what is going on, which is probably an enforcement problem internationally.

So these are real problems. The cross-boundary issues with Canada on lobsters up in the Northeast, those are issues. And there are some strange provisions in the law that do not allow the locals, you might say, in the maritime regions in Canada and our Northeast group, the Governors in the coastal regions there, to negotiate a deal between themselves. It has to go up to a higher level convention.

These are difficult hurdles to get over. So there are some funny little quirks in the way we operate internationally. I think the Magnuson-Stevens Act goes a long way to setting up the protection barriers against the overfishing that was done by these great trawlers that roll in there and suck up all the fish, including all the bycatch that goes with it, and rejecting them, which is a large number, like 25 percent.

So the overfishing issue I think we tried to get a handle on in Magnuson-Stevens 30 years ago, but it also needs adjustment now, and it certainly needs a friendly negotiation protocol between the people who really understand these fish and how they migrate. And if we have an El Nino event in which the pollock go north and become Canadian citizens, we have to recognize that. They do not pay any attention to the jurisdictional boundaries that we have set up politically.

Therefore, these kinds of issues again would be better resolved were we a signatory to this convention and say, you know, there are some rules of the game here, and we ought to be conservation-minded as well as taking advantage of the protein that is out there for the good of our people. So we can do both. We do not have to have them be mutually exclusive, but they need to be in part of the negotiation.

I think it is very inconsistent for the nations that are co-signers to this to take different positions on conservation relative to the norm, which ought to be adjudicated through an international body in my opinion. So we see this across all the hearings that we go to, that there is an international component here that is frustrating our own ability to manage the resources from the United States' point of view, when it is relatively irrelevant if all the other nations, the larger nations in the Asian waters, for example, can longline at will with whatever bycatch they pick up, however they want to report the annual tonnage.

The CHAIRMAN. Admiral Prueher.

Admiral PRUEHER. I really cannot address the tonnages that Admiral Watkins referred to, but the issue as I see it is every so often, from a security point of view, an overfishing event or a fishing event in someone else's EEZ will erupt into a security issue and sometimes, particularly in Northeast Asia, these things will erupt into shooting. So like the ideological reservations about this treaty, restrictions are imposed anytime one signs a treaty. That is one point of view.

The other point of view is that a well crafted treaty gives a framework, a codification, and a dispute resolution basis for resolving not only the environmental and the overfishing issues, but the security issues as well, without having to go into actual armed conflict about it, which is prevention, which is what I think we are after.

The CHAIRMAN. Mr. Moore.

Mr. MOORE. Mr. Chairman, that is a very important set of issues you raised on the protection of fish stocks globally and other broad environmental issues generally. Let me just say in relation to the Law of the Sea Treaty that it was an extraordinarily important advance in protecting global fish stocks. Before that what we had is a setting in which once you got beyond the territorial sea there was no legal regime to enable a management system coextensive with the range of the stocks, which is the starting point for effective management of fish stocks. You have got to have a management system coextensive with the stock; whether it is a coastal stock or highly migratory stock, or whatever it may be.

By extending the coastal State economic jurisdiction to 200 nautical miles plus the areas of the margin beyond that for the creatures of the shelf, the lobster, et cetera, of the shelf that went beyond that, we completely solved that problem; what the economists used to call the common pool problem in global fisheries. So now what we have in place is the coastal State management systems, and in addition to that we have this wonderful new implementing convention that the United States already has in force for itself, actually implementing a section of the Law of the Sea Treaty on the straddling stocks and highly migratory species.

When you put those two together, it gives us for all of our stocks a very solid management jurisdiction. What we have to do, of course, and the issues that both admirals I think addressed very well, relates to what your management system is, how you work it, how you negotiate with others, and I think the point made by both that we would be far better off in our continuing negotiations in this to be a member are absolutely true.

One last point on the treaty environmentally generally. When it came to the oceans as an environmental area at Rio at the Earth summit, the Law of the Sea Treaty was so far ahead of all the other areas in relation to the environment that basically Rio simply said: For the environment, it is the Law of the Sea Treaty; that is what we look to.

The CHAIRMAN. Professor, let me just ask, is it your perception that our government—and this is over the course of several years—has a sound conservation program with regard to fish, that the problem is not an intramural one in our country, but rather it is an external problem with regard to others who may not respect our conservation ethic?

Mr. MOORE. Mr. Chairman, I have not studied that like the commission has and so anything I said on it would not be particularly informed, and so, if you do not mind, I will not answer that. But let me make a general observation about world fisheries management as a whole. I believe that once we solve the problem of management systems, the next problem is you have to have proper management in all of the areas under national jurisdiction. And in this respect I believe one of the greatest single problems globally is oversubsidization of the fishing industry in general. The figures are hard to get, but some of the World Bank figures suggest we are subsidizing worldwide to the tune of about \$20 billion. So when stocks are declining dramatically and we are spending taxpayer funds around the world of approximately \$20 billion to subsidize, I suggest that is really one of the major problems here.

The CHAIRMAN. Admiral Schachte.

Admiral SCHACHTE. Thank you very much, Mr. Chairman. I cannot add much. I definitely agree with Admiral Prueher's observations. Just going through the articles pertaining to living resources myself, I must acknowledge that, interestingly, we have a recognized expert on this matter here in the hearing room today, Mr. Tucker Scully, who spent a lot of time in the State Department effectively managing these very difficult issues.

But the convention provides the framework under which these various programs can work. And a government such as ours—in a country as large as ours, and our government with our diverse interests and areas, we are often schizophrenic on matters because there is a pull of different interests. But I think that the convention clearly provides the framework for effective resource management and this is critically important.

Again back to the leadership role, oftentimes an international treaty will either provide a floor or a ceiling on an issue. Here I think it will provide a ceiling so we can contain and resolve this serious problem.

The CHAIRMAN. Let me ask if there are other considerations that any of you have thought of at this stage that you would like to proceed with? Yes, sir.

Mr. MOORE. Mr. Chairman, you might find it of interest. I was just handed from a good friend of mine who was formerly the legal counsel to the Senate Foreign Relations Committee from 1979 to 1984, Mr. Fred Tipson, his answer to this problem of where did the opposition come from. It is a very interesting answer. His answer was that the major reason for U.S. failure to ratify was the classic

free rider problem in economic theory, perceptions that the U.S. could get all the benefits of the treaty without the need to move forward to ratification.

I think there is a lot of truth in that as part of the lingering misperception problem. Let me just say that I think, as this panel has unanimously indicated, we did not get all the benefits without ratification. There are huge costs that we are paying by not moving forward.

The CHAIRMAN. Well, that is a very helpful addition. We thank all who are participating in the hearing, giving some additional thoughts.

We will have another hearing in a week, in which members of the administration will be speaking for our government, and we look forward to that testimony. I appreciate very, very much your coming this morning. Your prepared statements, as well as the additional responses to questions, I think have been very helpful as members of the committee and our staffs study what you have said and, more importantly, as the general public has the benefit of that record.

It is my hope, as I mentioned in the opening statement, after our second hearing to proceed to try to draft the proper advice and consent resolution, with consultation with other colleagues, including as we mentioned Senator Stevens and Senator McCain. There may be others. Likewise, we may have need to come back to you for final considerations as we take a look at it.

My thought with regard to the timetable of action early next year comes from the fact that I believe the Senate will adjourn at some point. At least I am advised that that is the intent of the majority leader. If that should be erroneous and we simply continue on, well, then that would perhaps change our committee schedule, too. In any event, your commission report will probably be delivered to us during that period of time, Admiral Watkins, and we will benefit from that. Likewise, other additional materials that any of you have as experts and veterans in this field would be much appreciated.

Having said that, the hearing is adjourned.

[Whereupon, at 11:10 a.m., the committee adjourned, to reconvene at 9:30 a.m., October 21, 2003.]





## THE U.N. CONVENTION ON THE LAW OF THE SEA (TREATY DOC. 103-39)

TUESDAY, OCTOBER 21, 2003

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

The committee met at 9:33 a.m., in room SH-216, Hart Senate Office Bldg., Hon. Richard G. Lugar (chairman of the committee), presiding.

Present: Senator Lugar.

The CHAIRMAN. This hearing of the Senate Foreign Relations Committee is called to order.

Today the committee meets to continue its consideration of the U.N. Convention on the Law of the Sea. Last Tuesday, the committee heard testimony on the convention from a distinguished panel of experts, including the Chairman of the U.S. Commission on Oceans Policy, a former Commander-in-Chief of U.S. forces in the Pacific, and two former negotiators of the Convention. They made several important observations about the convention.

First, they noted that the convention holds important benefits for United States national security. Freedom of navigation and overflight across the world's oceans is of paramount importance to our military's ability to protect United States security interests worldwide. The convention provides extensive legal protections for navigation and overflight rights that the United States worked hard to achieve during negotiation of the convention. The panel observed that these protections will strengthen the ability of the United States to respond to excessive territorial claims by other countries and to ensure that key sea and air lanes remain open to the United States as a matter of legal right.

Second, they noted that the treaty offers important economic benefits for the United States. The Convention enshrines our ability to explore and to exploit the natural resources of the ocean out to 200 miles from our shore. These include large reserves of oil and gas, as well as fisheries resources. The Convention also protects our ability to develop the resources of the broad continental margin of the United States beyond 200 miles, an area comprising an estimated 370,000 square miles. We heard that the legal certainty provided by the Convention with respect to control of these resources is important to the willingness of industry to make the investments necessary to develop them.

Third, our panel of experts underscored the Convention's importance for the protection of the marine environment. The Convention has been described as "the strongest comprehensive environ-

mental treaty now in existence.” It addresses pollution from a variety of sources, including land-based pollution, ocean dumping, vessel and atmospheric pollution, and pollution from offshore activities. Its provisions have provided the framework for a number of subsequent agreements, including the 1995 U.N. Fish Stocks Agreement, to which the United States became party in 1996 with the help of Senator Stevens’ leadership.

Fourth, our panel emphasized that ratifying the Law of the Sea Convention is important to the ability of the United States to exercise influence over oceans issues. By staying outside the treaty, we forfeit our membership in institutions that will make decisions about the future of the oceans, and we increase the risk that such decisions will be contrary to our interests. Next year the treaty will be open for amendment, creating the possibility that other nations may seek to roll back the protections our negotiators worked so hard to win.

These are compelling arguments in favor of ratifying the convention, and I believe that the Senate should move swiftly to do so. Today’s hearing is the next step in this process.

We are pleased to be joined by two distinguished panels representing the U.S. Government and the private sector.

On our first panel, we will hear from representatives of the Bush administration. We have been in touch with the leadership of the National Security Council, and we have been advised the President has expressed his support for this Convention. We welcome five officials to discuss it. With us this morning are Mr. John F. Turner, the State Department’s Assistant Secretary for Oceans and International Environmental and Scientific Affairs; Mr. William H. Taft, IV, the Legal Adviser for the State Department; Mr. Mark T. Esper, the Defense Department’s Deputy Assistant Secretary for Negotiations Policy; Admiral Michael G. Mullen, Vice Chief of Naval Operations for the United States Navy; and Admiral John E. Crowley, Chief Counsel and Judge Advocate General for the United States Coast Guard.

On our second panel, we will hear from Mr. Paul L. Kelly, senior vice president of Rowan Companies, Inc., who represents the American Petroleum Institute, the International Association of Drilling Contractors, and the National Ocean Industries Association; Admiral Roger T. Rufe, Jr., president and CEO of the Ocean Conservancy; Ms. Randi Thomas, national representative of the U.S. Tuna Foundation; and finally, we will hear from Mr. Joseph J. Cox, president of the Chamber of Shipping America.

[The opening statement of Senator Lugar follows:]

#### OPENING STATEMENT OF SENATOR RICHARD G. LUGAR

Today the Committee meets to continue its consideration of the UN Convention on the Law of the Sea. Last Tuesday, the Committee heard testimony on the Convention from a distinguished panel of experts, including the Chairman of the U.S. Commission on Oceans Policy, a former Commander-in-Chief of U.S. Forces in the Pacific, and two former negotiators of the Convention. They made several important observations about the Convention.

First, they noted that the Convention holds important benefits for U.S. national security. Freedom of navigation and overflight across the world’s oceans is of paramount importance to our military’s ability to protect U.S. security interests worldwide. The Convention provides extensive legal protections for navigation and overflight rights that the United States worked hard to achieve during negotiation of

the Convention. The panel observed that these protections will strengthen the ability of the United States to respond to excessive territorial claims by other countries and to ensure that key sea and air lanes remain open to the United States as a matter of legal right.

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These are compelling arguments in favor of ratifying the Convention, and I believe that the Senate should move swiftly to do so. Today's hearing is the next step in this process. We are pleased to be joined by two distinguished panels representing the U.S. government and the private sector.

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We welcome all of our distinguished witnesses and look forward to their insights on this treaty.

## PANEL I

The CHAIRMAN. We welcome all of our distinguished witnesses and look forward to their insights on this treaty. I will now call upon the first panel to testify in this order. First of all, Mr. Turner, then Mr. Taft, Mr. Esper, Admiral Mullen, and Admiral Crowley. Mr. Turner.

**STATEMENT OF HON. JOHN F. TURNER, ASSISTANT SECRETARY, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, DEPARTMENT OF STATE, WASHINGTON, DC**

Mr. TURNER. Mr. Chairman, good morning. I certainly appreciate this opportunity to appear with my colleagues from the administration to testify on the U.N. Convention on the Law of the Sea and the agreement on implementation.

Mr. Chairman, this administration has concluded that there are many important reasons for the United States to become a party to this convention and we strongly endorse the Senate proceeding with its advice and consent as soon as possible.

As the world's leading maritime power with the longest coastline and the largest exclusive economic zone in the world, the U.S. benefits more than any other nation from this convention. It enhances U.S. objectives as a major maritime power with worldwide interests in military and commercial navigation, in communications, in protection of the marine environment, and in furthering marine scientific research. The convention provisions on navigation and overflight, as well as the balance reflected in its jurisdictional articles, preserve the right of the United States military to use the world's oceans to meet national security requirements and of commercial vessels to carry seagoing cargoes. The rule of law as embodied in the convention underpins U.S. leadership and security.

The convention recognizes the coastal State's sovereign rights over the exploration and development of mineral resources, including oil and gas, found in the seabed and the subsoil of the shelf. It lays down specific criteria and procedures for determining the outer limits of the shelf. It also protects freedom to lay submarine cables and pipelines.

The convention promotes the resource and environmental interests of the United States as a coastal State, including strong obligations to conserve and manage living marine resources and to protect the marine environment from all sources of pollution, combined with broad and exclusive jurisdiction over living and non-living resources off our coasts. The convention's provisions on fisheries are entirely consistent with U.S. domestic fisheries laws, as well as our international fisheries agreements and understandings.

The convention's regime of access for marine scientific research will support the U.S. role as a leader in efforts to understand our oceans, including their role in global processes.

As to actual costs of being a party to the convention, our annual contribution to the convention's institutions would be about \$3 million, in our view a bargain.

As of today, Mr. Chairman, 143 parties, including most of our major allies, have joined the convention. It is time for us to take this unique opportunity to demonstrate U.S. leadership and credibility on oceans issues by becoming a party to the reformed Law of the Sea.

Mr. Chairman, the United States obviously has basic and enduring national interests in our oceans. Pursuit of our oceans objectives requires careful and often difficult balancing of those interests. As a coastal nation, for example, we naturally are concerned about control over the waters off our shores. Just as often, as a

major maritime power, we worry about efforts on the part of others to limit freedom of navigation.

Moreover, traditional perceptions of the inexhaustibility of marine resources and the capacity of the oceans to neutralize wastes have changed, as marine species have been progressively depleted by harvesting and their habitats damaged or threatened by pollution and a variety of human activities. Maintaining the productive capacity of the oceans while seeking to meet the economic aspirations of growing populations requires difficult choices.

Striking these balances must also be viewed in the international context. Living resources, of course, migrate across the jurisdictional lines that human beings draw on maps. Marine ecosystems and ocean currents transport pollutants and otherwise affect the environmental interests extending across maritime boundaries. National security and commercial interests are also international in scope. Achievement of ocean policy objectives thus requires international cooperation.

The United States has consistently taken the view that these interests are best protected through a widely accepted international framework governing uses of the sea. Since the late 1960s, each U.S. administration has recognized this goal as the cornerstone of United States oceans policy. 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.

It is time for the United States to become a party to the convention because of the substantive benefits to the United States; because U.S. adherence will promote the stability of the legal regime for oceans; and because U.S. accession will demonstrate to the international community that when it modifies a regime to address our concerns, we will join that regime.

Becoming a party to the convention represents the highest priority of this administration and also the United States international oceans policy, I believe, which also is a bipartisan priority. And to this end, we urge rapid and favorable action on these treaties by the U.S. Senate.

I am now pleased to yield to my colleague from the State Department, Will Taft, Chief Counsel for Secretary Powell, who can provide you with input on some of the specific provisions of the convention and the agreement. Thank you, Mr. Chairman.

[The prepared statement of Mr. Turner follows:]

PREPARED STATEMENT OF HON. JOHN F. TURNER, ASSISTANT SECRETARY OF STATE,  
BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS,  
DEPARTMENT OF STATE

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").

# I.

## Overview

This Administration has concluded that there are important reasons for the United States to become a party to this Convention and to do so now.

For many years, the United States has been seeking to assert its oceans interests as a non-party to the Convention. While we have had considerable success in doing so, our efforts will be enhanced by becoming a party. The Convention, as amended by the 1994 Agreement, offers an accepted and acceptable international framework within which to pursue and secure our oceans interests with greater certainty and with fewer political and economic disadvantages than we could otherwise achieve.

The reformed Convention applies stable and predictable rules to the uses of the oceans. It does not answer every question, but it provides the only generally accepted framework for resolving new oceans issues as they arise. By becoming party to the Convention, the United States will thus maximize its influence over the outcome of these wide-ranging issues.

As the world's leading maritime power, with the longest coastline and the largest exclusive economic zone in the world, the United States will benefit more than many other nations from the provisions of the Convention. The Convention enhances U.S. objectives as a major maritime power with worldwide interests. Its provisions on navigation and overflight, as well as the balance reflected in its jurisdictional articles, preserve 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. The rule of law as embodied in the Convention underpins U.S. leadership and security.

The Convention promotes the resource and environmental interests of the United States as a coastal State, including strong obligations to conserve and manage living marine resources and to protect the marine environment from all sources of pollution, combined with broad and exclusive jurisdiction over living and non-living resources off our coasts. The Convention's provisions on fisheries are entirely consistent with U.S. domestic fisheries laws and well as our international fisheries agreements and understandings.

In fact, the most innovative international fisheries agreements developed in the last decade have as their basis the Convention's statements of the obligations of each party to conserve and manage living marine resources in their own EEZs and on the high seas. The United Nations Fish Stocks Agreement, the FAO Compliance Agreement, the new convention on highly migratory species in the Western and Central Pacific, and recent bilateral agreements we have negotiated are elaborations on these obligations. Effective implementation of these forward-leaning agreements can bring about an end to rampant overfishing in the years to come. Becoming a party to the Convention will only strengthen our hand in addressing this serious issue.

The Convention's regime of access for marine scientific research will support the U.S. role as a leader in efforts to understand the oceans, including their role in global processes. Such research is critical for addressing problems associated with the use and protection of the marine environment.

Through its dispute settlement provisions, the Convention provides peaceful and effective mechanisms to ensure compliance by Parties with the Convention, thereby restraining unreasonable claims and interpretations and contributing to a stable international order.

As to actual costs of being a party, our annual contributions to the Convention's institutions would be about three million dollars, paid to the Law of the Sea Tribunal and the International Seabed Authority from the State Department's Contributions to International Organizations account. In our view, this is a bargain.

In spite of its manifest benefits to the United States, we said in 1982, when the Convention was adopted, that we could not become a party unless its seabed mining system were reformed. Through the 1994 Agreement, we have achieved the reform of this system that we sought. As of today, 143 parties, including most of our major allies, have joined the Convention. It is time for us to take this opportunity to demonstrate U.S. leadership on oceans issues by becoming a party to the Law of the Sea Convention.

## II.

### *U.S. Interests in the Oceans*

The United States has basic and enduring national interests in the oceans. As the world's preeminent naval power, the United States has strong national security interests in the ability to freely and rapidly navigate and overfly the oceans. These are essential preconditions for projecting military power that must be able to react rapidly to emerging threats.

Ensuring the free and secure flow of commercial navigation is likewise a basic concern for the United States as a major trading power, whose economic growth and employment are inextricably linked with a robust and growing export sector.

At the same time, the United States, with the longest coastlines, the largest exclusive economic zone, and one of the largest continental shelves of any nation in the world, has basic resource and environmental interests in the oceans. Inshore and coastal waters generate vital economic activities—fisheries, offshore mineral development, ports and transportation facilities, and, increasingly, recreation and tourism. The health and well-being of coastal populations—and the majority of Americans do live in coastal areas—are intimately linked to the quality of the coastal marine environment.

Understanding the oceans is one of the frontiers of human scientific inquiry. The United States is a leader in the conduct of marine scientific research and ocean observation. Further, marine data collection is essential for understanding and addressing problems associated with the use and protection of the marine environment, including marine pollution, conservation of fish and other marine living species, and forecasting of weather and climate variability.

Pursuit of our oceans objectives requires careful and often difficult balancing of interests. As a coastal nation, for example, we naturally are concerned about control over the waters off our shores. Just as often, as a major maritime power, we worry about efforts on the part of others to limit freedom of navigation.

Moreover, traditional perceptions of the inexhaustibility of marine resources and of the capacity of the oceans to neutralize wastes have changed, as marine species have been progressively depleted by harvesting and their habitats damaged or threatened by pollution and a variety of human activities. Maintaining the health and productive capacity of the oceans while seeking to meet the economic aspirations of growing populations also requires difficult choices.

Striking these balances must also be viewed in the international context. Living resources migrate across the jurisdictional lines that human beings draw on a map. Marine ecosystems and ocean currents transport pollutants and otherwise affect environmental interests extending across maritime boundaries and jurisdictional limits. National security and commercial interests are also international in scope. Achievement of ocean policy objectives thus requires international cooperation at the bilateral, regional, and global levels.

The United States 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. Since the late 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be generally respected. Each succeeding U.S. Administration has recognized this goal as the cornerstone of U.S. oceans policy. 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.

Notwithstanding the numerous beneficial provisions of the Convention, the United States decided not to sign the Convention in 1982 because of flaws in the deep seabed mining regime. As Mr. Taft will discuss, the 1994 Agreement before you overcomes these flaws and meets the objections the United States and other industrialized countries have expressed. It is time for the United States to become a party to the Convention, because of the substantive benefits to the United States; because U.S. adherence will promote the stability of the legal regime for the oceans, which is vital to U.S. national security; and because U.S. accession will demonstrate to the international community that, when it modifies a regime to address our concerns, we will join that regime.

Let me note in closing that the U.S. Commission on Oceans Policy—a Commission that Congress established to make recommendations for a coordinated and comprehensive national ocean policy—has unanimously recommended that the United States immediately accede to UNCLOS. As the Commission's resolution says: "Time is of the essence if the United States is to maintain its leadership role in ocean and coastal activities. Critical national interests are at stake and the United States can only be a full participant in upcoming Convention activities if the country proceeds with accession expeditiously." Becoming a party to the Convention, as modified by the 1994 Agreement, represents the highest priority of United States international oceans policy—a bipartisan priority—and to this end I urge rapid and favorable action on these treaties by the Senate.

I will of course be happy to answer any questions you might have, but at this time I would ask my colleague, Legal Adviser Will Taft, to provide you with a detailed description of the Convention and the Agreement. He will also note some of the legal issues arising from U.S. accession to the Convention and Agreement.

Thank you very much.

The CHAIRMAN. Well, we thank you for your testimony, Secretary Turner, and we look forward to Secretary Taft.

Let me mention that the full statements you prepared for the hearing will all be made a part of the record, and you need not ask for permission. It is granted. And you may proceed to either summarize them or present the full statements. We have not imposed arbitrary time limits because we really want to hear from you and to gain the insights that you have today. Thank you again, Secretary Turner. It is a pleasure, as always, to have you Secretary Taft.

**STATEMENT OF HON. WILLIAM H. TAFT, IV, LEGAL ADVISER,  
DEPARTMENT OF STATE, WASHINGTON, DC**

Mr. TAFT. Thank you, Mr. Chairman. It is a pleasure for me to appear before the committee and to join with Secretary Turner in representing the State Department and the administration. Secretary Turner has given you an overview of the important reasons for the United States to become a party and I will provide some additional detail on the convention and the 1994 agreement. I do have a longer statement which I appreciate your putting in the record, and I will try to summarize it here.

The CHAIRMAN. Thank you.

Mr. TAFT. The Law of the Sea Convention establishes international consensus on the extent of jurisdiction that States may exercise off their coasts and allocates rights and duties among States in all marine areas. It provides for a territorial sea of a maximum breadth of 12 nautical miles and a contiguous zone of up to 24 nautical miles from coastal baselines. It also gives the coastal State sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources, whether living or non-living, in an exclusive economic zone, which we naturally in government have called now the EEZ, that may extend to 200 nautical miles from the coast. In addition, the convention accords the coastal State sovereign rights over the Continental Shelf both within and beyond the EEZ to the extent of the geological margin.

The convention specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal State jurisdiction and on the high seas beyond. It guarantees passage for all ships and aircraft through, under, and over straits used for international navigation and archipelagos. It guarantees the high seas freedoms of navigation, overflight, and the laying and maintenance of submarine cables and pipelines consistent with the other provisions of the convention.

The convention imposes on coastal States a duty to conserve living marine resources in their EEZ's and also imposes obligations on all States to cooperate in the conservation of fisheries populations on the high seas and of so-called straddling stocks.

With respect to nonliving natural resources, the convention recognizes the coastal State's sovereign rights over the exploration and development of mineral resources, including oil and gas, which are found in the seabed and the subsoil of the continental shelf. It lays down specific criteria and procedures for determining the outer limit of the shelf. In the Arctic, our shelf could run as far as 600 miles to the north of our coast.



For the nonliving resources of the seabed beyond the limits of national jurisdiction, the convention establishes an international regime to govern exploration and exploitation. It defines the general conditions for access to deep seabed minerals and establishes an international organization, which is the International Seabed Authority, to oversee such development. The 1982 convention's provisions on deep seabed mining, as will be discussed shortly, have been fundamentally amended by the 1994 agreement. The United States did a lot of work to get that done.

The convention sets forth a comprehensive legal framework and basic obligations for protecting marine environment from all sources of pollution. This framework also allocates regulatory and enforcement competence to balance the interests of coastal States in protection of the marine environment and its natural resources with the rights and freedoms of navigation of all States.

The convention establishes a dispute settlement system to promote compliance with its provisions through the peaceful settlement of disputes. These procedures are flexible, providing options as to the appropriate means and forums for resolution of disputes. They are also comprehensive in subjecting the bulk of the convention's provisions to enforcement through mechanisms that are binding under international law. Importantly, the system also provides parties with means of excluding matters of vital national concern from the dispute settlement mechanisms. A State is able to choose one or more means for the settlement of disputes under the convention, and the administration recommends that the United States elect arbitration under Annex VII and special arbitration under Annex VIII of the convention as its means where appropriate.

Subject to limited exceptions, the convention excludes from dispute settlement mechanisms any disputes relating to the sovereign rights of coastal States with respect to the living resources in their EEZ's, the fish principally. It also permits a State to opt out of dispute settlement procedures with respect to one or more categories of disputes. The administration recommends that the United States elect to exclude all three of these categories that you can opt out of from dispute settlement mechanisms.

I would like to discuss a particularly important issue that arises with respect to the category of disputes concerning military activities. This exception has long been of particular importance to the United States. The U.S. negotiators sought and achieved language reflecting a very broad exception and we have consistently viewed this exception as a key element of the dispute settlement package, carefully balancing comprehensiveness with the need to protect our vital national interests.

Over the past year, we reexamined these provisions to ensure that they continue to meet U.S. national security needs. We considered whether the United States declaration on dispute settlement should highlight this exception, given its importance and the possibility, however remote it might be, that another State might seek dispute settlement concerning a U.S. military activity, notwithstanding our declaration that would except such disputes from dispute settlement. We have concluded that each State party has the exclusive right, including of course the United States, to determine which of its activities are military and that such determination is

not subject to review, and we recommend that the U.S. declaration invoking this exception should state our understanding of its operation.

As I noted earlier, the United States decided not to sign the convention in 1982 because of serious defects in the regime it would have established for managing the development of seabed mineral resources beyond national deep seabed mining. While the other parts of the convention were judged to advance basic U.S. oceans policy interests, the United States and other industrialized countries felt the part XI regime needed reform before they would consider becoming party to the convention.

As a result of international political and economic changes of the late 1980s and early 1990s, other countries recognized that the collectivist approach of part XI required basic change. Informal negotiations were launched in 1990 during the first Bush administration, and an agreement was adopted in July 1994. That agreement, signed by the United States that same year, contains legally binding changes to part XI. It is to be applied and interpreted together with the convention as a single instrument.

These changes overcome each one of the U.S. objections to the original part XI and meet our goal of guaranteed access by the U.S. industry to deep seabed minerals under reasonable terms and conditions. All other major industrialized nations have now signed the agreement and most have become party to the convention and the agreement as a package. As of today, 115 States and the European Community have consented to be bound by the 1994 agreement.

I would like to close my testimony just by outlining some of the distinct advantages of joining the convention over maintaining the status quo situation. You have mentioned some of these this morning yourself, Mr. Chairman, and I know they were well described by Admiral Watkins and some of the other witnesses that you had last week, but I think it is worth repeating on behalf of the administration.

U.S. accession would substantially enhance the authoritative force of the convention, likely inspire other States to join, and promote its provisions as the governing rules of international law relating to the oceans.

The United States would be in a much stronger position invoking a treaty's provisions to which it is a party, for instance in a bilateral disagreement where the other country does not understand or accept them.

While we have been able to rely on diplomatic and operational challenges to resist excessive maritime claims, it would be more desirable to establish universal norms of behavior and have available additional methods of resolving conflicts.

The convention continues to be implemented in various forums, both within and outside the convention. The United States as a party would be in a stronger position defending its military interests and other interests in these forums if it were to join.

Becoming a party to the convention would permit the United States also to nominate members for election to both the Law of the Sea Tribunal and the continental shelf Commission. Having U.S. members on those bodies would help ensure that the conven-

tion is being interpreted and applied in a manner that is consistent with U.S. interests.

And finally, becoming a party to the convention would strengthen our ability to deflect potential proposals that would be inconsistent with U.S. interests, including especially with our interests in freedom of navigation.

Beyond these affirmative reasons for joining the convention, there are down-side risks if we further delay U.S. accession. U.S. mobility and access have been preserved over the past 20 years in the oceans largely due to the convention's stable, widely accepted legal framework, but it would be risky to assume that it is possible to preserve *ad infinitum* the stable situation that the United States currently enjoys on the basis just of customary international law. Customary international law can be changed by the practice of States over time and therefore does not offer the future stability that comes with being a party to the convention.

I think, Mr. Chairman, that Jack McNeil who was the Assistant General Counsel of the Pentagon some years ago—and I worked with him there—put it well in his testimony to the committee some years ago when he said that basically what conduct that may be a violation, you are in a much stronger position condemning that conduct than waiting and seeing it actually turn into State practice over time, and we do not be in that position.

Because the global context for the convention is continually changing, we need to ensure that it continues to serve U.S. interests over time. After accession, we will conduct biennial reviews of implementation and we will identify any changes that may be required. After 10 years, the executive branch proposes to conduct a more comprehensive evaluation of the operation of the convention, and we would intend that the results of these reviews, the biennial ones and the decennial one, be shared with the Senate.

In addition, I would like to note that the convention includes simplified procedures for the adoption and entry into force of certain convention amendments and implementation and enforcement measures that do raise potential constitutional issues. We intend to sort these and other legal and policy issues out with our colleagues in the administration, particularly in the Department of Justice, and also with this committee, and we are confident that they can be satisfactorily resolved.

Mr. Chairman, becoming a party to the convention represents a highest priority of the United States international oceans policy, a bipartisan priority, and to this end, we recommend that the Senate give its advice and consent to accession to the convention and to the ratification of the 1994 agreement. Thank you, Mr. Chairman.  
[The prepared statement of Mr. Taft follows:]

PREPARED STATEMENT OF HON. WILLIAM H. TAFT, IV, LEGAL ADVISER,  
DEPARTMENT OF STATE

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"). My colleague, Assistant Secretary John Turner, has given you an overview of the important reasons for the United States to become a party to this Convention. Please allow me to provide additional detail on the Convention and the Agreement.

*The Convention*

The Convention sets forth a comprehensive framework governing uses of the oceans. It was adopted by the Third United Nations Conference on the Law of the Sea, which met between 1973 and 1982 to adopt a treaty regulating all matters relating to the law of the sea.

The Convention establishes international consensus on the extent of jurisdiction that States may exercise off their coasts and allocates rights and duties among States in all marine areas. It provides for a territorial sea of a maximum breadth of 12 nautical miles, within which the coastal State may generally exercise plenary authority as a function of its sovereignty. The Convention also establishes a contiguous zone of up to 24 nautical miles from coastal baselines, in which the coastal State may exercise limited control necessary to prevent or punish infringements of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea. It also gives the coastal State sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources, whether living (e.g., fisheries) or non-living (e.g., oil and gas), in an exclusive economic zone (EEZ) that may extend to 200 nautical miles from the coast. In addition, the Convention accords the coastal State sovereign rights over the continental shelf both within and beyond the EEZ where the geological margin so extends.

The Convention carefully balances the interests of States in controlling activities off their own coasts with those of all States in protecting the freedom to use ocean spaces without undue interference. It specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal State jurisdiction and on the high seas beyond. It protects the right of passage for all ships and aircraft through, under, and over straits used for international navigation and archipelagos. It protects the high seas freedoms of navigation, overflight, and the laying and maintenance of submarine cables and pipelines, as well as other internationally lawful uses of the sea related to those freedoms, consistent with the other provisions of the Convention.

In recognizing the sovereign rights and management authority of coastal States over living resources within their EEZs, the Convention brings most fisheries under the jurisdiction of coastal States. (Some 90 percent of living marine resources are harvested within 200 nautical miles of the coast.) The Convention imposes on coastal States a duty to conserve these resources and also imposes obligations upon all States to cooperate in the conservation of fisheries populations on the high seas and of populations that are found both on the high seas and within the EEZ (highly migratory stocks, such as tuna, as well as "straddling stocks"). In addition, it contains specific measures for the conservation of anadromous species, such as salmon, and for marine mammals, such as whales. These provisions of the Convention give the United States the right to regulate fisheries in the largest EEZ in the world, an area significantly greater than U.S. land territory, which contains some of the most resource-rich waters on the planet.

With respect to non-living natural resources, the Convention recognizes the coastal State's sovereign rights over the exploration and development of mineral resources, including oil and gas, found in the seabed and subsoil of the continental shelf, out to 200 nautical miles and beyond, to the outer edge of the geological continental margin. It lays down specific criteria and procedures for determining the outer limit of the margin. The United States has large areas of continental shelf seaward of 200 nautical miles in the Atlantic Ocean, the Gulf of Mexico, and the Arctic Ocean north of Alaska. In the Arctic, our shelf could run as far as 600 miles to the north.

For the non-living resources of the seabed beyond the limits of national jurisdiction (i.e., beyond the EEZ or continental margin, whichever is farther seaward), the Convention establishes an international regime to govern exploration and exploitation of such resources. It defines the general conditions for access to deep seabed minerals by commercial entities and provides for the establishment of an international organization, the International Seabed Authority, to oversee such development. The 1982 Convention's provisions on deep seabed mining, as will be discussed shortly, have been fundamentally amended by the 1994 Agreement.

The Convention sets forth a comprehensive legal framework and basic obligations for protecting the marine environment from all sources of pollution: from vessels, from dumping, from seabed activities, and from land-based activities. This framework also allocates regulatory and enforcement competence to balance the interests of coastal States in protection of the marine environment and its natural resources with the rights and freedoms of navigation.

The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. It confirms the right of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable and reasonable fashion to promote maximum access for research activities. More U.S. scientists conduct marine scientific research in foreign waters than scientists from almost all other countries combined.

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, providing options as to the appropriate means and forums for resolution of disputes. They are also comprehensive, in subjecting the bulk of the Convention's provisions to enforcement through mechanisms that are binding under international law. Importantly, the system also provides Parties with means of excluding matters of vital national concern from the dispute settlement mechanisms (e.g., disputes concerning maritime boundaries, military activities, and EEZ fisheries management). A State is able to choose, by written declaration, one or more means for the settlement of disputes under the Convention. The Administration recommends that the United States elect arbitration under Annex VII and special arbitration under Annex VIII.

Subject to limited exceptions, the Convention excludes from dispute settlement mechanisms disputes relating to the sovereign rights of coastal States with respect to the living resources in their EEZs. In addition, the Convention permits a State, through a declaration, to opt out of dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the United Nations Security Council is exercising the functions assigned to it by the Charter of the United Nations. The Administration recommends that the United States elect to exclude all three of these categories of disputes from dispute settlement mechanisms.

I would like to discuss a particularly important issue that arises with respect to the category of disputes concerning military activities. The military activities exception has long been of importance to the United States. The U.S. negotiators of the Convention sought and achieved language reflecting a very broad exception, successfully defeating attempts by certain other countries to narrow its scope. The U.S. has consistently viewed this exception as a key element of the dispute settlement package, which carefully balances comprehensiveness with protection of vital national interests.

Over the past year, the Administration reexamined the Convention's dispute settlement provisions to ensure that they continue to meet U.S. national security needs. Now, more than ever, it is critical that U.S. military activities, such as military surveys and reconnaissance flights over EEZs, are not inappropriately subject to international dispute resolution procedures, which could have a major impact on our military operations and national security interests.

As part of our review of this serious issue, we considered whether the U.S. declaration on dispute settlement should in some way particularly highlight the military activities exception, given both its importance and the possibility, however remote, that another State Party might seek dispute settlement concerning a U.S. military activity notwithstanding our declaration invoking the exception. We have concluded that each State Party has the right to determine whether its activities are military activities and that such determination is not reviewable. We also concluded that it was very important to highlight our understanding of the operation of this exception. As such, the Administration recommends that the U.S. declare that its consent to accession to the Convention is conditioned upon the understanding that each Party has the exclusive right to determine which of its activities are "military activities" and that such determination is not subject to review. We will provide the Committee with language for the dispute settlement declaration.

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 past thirty years. As I noted before, the United States decided not to sign the Convention upon its adoption in 1982 because of serious defects in the regime it would have established for managing the development of seabed mineral resources beyond national jurisdiction. While the other parts of the Convention were judged to advance basic U.S. ocean policy interests, the United States and other industrialized countries determined the deep sea-

bed regime of Part XI to be inadequate and in need of reform before they would ever consider becoming party to the Convention.

#### *The 1994 Agreement*

As a result of the important international political and economic changes of the late 1980s and early 1990s—including the end of the Cold War and growing reliance on free market principles—widespread recognition emerged, not limited to industrialized nations, that the collectivist approach of the seabed mining regime of the Convention required basic change. Thus, informal negotiations were launched in 1990 during the first Bush Administration, under the auspices of the United Nations Secretary-General. An agreement was adopted in July 1994.

The Agreement, signed by the United States on July 28, 1994, contains legally binding changes to that part of the LOS Convention dealing with mining of the deep seabed beyond the limits of national jurisdiction (Part XI). It is to be applied and interpreted together with the Convention as a single instrument.

The legally binding changes set forth in the 1994 Agreement overcome each one of the objections of the United States to Part XI of the Convention and meet our goal of guaranteed access by the U.S. industry to deep seabed minerals on the basis of reasonable terms and conditions. All other major industrialized nations have now signed the Agreement and most have become party to the Convention and the Agreement as a package.

The Agreement overhauls the decision-making procedures of Part XI to accord the United States, and others with major economic interests at stake, decisive influence over future decisions on possible deep seabed mining. The Agreement guarantees a seat for the United States on the critical decision-making body and requires financial decisions to be based on a consensus of major contributors.

The Agreement restructures the deep seabed mining regime along free market principles. It scales back the structure of the organization to administer the mining regime and links the activation and operation of institutions to the actual development of concrete interest in seabed mining. A future decision, which the United States and a few of its allies could block, is required before the organization's potential operating arm (the Enterprise) may be activated, and any activities on its part are subject to the same Convention requirements as other commercial enterprises. States have no obligation to finance the Enterprise, and subsidies inconsistent with GATT/WTO are prohibited. Equally important, the Agreement eliminates all requirements for mandatory transfer of technology and production controls that were contained in the original version of Part XI.

The Agreement provides for grandfathering the seabed mine site claims established on the basis of the exploration work already conducted by companies holding U.S. licenses on the basis of arrangements "similar to and no less favorable than" the best terms granted to previous claimants. It also strengthens the provisions requiring consideration of the potential environmental impacts of deep seabed mining.

The Agreement entered into force on November 16, 1998.

#### *Status of the Convention and the Agreement*

One hundred and fifty-two States signed the Convention during the two years it was open for signature between 1982 and 1984. The Convention entered into force on November 16, 1994, one year after the sixtieth nation consented to be bound by it. As of today, there are 143 Parties to the Convention, including virtually all of our NATO and OECD allies, as well as Russia and China.

The 1994 Agreement was concluded on July 28, 1994, and was signed by 99 nations, including the United States. As of today, 115 States and the European Community have consented to be bound by the Agreement.

## II.

I would like now to address some perceived disadvantages of U.S. adherence to the Convention.

First, it might be argued that the United States should not join the Convention because, as a party, we would be required to make financial contributions to run the Convention's institutions. However, payments to the Convention's institutions are modest. For the 2003-2004 biennial budget, the U.S. assessment for the International Seabed Authority would be a little over \$1 million. The U.S. assessment for the International Tribunal for the Law of the Sea for 2004 would be a little less than \$2 million (24% of the total budget) and 22% of the total for the 2005-2006 budget years. We do not anticipate the budget for either institution to increase substantially in later years.

Second, some would argue that we should not be joining and participating in a new bureaucracy for deep seabed mining. The International Seabed Authority has,

however, now been restructured in ways that meet the objections raised by the United States and others. The United States has a guaranteed seat on the 36-member Council, an effective veto (in combination with two other consumer States) in the Council, and an absolute veto in the Finance Committee with respect to any decision with financial or budgetary implications. Moreover, as a practical matter, U.S.-based companies will not be able to engage in mining the deep seabed, without operating through another State Party, unless we are party to the Convention.

Third, it might be argued that the United States should not join the Convention because we would have to pay a contribution based on a percentage of oil/gas production beyond 200 miles from shore. However, the revenue-sharing provisions of the Convention are reasonable. The United States has one of the broadest shelves in the world. Roughly 14% of our shelf is beyond 200 miles, and off Alaska it extends north to 600 miles. The revenue-sharing provision was instrumental in achieving guaranteed U.S. rights to these large areas. It is important to note that this revenue-sharing obligation does not apply to areas within 200 nautical miles and thus does not affect current revenues produced from the U.S. Outer Continental Shelf. Most important, this provision was developed by the United States in close cooperation with representatives of the U.S. oil and gas industry. The industry supports this provision. Finally, with a guaranteed seat on the Finance Committee of the International Seabed Authority, we would have an absolute veto over the distribution of all revenues generated from this revenue-sharing provision.

Finally, as to whether it is sufficient to continue to rely only on customary international law, the distinct advantages of joining the Convention include the following:

- U.S. accession would enhance the authoritative force of the Convention, likely inspire other States to join, and promote its provisions as the governing rules of international law relating to the oceans.
- The United States would be in a stronger position invoking a treaty's provisions to which it is party, for instance in a bilateral disagreement where the other country does not understand or accept them.
- While we have been able to rely on diplomatic and operational challenges to excessive maritime claims, it is desirable to establish additional methods of resolving conflict.
- The Convention continues to be implemented in various forums, both within the Convention and outside the Convention (such as at the International Maritime Organization or IMO). The United States would be in a stronger position defending its military interests and other interests in these forums if it were a party to the Convention.
- Becoming a party to the Convention would permit the United States to nominate members for both the Law of the Sea Tribunal and the Continental Shelf Commission. Having U.S. members on those bodies would help ensure that the Convention is being interpreted and applied in a manner consistent with U.S. interests.
- Becoming a party to the Convention would strengthen our ability to deflect potential proposals that would be inconsistent with U.S. interests, including freedom of navigation.

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

Having elaborated the basic elements of the Convention and Agreement and the advantages of U.S. accession, allow me to raise two final serious issues.

Because the global context for the Convention is rapidly and continually changing, a way needs to be found to ensure that the Convention continues to serve U.S. interests over time. We must ensure that, in obtaining the stability that comes with joining the Convention, we nonetheless retain sufficient flexibility to protect U.S. interests. After U.S. accession, the Executive Branch will conduct biennial reviews of how the Convention is being implemented and will seek to identify any changes in U.S. and/or international implementation that may be required to improve implementation and to better adapt the Convention to changes in the global environment. After ten years, the Executive Branch will conduct a more comprehensive evaluation to determine whether the Convention continues to serve U.S. interests. The results

of these reviews will be shared with the Senate. (Another option that we considered is that of a sunset provision, i.e., limiting the length of time that the United States is a party to the Convention, which has disadvantages as well as advantages.) Needless to say, the United States could, of course, withdraw from the Convention if U.S. interests were seriously threatened.

In addition, I would like to note that the Convention includes simplified procedures for the adoption and entry into force of certain Convention amendments and implementation and enforcement measures that raise potential constitutional issues. We intend to sort these and other legal and policy issues out with the Senate, confident that they can be satisfactorily resolved.

Let me join with Assistant Secretary Turner in underscoring that becoming a party to the Convention, as modified by the 1994 Agreement, represents the highest priority of United States international oceans policy—a bipartisan priority—and to this end the Administration recommends that the Senate give its advice and consent to accession to the Convention and ratification of the Agreement. Thank you very much.

The CHAIRMAN. Well, we thank you very much for your testimony.

The Chair would like to call now upon the Department of Defense Deputy Assistant Secretary, Mark Esper. Mr. Esper.

**STATEMENT OF MARK T. ESPER, DEPUTY ASSISTANT SECRETARY FOR NEGOTIATIONS POLICY, DEPARTMENT OF DEFENSE, THE PENTAGON, WASHINGTON, DC**

Mr. ESPER. Thank you, Mr. Chairman, and good morning. Thank you for the opportunity to testify today in support of the United Nations Convention on the Law of the Sea.

As my colleagues have already stated, the administration strongly supports accession to the Law of the Sea Convention. The convention codifies customary international law and practices that are critical to the United States Armed Forces and provides additional benefits to the United States.

The administration has, however, identified serious issues raised by U.S. accession to the convention that we believe can be resolved with the Senate's assistance.

I would like to address first the benefits to the United States that will be derived from accession to the convention and then follow with a discussion of the administration's concerns and proposed remedies.

The administration supports accession to the convention because the convention supports navigational rights critical to military operations. These rights are essential to the formulation and implementation of our national security strategy. Although much of what is contained in the convention is customary international law, accession to the convention ensures that the United States has the benefit of the stability that comes with the codification of customary international law. Indeed, an essential element of executing our national security strategy is the assumption that key sea and air lines of communication will remain open as a matter of international legal right, not contingent upon approval by coastal and island nations along the route or in the area of operations.

Examples of rights that exist under the convention that are critical to military operations include: freedom of navigation and overflight on the high seas and within the 200 nautical mile exclusive economic zone; freedom of navigation and overflight through key international straits; limitation of territorial seas to 12 nautical



miles; innocent passage through foreign territorial seas without notice or permission, regardless of armament or means of propulsion; and freedom to conduct military surveys seaward of foreign territorial seas without the permission of coastal States.

In short, Mr. Chairman, the Law of the Sea Convention codifies the rights of the United States Armed Forces to navigate freely on, under, and over the seas.

While the United States currently enjoys the benefits of the convention as reflected in customary international law, accession provides the United States with additional benefits.

First, U.S. accession to the convention will enhance our ability to influence the future direction of the law in international maritime forums, such as the International Maritime Organization, and the various entities established under the convention.

Second, accession will provide the United States with another venue to try to prevent the erosion of navigational rights and freedoms critical to the United States Armed Forces. We can do this by seeking to prevent adverse amendments to the convention and by using the annual meeting of States parties to address misunderstandings and misinterpretations of the convention. These treaty-based tools complement longstanding United States efforts to challenge, among other things, excessive maritime claims and illegal constraints on our navigational freedoms through our diplomatic initiatives and the freedom of navigation program.

Third, accession will not only provide the United States with additional mechanisms through which it can strive to stop the erosion of freedoms critical to the United States Armed Forces, but it will also provide the United States another forum to advance United States interests. For example, we believe that as a party to the Law of the Sea Convention, the United States will have another avenue through which to achieve international consensus proscribing the maritime trafficking of weapons of mass destruction, their delivery systems, and related materials to and from States of proliferation concern and terrorists. To be sure, we will avail ourselves of every available option to halt the proliferation of weapons of mass destruction on the high seas.

Finally, accession will allow the United States to participate in the bodies established by the convention. Specifically, it will permit the United States to participate in the Commission on the Limits of the Continental Shelf, the International Seabed Authority, and the International Tribunal for the Law of the Sea.

September 11 demonstrated how rapidly the world can change. As a result, the administration believes it is important to ensure that as time passes, the convention continues to provide the United States with the flexibility needed to meet national security challenges that may arise. To achieve that objective, the administration considered a number of options.

To begin, once in force, the administration will conduct biennial reviews of the treaty's implementation, including the identification of any needed changes in the convention's implementation or in the convention itself. Such reviews will help the United States assess whether the convention continues to serve United States interests. As part of these reviews, the administration will seek to identify any changes in the treaty or its implementation that may be re-

quired to adapt the treaty to changes in the global security situation. In addition, these reviews will be coupled with a more comprehensive review after 10 years. The results of these reviews will be shared with the Senate.

Reviews of this kind are not the only option for ensuring the convention continues to serve United States interests. Another option that we considered is that of a sunset provision, that is, limiting the length of time that the United States is a party to the convention, which has disadvantages as well as advantages. And, needless to say, the United States could, of course, withdraw from the convention if United States interests are ever seriously threatened.

In any case, the goal is to make certain that the convention continues to meet our national security requirements, protects our strategic flexibility, and advances broader United States interests in a world that is constantly changing.

To this end, in the past year the administration undertook a review of the Law of the Sea Convention to ensure that it continues to meet United States needs in the current national security environment. This dynamic environment also requires that the convention allow for the flexibility we need to meet U.S. national security objectives and interests over the long term.

Specifically, the administration sought to ensure that, given this new strategic environment, the Law of the Sea Convention provides the United States with sufficient operational freedom and flexibility to pursue effectively U.S. goals in the global war on terrorism and our efforts in concert with other nations to halt the proliferation of weapons of mass destruction. That review did not reveal particular problems affecting current U.S. operations.

Our review also focused on the convention's dispute settlement provisions which permit a party to exclude from dispute settlement the category of "disputes concerning military activities." This exception is of vital importance to the United States. That said, our review did identify one area of serious concern for United States military activities.

As you know, the convention establishes a mandatory dispute resolution scheme. Pursuant to part XV of the convention, an arbitral tribunal may be constituted to settle disputes that arise with respect to the interpretation and application of the convention. The convention authorizes State parties to the convention, through a declaration, to opt out of dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the U.N. Security Council is exercising the functions assigned to it under the U.N. Charter. Through the military activities exception, the convention recognizes that such activities involve vital national security interests that are not an appropriate matter for mandatory dispute resolution.

The military activities exception is of obvious importance to the activities of the U.S. Armed Forces. As a result, we have examined this issue thoroughly to make certain that a tribunal cannot question whether U.S. activities are indeed military for purposes of that

exception. Allow me to offer an example to illustrate the administration's concern.

It is possible to imagine a scenario wherein another State party calls upon a tribunal to decide whether or not our military surveys in that country's EEZ or reconnaissance aircraft flying in the airspace above that country's EEZ, both of which are military activities of paramount importance, are consistent with the convention. In this scenario, if a tribunal were permitted to interfere with such military activities, this would have a major impact on our military operations and U.S. national security.

In this light, the administration closely examined the convention, its negotiating history, and the practices of the tribunals constituted under the convention. Based on its examination, the administration believes that it is clear that whether an activity is military is for each State party to determine for itself. Indeed, having the ability to determine what is a military activity involves vital national security interests that are critical to our ability to defend the Nation, protect our forces overseas, safeguard our interests abroad, and assist our friends and allies in times of need.

The administration thus recommends that the United States submit a declaration electing to exclude all three of these categories of disputes from binding dispute settlement. With respect to the particular category of disputes concerning military activities, the administration further recommends that the U.S. declaration make clear that its consent to accession to the convention is conditioned upon the understanding that each party has the exclusive right to determine which of its activities are military activities and that such determinations are not subject to review. We will provide the committee with language on this point.

Additionally, I would like to note that the convention includes certain simplified procedures for the adoption and the entry into force of amendments and implementation and enforcement measures that raise potential constitutional issues. We intend to sort these and other legal and policy issues out with the Senate, confident that they can be satisfactorily resolved.

Mr. Chairman, let me conclude where I began by stating the administration's strong support for U.S. accession to the Law of the Sea Convention. The convention codifies customary international law that is critical to the United States Armed Forces. Accession will provide the United States with additional benefits and ways to safeguard the rights the convention codifies.

I would note that in addition to the declarations and provisions cited above, there are other declarations and issues that the administration is considering for inclusion in the resolution of ratification. That said, while the administration has identified problems with the convention, we believe those issues can be resolved by working in close partnership with the Senate.

In closing, the administration is confident that U.S. accession to the Law of the Sea Convention will benefit the United States and that accession with the right declarations supports the ability of the United States Armed Forces to protect and advance our national security interests.

Mr. Chairman, thank you again for the opportunity to appear before the committee this morning. The administration looks forward

to working with the committee to secure the Senate's advice and consent, and I am happy to respond to any questions you may have. Thank you.

[The prepared statement of Mr. Esper follows:]

PREPARED STATEMENT OF MARK T. ESPER, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR NEGOTIATIONS POLICY, DEPARTMENT OF DEFENSE, THE PENTAGON

Chairman Lugar, Senator Biden, Members of the Committee, good morning, and thank you for the opportunity to testify today in support of the United Nations Convention on the Law of the Sea.

Let me begin by stating that the Administration strongly supports accession to the Law of the Sea Convention. The Convention codifies customary international law and practices that are critical to the United States Armed Forces, and provides additional benefits to the United States.

The Administration has, however, identified serious issues raised by U.S. accession to the Convention that we believe can be resolved with the Senate's assistance.

I would like to address first the benefits to the United States that will be derived from accession to the Convention, and then follow with a discussion of the Administration's concerns and proposed remedies.

The Administration supports accession to the Convention because the Convention supports navigational rights critical to military operations. These rights are essential to the formulation and implementation of our national security strategy. Although much of what is contained in the Convention is customary international law, accession to the Convention ensures that the United States has the benefit of the stability that comes with the codification of customary international law. Indeed, an essential element of executing our national security strategy is the assumption that key sea and air lines of communication will remain open as a matter of international legal right—not contingent upon approval by coastal and island nations along the route or in the area of operations.

Examples of rights that exist under the Convention that are critical to military operations include:

- Freedom of navigation and overflight on the high seas and within the 200 NM Exclusive Economic Zone (EEZ);
- Freedom of navigation and overflight through key international straits (such as Gibraltar, Hormuz, Malacca) and archipelagoes (such as Indonesia and the Philippines);
- Limitation of territorial seas to 12 NM and limitations on the jurisdiction of coastal states within their EEZs and beyond;
- Innocent passage through foreign territorial seas without notice or permission, regardless of armament or means of propulsion; and
- Freedom to conduct military surveys seaward of foreign territorial seas without the permission of coastal states.

In short, the Law of the Sea Convention codifies the rights of the U.S. Armed Forces to navigate freely on, under, and over the seas.

While the United States currently enjoys the benefits of the Convention as reflected in customary international law, accession provides the United States with additional benefits.

First, U.S. accession to the Convention will enhance our ability to influence the future direction of the law in international maritime forums, such as the International Maritime Organization, and the various entities established under the Convention.

Second, accession will provide the United States with another venue to try to prevent the erosion of navigational rights and freedoms critical to the U.S. Armed Forces. We can do this by seeking to prevent adverse amendments to the Convention, and by using the annual meeting of States Parties to address misunderstandings or misinterpretations of the Convention. These treaty-based tools complement longstanding U.S. efforts to challenge, among other things, excessive maritime claims and illegal constraints on our navigational freedoms, through our diplomatic initiatives and the freedom of navigation program.

Third, accession will not only provide the United States with additional mechanisms through which it can strive to stop the erosion of freedoms critical to the U.S. Armed Forces, but it will also provide the United States another forum to advance U.S. interests. For example, we believe that as a party to the Law of the Sea Convention, the United States will have another avenue through which to achieve inter-

national consensus proscribing the maritime trafficking of weapons of mass destruction, their delivery systems, and related materials to and from states of concern and terrorists. To be sure, we will avail ourselves of every available option to halt the proliferation of weapons of mass destruction on the high seas.

Finally, accession will allow the United States to participate in the bodies established by the Convention. Specifically, it will permit the United States to participate in the Commission on the Limits of the Continental Shelf, the International Seabed Authority, and the International Tribunal for the Law of the Sea. These bodies could play an important role in influencing future law of the sea developments.

September 11 demonstrated how rapidly the world can change. As a result, the Administration believes it is important to ensure that, as time passes, the Convention continues to provide the United States with the flexibility needed to meet national security challenges that may arise. To achieve that objective, the Administration considered a number of options.

To begin, once in force, the Administration will conduct biennial reviews of the treaty's implementation, including the identification of any needed changes in the Convention's implementation or in the Convention itself. Such reviews will help the United States assess whether the Convention continues to serve U.S. interests. As part of these reviews, the Administration will seek to identify any changes in the treaty or its implementation that may be required to adapt the treaty to changes in the global security situation. In addition, these biennial reviews will be coupled with a more comprehensive review after ten years. The results of these reviews will be shared with the Senate.

Reviews of this kind are not the only option for ensuring the Convention continues to serve U.S. interests. Another option that we considered is that of a sunset provision, that is, limiting the length of time that the United States is a party to the Convention, which has disadvantages as well as advantages. And, needless to say, the United States could, of course, withdraw from the Convention if U.S. interests are ever seriously threatened.

In any case, the goal is to make certain that the Convention continues to meet our national security requirements, protects our strategic flexibility, and advances broader U.S. interests in a world that is constantly changing.

To this end, in the past year the Administration undertook a review of the Law of the Sea Convention to ensure that it continues to meet U.S. needs in the current national security environment. This dynamic environment also requires that the Convention allow for the flexibility we need to meet U.S. national security objectives and interests over the long term.

Specifically, the Administration sought to ensure that, given this new strategic environment, the Law of the Sea Convention provides the United States with sufficient operational freedom and flexibility to pursue effectively U.S. goals in the global war on terrorism and our efforts in concert with other nations to halt the proliferation of weapons of mass destruction. That review did not reveal particular problems affecting current U.S. operations.

Our review also focused on the Convention's dispute settlement provisions, which permit a Party to exclude from dispute settlement the category of "disputes concerning military activities." This exception is of vital importance to the United States. That said, our review, did identify one area of serious concern for U.S. military activities.

As you know, the Convention establishes a mandatory dispute resolution scheme. Pursuant to Part XV of the Convention, an arbitral tribunal may be constituted to settle disputes that arise with respect to the interpretation and application of the Convention. The Convention authorizes State Parties to the Convention, through a declaration, to opt out of dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring states, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the U.N. Security Council is exercising the functions assigned to it under the U.N. Charter. Through the military activities exception, the Convention recognizes that such activities involve vital national security interests that are not an appropriate matter for mandatory dispute resolution.

The military activities exception is of obvious importance to the activities of the U.S. Armed Forces. As a result, we have examined this issue thoroughly to make certain that a tribunal cannot question whether U.S. activities are indeed "military" for purposes of that exception. Allow me to offer an example to illustrate the Administration's concern. It is possible to imagine a scenario wherein another State Party calls upon a tribunal to decide whether or not our military surveys in that country's EEZ or reconnaissance aircraft flying in the airspace above that country's EEZ—

both of which are military activities of paramount importance—are consistent with the Convention.

In this scenario, if a tribunal were permitted to interfere with such military activities, this would have a major impact on our military operations and U.S. national security.

In this light, the Administration closely examined the Convention, its negotiating history, and the practices of the tribunals constituted under the Convention. Based on this examination, the Administration believes that it is clear that whether an activity is “military” is for each State Party to determine for itself. Indeed, having the ability to determine what is a “military activity” involves vital national security interests that are critical to our ability to defend the Nation, protect our forces overseas, safeguard our interests abroad, and assist our friends and allies in times of need.

The Administration thus recommends that the United States submit a declaration electing to exclude all three of these categories of disputes from binding dispute settlement. With respect to the particular category of disputes concerning military activities, the Administration further recommends that the U.S. declaration make clear that its consent to accession to the Convention is conditioned upon the understanding that each Party has the exclusive right to determine which of its activities are “military activities” and that such determinations are not subject to review. We will provide the Committee with language on this point.

Additionally, I would like to note that the Convention includes certain simplified procedures for the adoption and the entry into force of amendments and implementation and enforcement measures that raise potential constitutional issues. We intend to sort these and other legal and policy issues out with the Senate, confident that they can be satisfactorily resolved.

Mr. Chairman, let me conclude where I began by stating the Administration’s strong support for U.S. accession to the Law of the Sea Convention. The Convention codifies customary international law that is critical to the United States Armed Forces; accession will provide the United States with additional benefits and ways to safeguard the rights the Convention codifies.

I would note that, in addition to the declarations and provisions cited above, there are other declarations and issues that the Administration is considering for inclusion in the Resolution of Ratification. That said, while the Administration has identified problems with the Convention, we believe those issues can be resolved by working in close partnership with the Senate.

In closing, the Administration is confident that U.S. accession to the Law of the Sea Convention will benefit the United States, and that accession with the right declarations supports the ability of the U.S. Armed Forces to protect and advance our national security interests.

Mr. Chairman, I would like to thank you again for the opportunity to appear before the Committee this morning. The Administration looks forward to working with the Committee to secure the Senate’s advice and consent. I am happy to respond to any questions you or other members of the Committee may have, Mr. Chairman.

Thank you.

The CHAIRMAN. Well, thank you very much, Mr. Esper, for that testimony. Let me mention that I appreciate in the testimony from both the Department of State and the Department of Defense an eagerness to work with the committee to furnish language that may be helpful in furthering points that you have made in your testimony.

It is a privilege now to call upon from the United States Navy the Vice Chief of Naval Operations, Admiral Michael Mullen. Admiral.

**STATEMENT OF ADMIRAL MICHAEL G. MULLEN, VICE CHIEF OF NAVAL OPERATIONS, JOINT CHIEFS OF STAFF, DEPARTMENT OF THE NAVY, WASHINGTON, DC**

Admiral MULLEN. Good morning, sir. Mr. Chairman, I too would like to thank you for the opportunity to testify here today. General Myers, the Chairman of the Joint Chiefs of Staff, has asked that I review with you the position of the Joint Chiefs of Staff and the

combatant commanders on ratification of the Law of the Sea Convention. With your permission, I would like to make a brief opening statement, and as you have already stated yourself, submit my written testimony for the record.

The CHAIRMAN. Very good.

Admiral MULLEN. General Myers, the services, and the combatant commands strongly support the United States becoming a party to the convention, which DOD and five administrations have consistently supported.

As a comprehensive, multilateral treaty that confirms navigational rights and freedoms for maintaining global mobility and forward presence and readiness, the convention supports national security interests by codifying the right of U.S. military vessels to navigate freely on, under, and over the high seas or within international straits. Furthermore, within traditional choke point areas, a normal mode of operations is permitted, including formation steaming, use of sensors such as radar and sonar, submerged transits, and the launching and recovery of aircraft.

Since 1983, the Joint Chiefs and the combatant commanders have supported the navigational provisions of the convention because of the core belief that a comprehensive, widely accepted, and stable legal basis for the world's oceans is essential to U.S. national security. With the favorable changes already made to the deep seabed regime under the U.S. Government leadership, the minimal risks associated with operating inside the treaty are eclipsed by the risk to remain outside, to limit our operations, to permit excessive customary foreign claims, and to yield our position as the international leader, particularly in the maritime domain.

United States forces are continuously forward deployed worldwide to deter threats to our national security and remain in position to rapidly respond in order to protect U.S. interests either as part of a coalition or, if necessary, to act independently. In addition to Operations Enduring Freedom and Iraqi Freedom, our forces are now engaged in laying the groundwork for the implementation of the President's Proliferation Security Initiative. This international coalition will work together to disrupt the flow of weapons of mass destruction, their delivery systems, and any related illicit materials being transshipped throughout the world. Therefore, for present and other undefined future operations, our naval and air forces must be able to take maximum advantage of the navigational rights reflected in the Law of the Sea Convention.

The convention also restricts and deters encroachment of coastal States. We must be able to count on the codified limits, such as the 12 nautical mile territorial sea, the maximum jurisdiction of 200 nautical miles, or the right to conduct military operations, including intelligence activities, without permission or prior notice within a coastal State's exclusive economic zone. And we must be able to operate with the sovereign immunity imputed by the convention.

We believe that there are several fundamental points in support of ratification.

First, it preserves U.S. leadership in developing and influencing the Law of the Sea, including peaceful dispute settlement and participation within various international bodies.

Second, it codifies existing navigational freedoms that support the way we operate and limits the restrictions imposed upon us by the customary law of some coastal States.

And last, it represents the best guarantee against further erosion of essential navigational and overflight freedoms that place in jeopardy our global mobility and transforming defense strategy.

It is too risky to continue relying upon written customary international law as the primary legal basis to support U.S. military operations. We must be a party to the convention to claim the rights we assert. Challenges to our national security interests make strategic mobility more important than ever to our national security, and the oceans provide a vast and exploitable military maneuver space. By joining the convention, we incur the freedom to get to the fight 24 by 7 without a permission slip.

Again, Mr. Chairman, I wish to thank you and the committee for offering me the opportunity to appear before you today, and I will be very happy to answer any questions you may have.

[The prepared statement of Admiral Mullen follows:]

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

Chairman Lugar, Senator Biden, Members of the Committee on Foreign Relations, good morning. I would like to thank you for this opportunity to testify here today. I am Admiral Mike Mullen, U.S. Navy, the Vice Chief of Naval Operations for the Department of the Navy.

Although I am presently the Vice Chief of Naval Operations, I previously commanded the Navy's Second Fleet and NATO's Striking Force Atlantic, was privileged to command the George Washington Carrier Battle Group, and was commanding officer on and served aboard a number of cruisers, destroyers and other ships in our Fleet. The Administration, including the Military Departments, the Joint Chiefs of Staff and the Combatant Commanders, strongly support U.S. accession to the Convention. Entry into force for the United States will enhance the worldwide mobility our forces require and our traditional leadership role in maritime matters, as well as position us better to initiate and influence future developments in the law of sea.

The Administration has identified three areas of serious concern, one of which could have a direct impact on U.S. military activities. The Administration believes, however, that we can resolve these problems by working closely with the Senate.

Military operations since September 11—from Operation Enduring Freedom to Operation Iraqi Freedom to the Global War on Terrorism—have dramatically increased our global military requirements. U.S. Forces are continuously forward deployed worldwide to deter threats to our national security and are in position to respond rapidly to protect U.S. interests, either as part of a coalition or, if necessary, acting independently. U.S. military strategy envisions rapid deployment and mobility of forces overseas anytime, anywhere. A leaner, more agile force with a smaller overseas footprint places a premium on mobility and independent operational maneuver. Our mobility requirements have never been greater.

Future threats will likely emerge in places and in ways that are not yet fully clear. For these and other undefined future operational challenges, U.S. naval and air forces must take maximum advantage of the customary, established navigational rights that the Law of the Sea Convention codifies. Sustaining our overseas presence, responding to complex emergencies, prosecuting the global war on terrorism, and conducting operations far from our shores are only possible if military forces and military and civilian logistic supply ships and aircraft are able to make unencumbered use of the sea and air lines of communication. This is an enduring principle that has been in place since the founding of our country.

In addition to Operations Enduring Freedom and Iraqi Freedom, our ships and aircraft have been deployed overseas to intercept terrorists in the Mediterranean Sea, the Pacific Ocean and the Arabian Sea. They have also been deployed to the Pacific and Indian Oceans to ensure security in vital lines of communication in Southeast Asia, as well as to the waters off Central and South America to interdict the flow of illicit traffic from that region. Our forces are now engaged in laying the groundwork for implementation of the President's Proliferation Security Initiative.



The international coalition assembled as part of the President's initiative will work together to disrupt the flow of weapons of mass destruction, their delivery systems, and related materials throughout the world.

The navigation and overflight freedoms we require through customary international law are better served by being a party to the Convention that codifies those freedoms. Being a party to the Convention is even more important because the trend among some coastal states is toward limiting historical navigational and overflight freedoms. Would-be adversaries, or nations that do not support the particular missions or activities we undertake, will be less likely to dispute our lawful use of the sea and air lanes if we are parties to the Convention. We support the Convention because it protects military mobility by codifying favorable transit rights in key international straits, archipelagic waters, and waters adjacent to coastal states where our forces must be able to operate freely.

The Law of the Sea Convention serves some very important U.S. military interests. Specifically, the Convention, codifies:

- High seas freedoms of overflight and vessel navigation without discriminating against military exercises, military surveys, research and development activities, ordnance testing, and space and telecommunications activities;
- Limitation of territorial seas to 12 nm in the face of increasing pressure by some coastal states to expand those seas well beyond that limit, and to assert other claims that have the practical effect of extending coastal state control over the U.S. military's legitimate uses of those seas;
- Unimpeded overflight and passage rights through critical international straits such as the Straits of Hormuz, Gibraltar and Malacca;
- Unimpeded overflight and passage rights through archipelagic states such as Indonesia and the Philippines under a balanced regime of archipelagic sea lanes;
- The right of innocent passage of ships through the territorial seas of coastal states, without prior notification or permission;
- Limitation of the jurisdiction of coastal states in their exclusive economic zones (EEZ) to legitimate resource related concerns, while preserving high seas freedoms for other states;
- The right to conduct hydrographic and military surveys on the high seas and within foreign EEZs.

In addition to the rights that I just mentioned, the Convention guarantees the right to conduct transits through international straits in "normal modes," which means that submarines may stay submerged and air-capable ships may launch, recover, and operate aircraft. It further means that ships may steam in formation. This right to conduct transit in "normal modes," which is frequently challenged, is particularly important to our naval units because it ensures their ability to maintain appropriate readiness and defensive postures through many of the most important choke points in the world.

Moreover, the Convention also recognizes the right of ships to navigate in international waters and through territorial seas without regard to cargo or means of propulsion. Since many of the Navy's major combatants are nuclear powered, the importance of this right cannot be overemphasized as a component of strengthening the military's ability to respond globally.

The right of transit passage through international straits and the related regime of archipelagic sea lanes passage are particularly important. More than 150 international straits are overlapped by 12 nm territorial seas. Of these, we consider approximately a dozen to be "strategic" for commercial and military purposes. Among these strategic straits are the Straits of Hormuz, Bab el Mandeb, Malacca, Gibraltar, and Dover, plus the strategic sea lanes through the Philippine and Indonesian archipelagoes.

These straits have been critical to U.S. operations in the past. For example, during the raid on Libya in 1986, U.S. Air Force FB-111 fighter-bombers relied on free passage through the Strait of Gibraltar to accomplish their mission. Also, assured access for the enormous flow of forces and logistics to the Arabian Gulf during Operations Desert Shield/Desert Storm in 1990 and 1991 through Bab el Mandeb and Hormuz was a critical element of coalition success, as was again the case in Operation Enduring Freedom and Operation Iraqi Freedom. Afterwards, the United States used these straits continually throughout twelve years of enforcing U.N. sanctions against Iraq. Finally, since September 11, our forces have relied, to their advantage, upon all of these key routes in conducting Operation Enduring Freedom and Operation Iraqi Freedom as we prosecute the global war on terrorism.

Notwithstanding the fact that the navigational freedoms and transit rights we currently enjoy are embodied in customary international law, as a party to the Convention, the United States would, however, be in a stronger leadership position to assert its rights to use the oceans for navigation and overflight. For example, in making excessive claims, some coastal states contend that the navigational and overflight rights contained in the Convention are available only to those states that also accept the responsibilities set forth in the Convention by becoming parties to it. By becoming a party to the Convention we can deprive those states of this argument. This is not to suggest that countries' attempts to restrict navigation will cease once the United States becomes a party to the Law of the Sea Convention. Coastal states make excessive claims for a variety of reasons—because they believe such claims to be in their national interest; because they feed domestic politics; and, because they believe they can enforce those claims or that other nations will, for lack of resources and capability, acquiesce in those claims. The Administration believes, however, that with the United States as a party, fewer states are likely to view such claims as sustainable. As a party, our diplomatic and operational challenges to excessive claims will carry greater weight.

Although accession to the Convention will benefit the United States, the Administration has some concerns. As previously mentioned, three serious issues have been identified, one of which involves the military activities exception to the dispute settlement provisions.

With respect to the dispute settlement provisions, the Administration intends to exempt military activities from those provisions. Notwithstanding our exemption, it is conceivable that a tribunal could assert it has jurisdiction over what we believe is a military activity, such as military surveys. If a tribunal did so, and if it issued an adverse ruling, then such a ruling could have an impact on operational planning and activities, and our security. The extent of that impact will depend on the circumstances. It could be major, it could be minor or it could have no impact whatsoever. The point is, we cannot predict the future with certainty. We believe that whether an activity is "military" is for each party to determine for itself. We will work with the Senate to ensure that our declaration on accession contains solid language to address this issue.

Because the global context for the Convention is rapidly and continually changing, a way needs to be found to ensure that the Convention continues to serve U.S. interests over time. We must ensure that, in obtaining the stability that comes with joining the Convention, we nonetheless retain sufficient flexibility to protect U.S. interests. After U.S. accession, the Executive Branch will conduct biennial reviews of how the Convention is being implemented and will seek to identify any changes in U.S. and/or international implementation that may be required to improve implementation and to better adapt the Convention changes in the global environment. After ten years, the Executive Branch will conduct a more comprehensive evaluation to determine whether the Convention continues to serve U.S. interests. The results of these reviews will be shared with the Senate. Another option that the Administration considered is that of a sunset provision, i.e., limiting the length of time that the United States is a party to the Convention, which has disadvantages as well as advantages. Needless to say, the United States could, of course, withdraw from the treaty if U.S. interests were seriously threatened.

In conclusion, from an operational perspective, two fundamental points support accession to the Convention: First, the diversity of challenges to our national security combined with a more dynamic force structure make strategic mobility more important than ever; Second, the oceans are fundamental to that maneuverability and, by joining the Convention, we further assure the freedom to get to the fight, twenty-four hours a day and seven days a week, as necessary in the national security interests of the United States.

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

The CHAIRMAN. Well, thank you very much, Admiral Mullen. Let me just say as a personal point that I always appreciate whenever the Vice Chief of Naval Operations or the Chief of Naval Operations is testifying before our committee. It was my privilege to serve Admiral Burke as a young intelligence briefer a long time ago. He and Admiral Russell, who was then the Vice Chief, were mentors for me. So I would appreciate the Law of the Sea in any event.

I thank you for your strong affirmation on behalf of the Navy and on behalf of our defense establishment.

And as a very important part of that defense effort, we call now upon the Coast Guard Chief Counsel, Admiral John Crowley. Admiral.

**STATEMENT OF REAR ADMIRAL JOHN E. CROWLEY, JR., CHIEF COUNSEL AND JUDGE ADVOCATE GENERAL, U.S. COAST GUARD, DEPARTMENT OF HOMELAND SECURITY, WASHINGTON, DC**

Admiral CROWLEY. Thank you very much, Mr. Chairman. I also appreciate the opportunity to present the views of the Coast Guard and the administration in support of the 1982 U.N. Convention on the Law of the Sea, as amended.

As you know, Mr. Chairman, the U.S. Coast Guard is the law on the sea. And as steward of the marine environment, my comments will focus on the convention and how it will support the Coast Guard's efforts in performing its multi-mission responsibilities.

Following the comments that you have allowed into the record from our formal statements and the comments of my esteemed colleagues, I will first put my attention to the matter of drug interdiction.

Article 108 of the convention requires all States, flag States and coastal States, to cooperate in the suppression of illicit traffic in narcotic drugs. Following the lead of the U.N. Convention on the Law of the Sea, the 1988 Vienna Convention, article 17 was complemented in its direction for States to cooperate. And we see today 23 bilaterals that have been formulated between the United States and other governments, last year resulting in 135,000 pounds of cocaine seized on high seas, 56 vessels seized, and 207 arrests.

Turning my attention to the matter of living marine resources, we have a regime that was followed closely upon the United States Fishery Conservation Management Act in the development of the convention. It also established a regime whereby agreements and a framework for the conservation of living marine resources beyond the exclusive economic zone. Article 55 established the basic legal regime for the EEZ in a way consistent with the Magnuson-Stevens Act. Consistent with article 73, which provided for enforcement measures, the Coast Guard enforces today the Fishery Conservation Management Act and, in fiscal year 2003, discovered one minor incursion in the maritime boundary line of the Pacific and one, and the first in 3 years, incursion of the Hague Line in the east coast.

Finally, turning attention to the marine environmental protection provisions in part XII, article 194 specifically identifies measures to prevent, reduce, and control pollution of the marine environment. The convention marks the competent international organization, in this case, IMO, to establish regulations in article 211. Articles 217, 218, and 220 are very important in that they establish this framework for flag, port, and coastal States' enforcement regimes, and this is the architecture that the Coast Guard has been able to leverage, together with the administration, in the IMO in protecting our coastal interests in the marine environment.

But, Mr. Chairman, the effects of September 11, 2001 had a profound impact on the direction of the Coast Guard and the Nation. We see the potential for the development of a law enforcement regime in support of maritime security that follows in the footsteps of our experience in counter-drug interdiction, as well as marine environmental protection, where we have a strong reliance on the competent international organizations. In this case, IMO stepped up to the bar last year working with our delegation and passing provisions for the security of ships and ports balancing the needs of flag States and port States so that we can accomplish commerce together. The security of our ports is No. 1. We will achieve that with the great support in the international community by bringing the flag State level up to our own port State equivalence.

Mr. Chairman, this concludes my summary. I again appreciate your invitation today and I am available for any questions.

[The prepared statement of Admiral Crowley follows:]

PREPARED STATEMENT OF REAR ADMIRAL JOHN E. CROWLEY, JR., CHIEF COUNSEL AND JUDGE ADVOCATE GENERAL, U.S. COAST GUARD, DEPARTMENT OF HOMELAND SECURITY

Good Morning Mr. Chairman and distinguished members of the Committee. I am Rear Admiral John E. Crowley, Chief Counsel and Judge Advocate General of the U.S. Coast Guard. It is a pleasure to appear before you today to discuss the United Nations Convention on the Law of the Sea.

I have previously served as the Assistant to the Secretary of Transportation's Representative to the United Nations Law of the Sea Conference in 1979-80, where I acquired an appreciation for the breadth of Law of the Sea issues. I also have served on five cutters, twice as commanding officer. My sea duty has encompassed all of the Coast Guard's Deepwater missions, including service as the Chief Staff Officer of the Joint Task Force responding to the 1994 Haitian and Cuban mass migrations. I have more recently served as the Special Assistant to the Secretary of Homeland Security and the interim Director of the Homeland Security Center. These assignments allow me to provide comments from the operator's point of view as well. Following these remarks, I am prepared to answer any questions you may have concerning the potential effects of this Convention on the U.S. Coast Guard's missions.

Although the 1982 UN Convention on the Law of the Sea (LOS) entered into force in 1994, the U.S. has continued to rely upon customary international law as reflected in the Convention to advance our oceans policy. While reliance upon customary international law has, in fact, served us well for many years, becoming a party to the LOS Convention will enhance our position in maritime affairs. The first UN effort at codifying the Law of the Sea took place in 1958, when the first UN Conference on the Law of the Sea concluded four separate conventions dealing with the Law of the Sea. These four conventions represented, in the main, codifications of customary international law at the time. However, it must be remembered that at the time, pollution of the world's oceans was not considered an important issue; fish stocks were thought to be inexhaustible, and the need for maritime domain awareness was not present. Beginning in the 1960's, the world, in general, and the oceans, in particular, began experiencing significant change in such areas as pollution standards and fisheries management. This led to the Third United Nations Conference on the Law of the Sea (UNCLOS III), which developed the 1982 UN Convention on the Law of the Sea. With 143 states party to the 1982 UN Convention on the Law of the Sea, the Convention will play a central role in resolving such issues in the future. It will also serve as a foundation upon which future oceans agreements will be based. For these reasons, it is particularly important for the United States to become a party to the Convention.

On November 16, 1994, the LOS Convention entered into force. That event represented a milestone in the United States' efforts to achieve a widely ratified, comprehensive law of the sea treaty that protects and promotes a wide range of U.S. ocean interests, many of which affect the U.S. Coast Guard. Because of our law enforcement and national security missions, the Coast Guard has long been a proponent of achieving a comprehensive and stable regime with respect to traditional uses of the oceans. The Convention aids our interests by stabilizing the trend towards expansion of national jurisdiction over coastal waters, while furthering our

efforts to protect and manage fishery resources and to protect the marine environment. From the Coast Guard perspective, public order of the oceans is best established and maintained by a stable, universally accepted law of the sea treaty reflective of U.S. national interest.

One of the bedrock underpinnings of the Convention was codification of rights and responsibilities of states as port states, flag states and coastal states. During the LOS Convention negotiations, the U.S. aggressively sought both clarification and delimitation of seaward territorial claims by coastal states in order to ensure navigational freedoms while at the same time recognizing the U.S.'s interest as a coastal state with sovereignty to protect its living and non-living marine resources. The result was a limit nations could claim as a territorial sea of no more than 12 nautical miles. Our fishery conservation management interests, as reflected in the Magnuson-Stevens Fishery Conservation Management Act, were instrumental in the international development of the 200 nautical mile Exclusive Economic Zone (EEZ). In the EEZ, all nations enjoy freedoms of navigation, while the coastal state possesses sovereign rights to protect and exploit the living and non-living marine resources. Following the *Amoco Cadiz* and subsequent vessel oil spill incidents, marine pollution was also addressed in the 1982 UN Convention on the Law of the Sea with provisions that have been described as a far-reaching environmental accord. The Convention struck the appropriate balance of competing claims, so that all nations could engage in high seas freedoms, including non-resource related law enforcement in other nation's EEZ waters, and the coastal state enjoyed the right to protect its marine environment, including damage from oil spills by vessels, fisheries conservation and enforcement of domestic laws designed to conserve and protect the living marine resources in their EEZ. The Convention also recognized a port state regime adequate to ensure their interests were protected when vessels voluntarily entered their ports or places subject to their jurisdiction.

The Coast Guard and other U.S. military forces already rely heavily on the elemental navigation freedoms codified in the Law of the Sea Convention. These protections allow the use of the world's oceans to meet changing national security requirements. The Convention limits a nation's territorial sea to no more than 12 nautical miles, beyond which all nations enjoy a high seas navigation regime that includes the freedom to engage in law enforcement activities. The Convention codifies the right to operate freely beyond a nation's territorial sea and protects this right by limiting excessive maritime claims that often have the effect of creating maritime safe havens for drug traffickers and other criminals. In fiscal year 2003, the Coast Guard maritime interdiction operations occurring on international waters resulted in the seizure of over 135,000 pounds of cocaine, 56 vessels, and 207 arrests. In keeping with our aggressive international crime control strategy, most of these seizures took place on distant maritime transit routes far from our shores. However, during hi-lateral negotiations, several nations have, in the past, questioned our authority to contest certain of their excessive maritime claims simply because we have yet to ratify the treaty. Becoming a party to the Convention will enhance our ability to conduct such interdiction operations and to refute excessive maritime claims. Rather than only basing our law enforcement operations on customary international law, the United States should become a conspicuous and leading party to the treaty that codifies these important navigational rights.

The Convention also contains provisions that enhance our ability to interdict foreign flagged vessels off our own coasts. The Convention codifies a coastal nation's right to establish a contiguous zone not to exceed 24 nautical miles where it may enforce its customs, immigration, fiscal, and sanitary laws. Adoption by the U.S. of an expanded contiguous zone has doubled the area where we can exercise these increased authorities. The benefits of the contiguous zone against traffickers surreptitiously shipping their illicit products to U.S. shores are clear.

Article 108 of the Convention requires international cooperation in the suppression of the transport of illegal drugs. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) is a fine example of this. The United States has been at the forefront. We have aggressively pursued bilateral agreements with many nations that border drug transit zones as well as States with large registries to facilitate the effective interdiction of vessels suspected of transporting illegal drugs and the eventual prosecution of the drug traffickers. During discussions with these nations, we emphasize the Convention's call for cooperation and premise each agreement on concepts codified within the Convention; becoming a party to the Convention will improve our position during these negotiations.

The Convention contains numerous provisions that advance the economic interests of the United States as a coastal state. By codifying the 200-nautical mile EEZ, the Convention confirms U.S. exclusive jurisdiction over all the living and non-living

resources in the zone. Experts agree that the problems associated with the management of fish stocks will continue as a contentious issue for states that rely on fishing to feed their population. The Convention provides a legal baseline that sanctions the actions of regional fishing organizations to deal with such conservation issues. Indeed, the Convention imposes responsibilities on the coastal states to manage their fishery resources responsibly, and provides the best structural framework for resolving conflicts between competing users. The Convention's provisions regarding the exclusive economic zone are fully in accord with our fisheries policies and interest. Similarly, the Convention makes provision for a wider continental shelf. This is important to our oil and gas interests because they need the certainty of established continental shelf boundaries before they begin exploration.

The Convention is also an environmental accord that provides a comprehensive framework for the prevention, reduction, and control of maritime pollution. The Coast Guard conducts a wide-ranging port state control program to purge our waters of substandard ships and is assisting other nations in doing the same. This initiative will be enhanced through the consistent application of the Convention's broad enforcement mechanisms. Additionally, the Convention carefully balances the rights of coastal states to adopt certain measures to protect the marine environment adjacent to their shores and the general right of a flag state to set and enforce standards and requirements concerning the operation of its vessels. Becoming a party to the Law of the Sea Convention will strengthen the international credibility of the U.S. and our efforts to guide the development of internationally accepted vessel standards, thereby improving marine safety and protection of the marine environment.

The Convention calls for international cooperation among states in preserving the world's high seas fisheries. This provision on cooperation supports the UN ban on high seas drift net fishing.

As the lead Federal agency for maritime security, the Coast Guard believes that acceding to the 1982 UN Convention on the Law of the Sea will benefit the Coast Guard in our efforts to ensure maritime homeland security, and ensure that our maritime borders are secure, as well. In that regard, in the Maritime Transportation Security Act, the Congress found that, "it is in the best interests of the United States to implement new international instruments that establish [the IMO International Ship and Port Facility Security Code and amend SOLAS to include maritime security as well as safety among its provisions]."

The Convention recognizes that various UN subsidiary bodies may serve as competent international organizations for the further Conventional development of the law of the sea. IMO has always been the recognized competent international organization for maritime safety and marine environmental protection. It has now assumed a similar role in port facility and vessel security. Acceding to the Convention will enhance Coast Guard efforts to work in the international community through the International Maritime Organization, the International Labor Organization and other UN subsidiary bodies to improve our security measures and to project our maritime domain awareness, consistent with the Convention's balance of states' rights to the uses of the oceans. Specifically, we are working now at IMO to build upon the successes achieved by the United States in that body at the December 2002 diplomatic conference. As you know, that diplomatic conference resulted in the landmark amendments to the SOLAS Convention for vessel and port facility security contained in Chapter XI and the International Ship and Port Facility Security Code. We have on-going efforts in respect of Conference Resolution 10 to enhance our maritime domain awareness through Long Range Tracking of vessels bound for our ports and waters. These negotiations are taking place in the context of the overwhelming number of nations at IMO being parties to the Law of the Sea Convention. Because of this fact, the Law of the Sea Convention provides the framework for the discussions and agreements. Although we have enjoyed success in the international security agreements so far, those negotiations have not always been easy. Further progress will not be as easy to achieve as our past successes. Frankly, the fact that the United States is not a party to the Law of the Sea Convention, when the overwhelming number of our international partners are parties, has occasionally put us in a difficult negotiating position at IMO. It is our judgment that accession to the Convention will put us in a stronger position at the IMO than we currently enjoy.

In the view of the Department of Homeland Security and the Coast Guard, accession to the LOS Convention helps safeguard United States security and economic interests. The LOS Convention contains provisions that go beyond codifying existing customary international law. The LOS Convention contains both customary international law and the provisions allowing for the progressive development of law. Becoming a party to the Convention will help us preserve the significant concessions

we obtained during the negotiations of the Convention in the area of navigational freedoms, and help us in the development of the law of the sea as it evolves.

It is our understanding that the Administration has, however, identified certain serious concerns regarding accession to the Convention, but which we believe can be resolved. Those issues will be addressed by the State Department and the Department of Defense.

Thank you for the opportunity to testify before you today. I will be happy to answer any questions you may have.

The CHAIRMAN. Thank you very much, Admiral Crowley.

Before turning to questions, let me make a couple of observations. I read the testimony before the hearing and have appreciated your presentations this morning. I am pleased to learn from the administration that there is strong support for the Convention. I agree that ratification is strongly in our national interest.

I have listened carefully to at least three issues of possible concern which you have raised with respect to the Convention. It appears that the administration will be in a position to suggest various means of addressing these issues. I do not believe any of the issues present an obstacle to the Senate providing advice and consent to the convention. As I indicated in my opening statement, I will work to have the committee move swiftly with the Convention. I look forward to the administration's cooperation during the process, which you have generously offered.

Let me turn to a question that relates to the administration's Proliferation Security Initiative, which is designed to prevent the proliferation of weapons of mass destruction and missile technology. I understand that the Statement of Principles establishing that initiative provides that actions taken under the initiative will be consistent with national legal authorities and relevant international law and frameworks, including the United Nations Security Council. What impact, if any, does the Convention that we are discussing today, the Law of the Sea, have on the ability of the United States to carry out interdiction efforts to be undertaken pursuant to this initiative? Perhaps, Mr. Esper, do you have a view—or Mr. Taft?

Mr. TAFT. Mr. Chairman, yes, we have actually considered this, of course, as an important issue because the Proliferation Security Initiative is a very high priority. The President announced his effort to the United States' commitment to bring this off in his speech to the United Nations just last month. So we are pursuing that initiative.

But basically the language that you cited is that it is consistent with the international legal framework that actually is reflected in the provisions of the Law of the Sea Convention. Of the parties that we are working with at the moment on this initiative, all of them are actually parties to the Law of the Sea Convention, except ourselves. So they will be working with us in that framework, and it doesn't present any difficulties for us in conforming that initiative, which must be successful, is critically important, in any obligations that we would be undertaking under the convention, should we become a party to it.

The CHAIRMAN. Thank you. Is there any other comment on that issue? Yes.

Admiral MULLEN. I might comment, sir, just from the standpoint of being in a position at sea to enforce this kind of initiative. Cer-

tainly the strength of the Law of the Sea Convention in terms of establishing and reinforcing and codifying the 12-mile territorial sea, the 200-mile EEZ, the right to transit, freedom of transit in international straits, all of that, it seems to me, would greatly strengthen our ability to support the objectives of this very important initiative in the PSI sense specifically and not be restricted when a situation would arise by a legal restriction and particularly in those kinds of situations, as in many military situations, where time is of the essence.

So I see them as very consistent. Clearly the uniformity of approach, both in PSI and what we typically do in our maritime interception operations, that consistency would be very beneficial.

The CHAIRMAN. I thank you.

Let me ask Admiral Crowley. You have mentioned the security of our ports. We are always concerned about that. You have indicated an enhanced interest in that subsequent to September 11, 2001. On those issues and those of homeland security—insofar as the Coast Guard serves as an important enforcement agent—is it your view that the Law of the Sea Convention is helpful or neutral? Does it make any difference? Can you flesh out, at least from the homeland security situation, your views on the Convention?

Admiral CROWLEY. Yes, Mr. Chairman, I would be pleased to answer that question. The Coast Guard's view would be, as a port State, we rely on our own domestic legislation and our sovereign concerns to protect our ports and being the preeminent element of law in ensuring port security. What the Law of the Sea Convention and the work that we have undertaken through the International Maritime Organization are able to accomplish and therefore enhance our ability to provide security within our ports is to provide this very important framework that first appeared in the convention whereby port States, coastal States, and flag States have their corresponding responsibilities welded together. And together, we are able to raise the standard for the flag States that sail through all the ports and that in various capacities affect our own security as the security of other ports that are part of the international commerce are touched. And in this fashion, we see that the framework and the regime, established first in UNCLOS, is a good thing and we look forward to ratification of the convention. We quite frankly see an enhancement of our position in negotiating enhanced flag State levels of comportment and other port States' levels of comportment with our standing as a member of the convention.

The CHAIRMAN. I thank you, Admiral.

Mr. Esper, as I listened to your testimony, you mentioned that, at one point at least, the administration considered a sunset provision. Now, do I understand it correctly that the administration has rejected this option, or do you have any further comment on that particular portion of your testimony?

Mr. ESPER. As you stated, Mr. Chairman, the issue of the sunset provision was considered. Clearly it has advantages and disadvantages. What we were looking at in considering a sunset provision, in addition to the others that were mentioned, is the means to maintain our strategic flexibility in the long term, given that you



constantly have changes in the security environment and the strategic environment. So that was a provision that was considered.

The CHAIRMAN. Well, where do you come out on it at this point?

Mr. ESPER. I think at this point it was considered and set aside, given the balance of interests and given the other options we had to ensure that we have some strategic flexibility.

The CHAIRMAN. Thank you. Well, I appreciate very much the testimony that you have given. It is a very strong part of the record that we are establishing. As I mentioned, we are indebted to our first panel of witnesses a week ago, but you have fortified the case enormously. We look forward to working with each of the Departments represented here today and with the administration as a whole to perfect the work that we will attempt to do.

Unless you have additional testimony that has come to mind, I thank you and we will look forward to hearing from the next panel.

Admiral MULLEN. Thank you very much, Mr. Chairman.

Mr. TAFT. Thank you, Mr. Chairman.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. ESPER. Thank you, Mr. Chairman.

Admiral CROWLEY. Thank you, Mr. Chairman.

## PANEL II

The CHAIRMAN. The chair would like to call now Paul Kelly, Roger Rufe, Randi Thomas, and Joseph Cox to the witness table.

We thank each of you for coming to be with us this morning. We look forward to your testimony. As I indicated to the previous panel, we would like to incorporate all of your statements, the full statements, into the record. I will ask you to proceed as you wish, either with those statements or with summaries or points that you wish to make. I would ask that you testify in the order that I introduced you: first of all, Mr. Kelly, then Admiral Rufe, then Ms. Thomas, and then Mr. Cox. Mr. Kelly.

### STATEMENT OF PAUL L. KELLY, SENIOR VICE PRESIDENT, ROWAN COMPANIES, INC., HOUSTON, TX

Mr. KELLY. Thank you, Mr. Chairman for inviting me to testify before you today to express the U.S. oil and natural gas industry's views on the important subject of United States accession to the United Nations Law of the Sea Convention.

Taken together, the three associations I am representing, the American Petroleum Institute, the International Association of Drilling Contractors, and the National Ocean Industries Association, 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.

Offshore oil and natural gas is now the world's biggest marine industry, where oil production alone can have a value of more than \$300 billion per annum. This compares to global shipping revenues of \$234 billion and expenditures of all the world's navies amounting to \$225 billion. Submarine cables, which provide part of the World Wide Web and enable the very existence of the Internet is the next largest marine business with \$86 billion in revenues. And

incidentally, that important industry is on record as supporting U.S. accession to the convention.

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 oil field drilling equipment and service companies, are important players in the competition to locate and develop offshore natural gas and oil. 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 uneconomical.

Recognizing the importance of the convention to the energy sector, the National Petroleum Council, an advisory body to the United States 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 changes made to the convention, the U.S. oil and natural gas industry's major trade associations, including API, IADC, and NOIA, support ratification of the convention. Also, the Outer Continental Shelf Policy Committee, an advisory body to the United States Secretary of the Interior on matters relating to our offshore oil and gas and natural leasing program, in 2001 adopted resolutions supporting the U.S. acceding to the convention.

Considering the remarkable advances in offshore exploration technology that have taken us farther and farther offshore into deeper and deeper water, the assessment of the National Petroleum Council in 1973 seems remarkably prescient in retrospect. And that assessment rings more true today than ever.

With what may be the largest and most productive continental shelf in the world, the U.S. now obtains about 28 percent of its natural gas and almost as much of its oil from the Outer Continental Shelf. This share of U.S. production is increasing, thanks to new world-class oil discoveries in the deep waters of the Gulf of Mexico.

Offshore petroleum production is a major technological triumph. We now have world-record complex development projects located in 5,000 to 6,000 feet of water in the Gulf of Mexico 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 9,000 feet of water. New technologies are taking oil explorers out more than 200 miles offshore for the first time, thus creating a more pressing need for certainty and stability in delineation of the outer shelf boundary.

Under the convention, the continental shelf extends seaward to the outer edge of the continental margin or to the 200-mile limit of the EEZ, whichever is greater, to a maximum of 350 miles. The U.S. understands that such features as the Chukchi Plateau and its component elevations, situated north of Alaska, are not subject to the 350-mile limitation and claims on the part of the United States could go as far as 600 miles with regard to that area. 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 interest of the U.S. to register its claims extending the outer limits of our continental shelf where appropriate. In so doing, the United States could expand its areas for mineral exploration development by more than 291,000 square miles. And we need to get on with the mapping work and other analyses and measurements required to substantiate our claims. 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 are a number of countries vying for the same resource area. In fact, Russia has already submitted claims to the U.N. body with respect to the outer limit of its continental shelf in the Arctic.

As a result of the settlement of our maritime boundary with Mexico recently, according to the Minerals Management Service of the Department of the Interior, seven leases have been awarded to companies in the far offshore Gulf of Mexico which include stipulations that any discoveries made in those leases could be subject to the royalty provisions of article 82 of the convention. MMS also reports that one successful well has been drilled recently about 2.5 miles inside the U.S. EEZ. So we are getting closer and closer. Details on how the revenue sharing scheme will work beyond 200 miles remain somewhat unclear, and without ratification, the U.S. Government's ability to influence decisions on implementation of this provision is limited or nonexistent. This creates uncertainty for industry.

Ratification of the convention also has an important bearing on a longer-term potential energy source that has been the subject of much resource and investigation by the Department of Energy, and that is gas hydrates. Gas hydrates are ice-like crystalline structures of water that form cages that trap low molecular weight gas molecules, especially methane, and have recently attracted international attention from government and scientific communities. World hydrate deposits are estimated to total more than twice the world's reserves of all oil, natural gas, and coal deposits combined. The U.S. needs to have a seat at the table of the Continental Shelf Commission in order to influence development of any international rules or guidelines that could affect gas hydrates beyond our EEZ.

Let me turn my attention briefly to marine transportation. 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 archipelagos. U.S. acces-

sion to the convention would put us in a much better position to invoke such rules and rights.

The outlook for United States energy supply in the first 25 years of the new millennium, truly brings home the importance of securing sea routes through which imported oil and natural gas is transported.

According to API's Monthly Statistical Report, published just last week on October 15, imports of crude oil reached a new, all-time high in September. At close to 10.4 million barrels per day, crude imports surpass the previous high record reached in April 2001. When combined with higher volumes for products such as gasoline, diesel fuels, and jet fuel, total imports amounted to nearly two-thirds of domestic deliveries for the month. This is an extraordinary volume of petroleum liquids being transported to our shores in ships every day.

Recently there has been a newer development involving emerging economic and technology development that should give us additional concern for the Nation's energy transportation security. The Energy Information Agency's 2003 Outlook states that despite the projected increase in domestic natural gas production, over the next 20 years an increasing share of U.S. gas demand will also be met by imports. All four existing LNG import facilities in the U.S. 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.

In addition, world oil demand in 2001 was 76.9 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 2025, world demand is expected to reach nearly 119 million barrels per day. 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 gas in all directions.

Finally, I would like to make a comment on the need for U.S. involvement in Law of the Sea governance. The United States should be in a position to exercise leadership and influence on how the Seabed Authority will implement its role in being the conduit for revenue sharing from broad margin States such as the United States. Yet at the present time, we do not have membership on key subsidiary bodies of the Seabed Authority and cannot have membership until we accede to the convention. With 143 countries and the European Union having ratified the convention, the convention will be implemented with or without our participation and will be sure to affect our interests.

For all these reasons, the U.S. oil and gas industry supports ratification of the convention at the earliest date possible.

[The prepared statement of Mr. Kelly follows:]

PREPARED STATEMENT OF PAUL L. KELLY, SENIOR VICE PRESIDENT, ROWAN  
COMPANIES, INC., HOUSTON, TX

ON BEHALF OF

THE AMERICAN PETROLEUM INSTITUTE  
THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS  
THE NATIONAL OCEAN INDUSTRIES ASSOCIATION

Mr. Chairman and members of the Committee:

Thank you for inviting me to testify before you today to express the U.S. oil and natural gas industry's views on the important subject of United States accession to the United Nations Law of the Sea (LOS) Convention.

Taken together, the three associations I am representing here today, the American Petroleum Institute (API), the International Association of Drilling Contractors (IADC) and the National Ocean Industries Association (NOIA), 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.

The offshore oil and natural gas industry is a multibillion-dollar industry. A recent economic survey of global ocean markets done in the United Kingdom<sup>1</sup> brings home clearly the economic significance of offshore oil and natural gas production. Offshore oil and natural gas is now the world's biggest marine industry where oil production alone can have a value of more than \$300 billion per annum. This compares to global shipping revenues of \$234 billion and expenditures of all the world's navies amounting to \$225 billion. Submarine cables, which provide the "worldwide" part of the Worldwide Web and enable the very existence of the Internet, is the next largest marine business with \$86 billion in revenues; and incidentally, that important industry is on record as supporting United States accession to the LOS Convention. In addition to activities in areas under United States 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 United States 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.

Among the provisions that were influenced by the study are the following:

- confirmation of coastal state control of the continental shelf and its resources to a distance of 200 nautical miles and beyond to the outer edge of the continental margin, defined on the basis of geological criteria;
- establishment of a Continental Shelf Commission to advise states in delimiting their continental shelves in order to promote certainty and uniformity;
- specific provisions on the settlement of disputes related to the delimitation of continental shelves among states with opposite or adjacent coasts;
- revenue sharing applicable to development of resources beyond 200 nautical miles based on a modest royalty beginning in the sixth year of production;
- recognition of the role of the International Maritime Organization in setting international safety and select environmental standards;
- allocation of enforcement responsibility for safety and environmental standards among states of registry, port states, and coastal states;

<sup>1</sup>John Westwood, Barney Parsons and Will Rowley, Douglas Westwood Associates, Canterbury, United Kingdom, "Oceanography," vol. 14, no. 3/2001.

- requirements for the prompt release of detained vessels and crews upon the posting of bond; and
- a comprehensive system of dispute settlement allowing a choice among the International Court of Justice, a specialized Law of the Sea Tribunal, and arbitration.

Having been satisfied with changes made to the Convention, the U.S. oil and natural gas industry's major trade associations, including API, IADC and NOIA, support ratification of the Convention by the United States Senate. Also, the Outer Continental Shelf Policy Committee, an advisory body to the United States Secretary of the Interior on matters relating to our offshore oil and natural gas leasing program, in 2001 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 non-living 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 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 U.S. as one of the few nations with broad continental margins, particularly in the North Atlantic, Gulf of Mexico, the Bering Sea and the Arctic Ocean.

Considering the remarkable advances in offshore exploration technology that have taken us farther and farther offshore into deeper and deeper water, the assessment of the National Petroleum Council in 1973 seems remarkably prescient in retrospect; and that assessment rings more true today than ever.

With what may be the largest and most productive continental shelf in the world, the U.S. obtains about 28 percent of its natural gas and almost as much of its oil production from the outer continental shelf (OCS); this share of U.S. production is increasing thanks to new world class oil discoveries in the deep waters of the Gulf of Mexico.

#### 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 5,000-6,000 feet of water in the Gulf of Mexico which were thought unimaginable a generation ago. Even more eye-opening, a number of exploration wells have been drilled in the past three years in over 8,000 feet of water and a world record well has been drilled in over 9,000 feet of water. New technologies are taking oil explorers out more than 200 miles offshore for the first time, thus creating a more pressing need for certainty and stability in delineation of the outer shelf boundary. 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 conflict. Under the Convention, the continental shelf extends seaward to the outer edge of the continental margin or to the 200-mile limit of the EEZ, whichever is greater, to a maximum of 350 miles. The U.S. understands that such features as the Chukchi Plateau and its component elevations, situated to the north of Alaska, are not subject to the 350-mile limitation. 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.

#### REVENUE SHARING

The Convention provides a reasonable compromise between the vast majority of nations whose continental margins are less than 200 miles and those few, including the U.S., whose continental shelf extends beyond 200 miles, with a modest obligation to share revenues from successful minerals development seaward of 200 miles. Payment begins in year six of production at the rate of one percent and is structured to increase at the rate of one percent per year to a maximum of seven percent. Our understanding is that this royalty should not result in any additional cost to industry. Considering the significant resource potential of the broad U.S. continental shelf, as well as U.S. companies' participation in exploration on the continental shelves of other countries, on balance the package contained in the Convention, including the modest revenue sharing provision, clearly serves U.S. interests.

## IMPORTANCE OF DELINEATING THE CONTINENTAL SHELF

The Convention established 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 avoid potential conflicts and provide a means to ensure the security of tenure crucial to capital-intensive deepwater oil and natural gas development projects.

It is in the best interest of the U.S. to register its claims extending the outer limits of our continental margin beyond 200 miles where appropriate—in so doing the U.S. 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 our claims, however. 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 are a number of countries vying for the same resource area. In fact, Russia has already submitted claims with respect to the outer limit of its continental shelf in the Arctic.

## RESOLUTION OF BOUNDARY DISPUTES

As regards maritime boundaries, there presently exist about 200 undemarcated claims in the world with 30 to 40 actively in dispute. There are 24 island disputes. The end of the Cold War and global expansion of free market economies have created new incentives to resolve these disputes, particularly with regard to offshore oil and natural gas exploration. During the last few years hundreds of licenses, leases or other contracts for exploration rights have been granted in a variety of nations outside the U.S. These countries are eager to determine whether or not hydrocarbons are present in their continental shelves, and disputes over maritime boundaries are obstacles to states and business organizations which prefer certainty in such matters. We have had two such cases here in North America where bilateral efforts have been made to resolve the maritime boundaries between the U.S. and Mexico in the Gulf of Mexico and between the U.S. and Canada in the Beaufort Sea. Both of these initiatives have been driven by promising new petroleum discoveries in the regions. The boundary line with Mexico was resolved in 2000 after a multi-year period of bilateral negotiations. Negotiations with Canada, however, seem to be languishing.

While such bilateral resolution is always an option, the Convention provides stability and recognized international authority, standards and procedures for use in areas of potential boundary dispute, as well as a forum for dealing with such disputes and other issues.

The settlement we made with Mexico now makes it possible for leases in the Gulf of Mexico issued by the Department of the Interior's Minerals Management Service (MMS) to be subject to the Article 82 "Revenue Sharing Provision" calling for the payment of royalties on production from oil and natural gas leases beyond the EEZ. According to MMS, seven leases have been awarded to companies in the far offshore Gulf of Mexico which include stipulations that any discoveries made on those leases could be subject to the royalty provisions of Article 82 of the Convention. MMS also reports that one successful well has been drilled about 2.5 miles inside the U.S. FEZ. Details on how the revenue sharing scheme will work remain unclear, and without ratification the U.S. Government's ability to influence decisions on implementation of this provision is limited or non-existent. This creates uncertainty for U.S. industry.

## GAS HYDRATES

Ratification of the Law of the Sea Convention also has an important bearing on a longer-term potential energy source that has been the subject of much research and investigation at the U.S. Department of Energy for several years: gas hydrates.

Gas hydrates are ice-like crystalline structures of water that form "cages" that trap low molecular weight gas molecules, especially methane, and have recently attracted international attention from government and scientific communities. World hydrate deposits are estimated to total more than twice the world reserves of all oil, natural gas and coal deposits combined.

Methane hydrates have been located in vast quantities around the world in continental slope deposits and permafrost. They are believed to exist beyond the EEZ. If the hydrates could be economically recovered, they represent an enormous potential energy resource. In the U.S. offshore, hydrates have been identified in Alaska, all along the West Coast, in the Gulf of Mexico, and in some areas along the East

Coast. The technology does not now exist to extract methane hydrates on a commercial scale. A joint industry group of scientists has been at work in the Gulf of Mexico since May of this year examining the hydrate potential in several deepwater canyons. This work is intended to help companies find and analyze hydrates seismically and to complete an area-wide profile of hydrate deposits.

In the Methane Hydrate Research and Development Act of 2000 Congress mandated the National Research Council to undertake a review of the Methane Hydrate Research and Development Program at the Department of Energy to provide advice to ensure that significant contributions are made towards understanding methane hydrates as a source of energy and as a potential contributor to climate change. That review is now underway. The U.S. Navy has also done work on gas hydrates, as has the U.S. scientific community, including universities such as Louisiana State University and Texas A&M. Significant research is also being conducted by scientific institutions in Japan. The United States needs to have a seat at the table of the Continental Shelf Commission in order to influence development of any international rules or guidelines that could affect gas hydrate resources beyond our EEZ.

#### 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 U.S., 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 25 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 Monthly Statistical Report published on October 15, 2003, imports of crude oil reached a new, all-time high in September. At close to 10.4 million barrels per day, crude imports surpassed the previous high reached in April 2001. When combined with higher volumes for products such as gasoline, diesel fuel and jet fuel, total imports amounted to nearly two thirds of domestic deliveries for the month. 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 (ETA), in its 2003 Annual Energy Outlook, projects that by 2025, net petroleum imports, including both crude oil and refined products on the basis of barrels per day, are expected to account for 68 percent of demand, up from 55 percent in 2001. Looking at the October numbers from API makes one wonder whether 2025 is fast approaching.

#### GROWING NATURAL GAS IMPORTS

ETA's 2003 Outlook also states that, despite the projected increase in domestic natural gas production, over the next twenty 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 U.S. 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.

#### GLOBAL SIGNIFICANCE OF PERSIAN GULF EXPORTS

Another important factor to consider is that, according to ETA, Persian Gulf exports as a percentage of world oil imports are in the process of growing from 30 percent in 2001 to 38 percent in 2025. The Persian Gulf is a long, semi-enclosed sea. Much of it lies beyond the 12-mile limit of the territorial sea but not beyond the 200-mile limit. Within the Persian Gulf there are seven settled international maritime boundaries and as many as nine possible maritime boundaries that have not been resolved in whole or in part.<sup>2</sup>



Fortunately, from the standpoint of U.S. and world dependence on Persian Gulf oil imports, the LOS Convention provides authority that in those areas beyond the territorial sea the right of high seas navigation applies to all vessels. According to the Convention, within the territorial sea vessels have the right of innocent passage and, for straits used for international navigation, the right of transit passage applies. It goes without saying that the United States would be in a better position to secure these rights in this unstable area if it were a party to the Convention.

#### RIISING WORLD OIL DEMAND

World oil demand in 2001 was 76.9 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 2025 world demand is expected to reach nearly 119 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.

#### NEED FOR U.S. INVOLVEMENT IN LOS GOVERNANCE

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 U.S. the chance to exercise needed leadership in addressing these pressures and protecting the many vital U.S. ocean interests. Notwithstanding the United States' view of customary international law, 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. In November 1998, the U.S. lost its provisional right of participation in the International Seabed Authority by not being a party to the Convention. At present there is no U.S. participation, even as an observer, in the Continental Shelf Commission—the body that decides claims of OCS areas beyond 200 miles—during its important developmental phase. The U.S. lost an opportunity to elect a U.S. commissioner in 2002, and we will not have another opportunity to elect a Commissioner until 2007.

The United States should also be in a position to exercise leadership and influence on how the International Seabed Authority will implement its role in being the conduit for revenue sharing from broad margin States such as the U.S., yet the U.S. cannot secure membership on key subsidiary bodies of the Seabed Authority until it accedes to the Convention. Clearly United States views would undoubtedly carry much greater weight as a party to the Convention than they do as an outsider. With 143 countries and the European Union having ratified the Convention, the Convention will be implemented with or without our participation and will be sure to affect our interests.

It is for these reasons that the U.S. oil and natural gas industry supports Senate ratification of the Convention at the earliest date possible.

<sup>2</sup> See "Persian Gulf Disputes," comments prepared by Jonathan L. Charney, Professor of Law, Vanderbilt University, for a conference on "Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation," New York City on February 7-8, 1997.

The CHAIRMAN. Thank you very much, Mr. Kelly, for your testimony.

I would like to call now on Admiral Rufe of The Ocean Conservancy. Admiral.

#### **STATEMENT OF VICE ADMIRAL ROGER T. RUFÉ, JR., USCG (RET.), PRESIDENT, THE OCEAN CONSERVANCY, WASHINGTON, DC**

Admiral RUFÉ. Good morning, Mr. Chairman, and I too thank you for the opportunity to appear before you this morning and present our views on the United States Convention on the Law of the Sea.

In addition to being President of The Ocean Conservancy, I am also a member of the Pew Oceans Commission, which I think as

you know, Mr. Chairman, strongly supports accession to this convention.

I am here this morning representing The Ocean Conservancy, and I will give a brief summary of my remarks.

The Ocean Conservancy strives to be the world's foremost advocate for the oceans. Our headquarters are here in Washington, and we have offices throughout the United States, including Alaska, Maine, California, Florida, and the Virgin Islands.

Since all oceans are connected and all species related, our work to protect the oceans range from the local to the international. The Ocean Conservancy serves on the Species Survival Commission of the World Conservation Union and has led efforts to extend protections for threatened marine species worldwide. We have also been a major proponent for marine protected areas both in the United States and abroad.

The Ocean Conservancy collaborated closely with our colleagues at Oceana and the Center for International Environmental Law in developing this testimony, and we have prepared a joint statement in support of accession that is appended to my written testimony for the record.

In your opening statement on October 14, Mr. Chairman, you appropriately recognized the Law of the Sea as the international law for the world's oceans. You also took the opportunity to recognize the contributions of a former chair of the committee, Senator Pell, to this important issue, and you already recognized your past naval history. I might mention, for the benefit of those who do not know, Senator Pell was a very proud veteran of the United States Coast Guard and was a Coast Guard Reserve retired officer. He characterized the Law of the Sea as a constitution for the oceans, a characterization that has been widely echoed by others. Both your and Senator Pell's descriptions are entirely right. The convention is both international law and a constitution for the world's oceans to be used to guide and to promote positive international and national decisionmaking over time.

The Ocean Conservancy strongly supports U.S. accession to the convention. We also believe, however, that several of its provisions require interpretive language to ensure that its terms are not misconstrued as limiting the United States regulatory authority to protect the marine environment. The Ocean Conservancy is concerned that absent such language, an argument could be made that the United States is precluded from taking unilateral action where necessary to protect its marine ecosystems through the adoption of national legislation.

For instance, the Senate must ensure that the United States retains its full authority to regulate pollution from vessels or prevent a spread of invasive species. On one hand, the convention grants coastal States the authority to broadly regulate for purposes of environmental protection. On the other hand, it focuses on the rights to be enjoyed by ships in traveling throughout the seas, as we have heard earlier today.

I have provided detailed descriptions of a number of potentially problematic provisions in our written testimony. This list is not intended to be exclusive. There may be additional areas of potential ambiguity that warrant Senate interpretation in its advice and con-

sent. We would welcome the opportunity to work with the committee and members of your staff to address these issues through interpretive language.

I would also like to stress the importance of continued international leadership by the United States after accession to ensure that future changes to the convention advance environmental goals. My comments here draw from the 1998 statement of the environmental community's views on accession to the convention. The environmental community noted at that time that the concept of precautionary principle did not exist at the time the Law of the Sea Convention was negotiated and that consequently the term did not appear in the convention. Fortunately, the convention as a constitution does establish some principles and tools that may provide a framework for future application of the precautionary principle. Moreover, subsequent multilateral agreements related to UNCLOS include the use of the precautionary principle, including the Straddling Stocks Agreement. We urge the United States to work to ensure that subsequent changes to the convention appropriately embrace the precautionary approach.

The Ocean Conservancy also urges the United States to take a leadership role through the Law of the Sea Convention and other treaties to ensure better implementation and enforcement of fish conservation measures. The Law of the Sea treaty did not resolve major issues regarding the management, exploitation, and conservation of living marine resources, particularly the highly migratory species of fish and populations of fish that straddle the boundaries between States and the high seas. The failure of governments to deal effectively with these issues has led to widespread over-fishing and conflicts between nations.

Recognizing the convention's limitations, the U.N. fisheries conference was convened. The resulting U.N. Straddling Stocks Agreement provisions are enforceable through the convention's dispute resolution system, thus reinforcing enforcement and compliance opportunities for parties to the convention.

This example demonstrates the kind of leadership the United States should continue to exercise in the future. It illustrates how accession to the convention for this area, as well as others, provides a foundation for the further progressive development of international law.

In conclusion, Mr. Chairman, we strongly support U.S. accession to the convention, and we urge the committee to develop interpretive language, as necessary, in its advice and consent to reconcile the Law of the Sea Convention's provisions with U.S. statutory law, and to preserve the ability of the United States to act to protect and conserve its marine environment. We also urge the Senate to include report language encouraging the United States to fully commit to its role as a world leader in advancing environmental protections for areas where the convention needs further development. It is our hope that with accession the United States will lead by example so that we may protect, maintain, and restore our magnificent ocean trust for future generations.

Thank you, Mr. Chairman.

[The prepared statement of Admiral Rufe follows:]

PREPARED STATEMENT OF VICE ADMIRAL ROGER T. RUFÉ, JR., USCG (RET.),  
PRESIDENT, THE OCEAN CONSERVANCY, WASHINGTON, DC

I. INTRODUCTION AND BACKGROUND

Mr. Chairman and Members of the Committee, thank you for the opportunity to present our views on the United Nations Convention on the Law of the Sea (UNCLOS or Convention). My name is Roger Rufe; I am the President of The Ocean Conservancy.

*A. The Ocean Conservancy*

The Ocean Conservancy (TOC) strives to be the world's foremost advocate for the oceans. Through science-based advocacy, research, and public education, we inform, inspire, and empower people to speak and act for the oceans. TOC is the largest and oldest nonprofit conservation organization dedicated solely to protecting the marine environment. Headquartered in Washington, D.C., TOC has offices throughout the United States, including offices in Alaska, Maine, California, and the Virgin Islands.

TOC has a long history as a leading proponent of numerous international initiatives to conserve the world's most biologically vulnerable marine animals—specifically marine mammals, sea turtles, sharks and their close relatives, skates and rays. TOC serves on the Species Survival Commission of the IUCN and has led efforts to extend protections for threatened marine species. We also helped secure listing of basking and whale sharks under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and passage of the International Dolphin Conservation Act and its sister treaty, The Antiqua Convention to the Inter-American Tropical Tuna Convention. To reduce litter on beaches, each year TOC sponsors an International Coastal Cleanup, assisted by hundreds of thousands of volunteers from over 100 participating countries.

We have also been a major proponent of marine protected areas, both in the United States and abroad. Since the 1980s, The Ocean Conservancy has been one of the few U.S. organizations to work collaboratively with Cuban universities and researchers to inventory and conserve marine biodiversity in Cuba. More recently, this work has expanded to include an exciting and promising new marine protected area project in Colombia. As all waters are connected, our work on marine pollution ranges from urging the strongest Clean Water Act protections for all waters in the United States to efforts to restore and protect sensitive coral reef habitats from marine pollution produced by ocean-going ships.

TOC collaborated closely with our colleagues at the Center for International Law and Oceana in developing this testimony, and we have prepared a joint statement in support of accession that is appended to this testimony. My testimony on behalf of TOC is organized as follows: first, I will explain why we support U.S. accession to the United Nations Convention on the Law of the Sea. Second, I will highlight several issues that require the Senate's attention and development of interpretive language so that potentially ambiguous terms of the Convention are not misconstrued as limiting the United States' authority to protect its marine environment. In the third part of my testimony, I will highlight a few environmental issues that warrant further attention by the United States after our accession to ensure that implementation of, and future changes to, the Convention fully advance environmental goals and protect our interests in healthy, vibrant oceans.

*B. UNCLOS*

In his opening statement for the October 14th hearing, Chairman Lugar appropriately recognized the Law of the Sea as the international law for the world's oceans. The Chairman also took the opportunity to recognize the contributions of a former Chair of the Committee, Senator Pell, to this important issue. Senator Pell characterized the Law of the Sea as a "constitution" for the oceans,<sup>1</sup> a characterization that has been widely echoed by others. As the committee has heard from many witnesses, UNCLOS is an important and progressive international agreement that largely reflects values that our nation has worked to implement over the years. The Convention imposes basic obligations for all states to protect and preserve the marine environment and to conserve marine living species. These commitments are testaments to enlightened diplomacy to manage shared resources. Perhaps even more importantly, the Convention calls for the further development of global and regional rules on these subjects, and provides a framework of principles and objectives for that development. Both Chairman Lugar and Senator Pell's descriptions are entirely right: the Convention is both international law and a constitution for the world's

<sup>1</sup> 141 Cong. Rec. S2, 266-67 (daily ed. Feb 7, 1995) (statement of Senator Pell).

oceans, to be used to guide and promote positive international and national decision-making over time.

The Third United Nations Conference on the Law of the Sea was convened in late 1973. The Conference continued until its final meeting in late 1982, at which time the final act was signed and the Convention was opened for signature. As time went on, it became clear that developed states were not willing to agree to Part XI of the Convention concerning deep seabed portions and mining of potentially valuable metals. Thus, modifications to that provision were negotiated, and an amending agreement was finalized in July of 1994. The U.S. signed the Agreement in 1994 and recognizes the Convention as general international law, but has not ratified it at this time. UNCLOS entered into force in November of 1994 with the requisite sixty ratifications.

The Convention establishes law over a vast array of issues affecting the world's oceans, ranging from maritime boundary delimitation, to fisheries management, to the rights and duties of ships with regard to navigation, to ownership of marine resources. The United States' interests in becoming a signatory to the Convention are similarly broad and diverse, and the Committee has heard from many witnesses representing these interests, all in support of accession. Our testimony will be limited to a brief commentary on the environmental benefits and implications of U.S. accession at this time.

## II. TOC STATEMENT IN SUPPORT OF U.S. ACCESSION TO UNCLOS

There is general agreement in the environmental community that the Convention serves the environmental interests of the United States in providing a stable legal framework,<sup>2</sup> and as the foundation of public order in the oceans.<sup>3</sup> The primary environmental reason for encouraging U.S. accession to UNCLOS at this time is to give the United States the credibility and full rights accorded to a signatory, ensuring that the United States is in the best position to negotiate and lead future applications of this constitution for the oceans.

The Committee has heard from many witnesses that our failure to ratify this global treaty has hurt us to some extent economically, diplomatically and environmentally. These witnesses have rightly noted that our failure to ratify the Convention has hurt not only our international credibility, but also our ability to effect future changes in the terms and agreements upon which international law is based. The United States is a world leader in marine conservation, and our accession to UNCLOS will greatly help us advance international standards and practices.

While the United States is a world superpower, we must fully engage our fellow nations and secure the cooperation of the international community if we are to be successful in protecting our oceans and their resources. For example, currently the United States adheres to the fisheries conservation measures in the Law of the Sea and subsequent Straddling Stocks Agreement, and we treat them as customary international law. However, unless we become a signatory to the treaty, we are without recourse to enforce this Agreement's terms with regard to other states which do not. We are also unable to fully represent U.S. interests in negotiating future changes or terms to both of these agreements. Both the Pew and the Federal Oceans Commission have recently recommended accession for this purpose: to secure a positive environmental framework for U.S. ocean management. In sum, it is impossible to be a world leader relative to the health of the oceans without full participation in the international rule of law that applies to them.

Therefore, TOC urges accession at this time primarily to enable the United States to be a full participant and negotiator in the future development of the terms of the Convention. However, recognizing some of the environmental implications of our accession upon U.S. regulatory authority, we urge the Senate to include several interpretive statements as part of the record in giving its advice and consent to the President, and to be included in our accession instrument. These interpretive statements must clarify how some UNCLOS provisions will be implemented by the United States, so that our full authority to protect our marine environment and resources will be preserved and exercised effectively in the future. Part III of this tes-

<sup>2</sup>In 1998 Clifton Curtis prepared a statement of accession endorsed by many environmental organizations, including The Ocean Conservancy (then the Center for Marine Conservation). This testimony draws from that statement in its discussion of dispute settlement procedures, the precautionary principle and fisheries conservation measures. See also, *The United Nations Convention on the Law of the Sea and the Marine Environment: A Non Governmental Perspective*, Clifton E. Curtis, *Geo. Int'l Envtl. L. Rev.*, 7: 739-743 (1995).

<sup>3</sup>See Statement by Robert Hirshon, President, the American Bar Association, to the Commission on Ocean Policy, (November 13, 2001), available at <http://oceancommission.gov/meetings/nov13-14-01/hirshon-testimony.pdf>.

timony will address several areas requiring interpretive language to be developed by the Senate with its advice and consent.

### III. ISSUES REQUIRING INTERPRETIVE STATEMENTS

UNCLOS is a self-executing treaty, meaning the United States does not need to pass additional national legislation to implement its terms. By acceding to the treaty, the United States indicates its intent to be bound by the Convention. The broad scope and general nature of UNCLOS presents significant interpretational challenges that must be fully addressed by the United States in its accession. We are concerned that because of some potential ambiguities between the Convention's terms and the United States' own statutory framework, an argument could be made that the United States is precluded from taking unilateral action where necessary to protect its marine ecosystems through the adoption of protective national legislation.

Before I summarize those provisions, let me provide a specific example. In the Department of Justice's 1998 prosecution of Royal Caribbean Cruise Lines (RCCL), the company attempted to use the Convention as a shield to prosecution.<sup>4</sup> The Coast Guard had observed a cruise ship dumping oil in the waters off the Bahamas on its way to Miami. RCCL claimed it was immune from criminal prosecution in the United States under UNCLOS. Although the court denied RCCL's motion to dismiss on those grounds, this case illustrates the potential conflict with the Convention, even before ratification, and the willingness of industry to employ its terms to attempt to avoid U.S. health, safety and environmental laws.<sup>5</sup> The case also demonstrates the potential for further confusion absent interpretation by the United States.

Therefore, it is crucial that the United States indicate its intent to implement UNCLOS's provisions in a manner that is consistent with existing U.S. statutory law and preserves our ability to act to protect and conserve the marine environment. I will now turn to the main areas of potential conflict or confusion between UNCLOS and U.S. provisions on environmental matters. In each case, we recommend that the Senate reconcile these conflicts through the inclusion of interpretive language, to be delivered with the United States' instrument of accession. We recognize that there may be other areas of potential ambiguity that warrant Senate interpretation in its advice and consent. We would welcome the opportunity to work with the Committee to address these issues through interpretive language.

#### A. Pollution From Vessels

The Law of the Sea is particularly vague with respect to the rights of a coastal state to protect itself against pollution from ships.

On one hand, the Convention grants coastal states the authority to broadly regulate for the purposes of environmental protection. Within the Exclusive Economic Zone (EEZ), Article 56 grants coastal states "sovereign rights" for the purpose of (among other things) "conserving and managing the natural resources," as well as jurisdiction over "the protection and preservation of the marine environment." On the other hand, Article 211, which generally discusses the regulation of pollution from vessels, potentially limits this broad authority. Article 211 permits a coastal state to establish particular requirements for the prevention, reduction and control of pollution of the marine environment "as a condition for the entry of foreign vessels into their ports," and where "conforming to and giving effect to generally accepted international rules and standards established through the competent international organizations . . ." Thus, potentially a state may not regulate pollution discharges from vessels in the EEZ unless it is doing so either as a condition of port entry or to give effect to international standards.

Relative to the territorial sea, there is additional ambiguity between the balance of the authority vested in the coastal state, and the rights of ships passing in innocent passage. Article 21 grants coastal states the authority to adopt laws and regulations for several purposes, including the conservation of the living resources of the sea, the prevention of infringement of the fisheries laws and regulations of the coastal state, the preservation of the environment of the coastal state and the pre-

<sup>4</sup> *U.S. v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp.2d 1358 (S.D. Florida, 1998).

<sup>5</sup> See William A. Goldberg, *Cruise Ships, Pollution and International Law: The United States Takes on Royal Caribbean Cruise Lines*, 19 Wis. Int'l. L.J. 71 (2000), calling into question the continuing ability of international law to control pollution in the world's waterways. See also Shaun Gehan, *United States v. Royal Caribbean Cruises, Ltd.: Use of Federal "False Statements Act" to Extend Jurisdiction over Polluting Incidents into Territorial Seas of Foreign States*, 7 Ocean & Coastal L.J. 167 (2001), concluding that similar applications of domestic law are entirely consistent with the goals of the applicable international treaties. *Id.*, at 168.

vention, reduction and control of pollution thereof, and the prevention of infringement of the customs, fiscal immigration or sanitary laws and regulations of the coastal state. However, all of these are subject to limitations in Article 21.2, preventing a state from imposing restrictions on design, construction, manning, or equipment upon a foreign ship in innocent passage unless the state is doing so to give effect to “generally accepted international rules or standards.” Unfortunately, no clear view has been articulated either at the international level or within the United States as to what does or should constitute a “generally accepted international standard” under these articles.

Without clarification by the United States, these provisions could be interpreted to preclude the U.S. from adopting legislation—even in the absence of any international dialogue on a particular subject—as may be necessary to protect its marine ecosystems. It could potentially limit the U.S. from taking necessary steps to protect the territorial sea except to give effect to those general rules or standards.

Although generally the United States exercises jurisdiction in accordance with UNCLOS provisions, the Oil Pollution Act of 1990 (OPA) is one example of the U.S. exercising extraterritorial jurisdiction and exceeding the standards in UNCLOS.<sup>6</sup> OPA requires all ships operating in U.S. waters to be constructed with a double-hulled design.<sup>7</sup> Additionally foreign vessels lightering in the U.S. EEZ, including “those not intending to enter United States waters,” must maintain certificates of financial responsibility if some of the oil is destined for the United States. OPA also imposes a series of additional requirements for vessels transferring oil or hazardous materials in the marine environment. Passed in response to the devastating Exxon Valdez oil spill off the coast of Prince William Sound in Alaska, OPA is a clear example of the need to protect the United States’ ability to act in the absence of adequately protective international standards.

The Senate must therefore ensure in its advice and consent that the provisions in UNCLOS do not overly limit the current authority of the United States to regulate pollution from vessels by clarifying the phrase “generally accepted international standards.” The Senate should also specify that the U.S. believes it is free to act where necessary to protect its waters where the regulated activity is not addressed by a specific international rule or standard to prevent, reduce or control its pollution.

#### *B. Treatment of Invasive Species*

The introduction of invasive species via ballast water is a continuing and growing challenge for the protection of U.S. resources, both inland and throughout the EEZ. The potential ecological damage from invasive species is enormous. According to the International Maritime Organization, invasive species are one of the four greatest threats to the health of the world’s oceans, along with other pollution, overexploitation of marine resources, and destruction of marine habitat. The discharge of ballast water from ships is the number one source of marine invasive species in the United States.<sup>8</sup>

UNCLOS, however, fails to clearly address the problem of invasive species. If the treaty were interpreted such that invasive species were intended to be covered by the broad definition of “pollution” as defined in Article 1.1.3, then coastal states would be potentially constrained in their ability to prevent the spread of these invasive species from ships operating outside of the territorial sea. As the IMO has failed to prescribe international standards for the treatment of ballast water, more stringent measures by the U.S. could be interpreted as being “beyond generally accepted international rules or standards.”<sup>9</sup> This would leave the United States reliant upon the remaining authority granted in 211 to require treatment and practices as a condition of entry into port.

We urge instead the better interpretation that alien species are not intended to be addressed by the definition of “pollution” by UNCLOS. This interpretation is supported by the fact that invasive species are addressed by Article 196, and not in Article 194, which addresses the regulation of various types of marine pollution generally. Moreover Article 196 distinguishes invasive species from pollution within the provision. We recommend that the Senate include an interpretive statement on this issue as part of its advice and consent to be included with the instrument of acces-

<sup>6</sup> See Christopher P. Mooradian, *Protecting Sovereign Rights: The Case for Increased Coastal State Jurisdiction over Vessel Pollution in the Exclusive Economic Zone*, 82 Boston U.L. Rev. 767, 801, 802 (2002).

<sup>7</sup> 46 U.S.C. 3703(a)(c)(3).

<sup>8</sup> See, e.g., Canton and Geller, “Ecological Roulette: The Global Transport and Invasion of Non-indigenous Marine Organisms,” *Science* (1993); Marine Board of the National Research Council, *Stemming the Tide*, National Academy Press, Washington D.C. (1996).

<sup>9</sup> UNCLOS Art. 211.5

sion specifying that the United States does not view invasive species as “pollution” for purposes of UNCLOS.

#### *C. Conditions of Port State Entry*

UNCLOS allows coastal states fairly wide authority to prescribe conditions of entry upon foreign vessels. This constitutes perhaps the most obvious mechanism for addressing illegal or problematic shipping discharges of pollution. Yet the U.S. should ensure its right to establish more stringent or targeted measures as necessary to protect and conserve the marine environment. For example, since 1996 the U.S. has required ships entering the Great Lakes to exchange ballast water from beyond the Exclusive Economic Zone as a condition of entering into the Great Lakes system to minimize the spread of invasive species.<sup>10</sup>

We urge the Senate to include an interpretive statement on this issue as part of its advice and consent, to be included with the instrument of accession. This statement should clarify that the U.S. interprets Articles 25.2 and 211.3 to recognize longstanding rights of states to impose conditions on the entry of vessels into ports or internal waters. Conditions on port of entry include conditions on operation and design of a vessel as it proceeds to a given U.S. port of call, extending seaward as necessary.

#### *D. Enforcement of Non-Monetary Penalties in the Territorial Sea*

Article 230.2 of UNCLOS authorizes only monetary penalties for violations committed in the territorial sea, except in the case of “a willful and serious act of pollution.” U.S. law (e.g. the Clean Water Act), currently authorizes criminal penalties as well as broad civil penalties for illegal discharges in the territorial sea.

Two potential ambiguities are created by reconciling the UNCLOS provisions with U.S. law. The first is whether the monetary penalties authorized by UNCLOS are consistent with the U.S. concept of “civil penalties” so as to potentially allow for injunctive relief, administrative orders or restitution. And second, in determining where criminal penalties may be available in the territorial sea, to what extent is “willful and serious” consistent with the U.S. concept of *mens rea*; does it mean knowing, negligent or grossly negligent?

So that this provision is not construed in a manner inconsistent with U.S. interests, the Senate should make clear in its advice and consent that the determination of “willful and serious” will be made by the responsible U.S. agency in accordance with U.S. law; that the “willful” element is satisfied if the defendant was aware of the conduct leading to the “act of pollution,” regardless of whether the defendant intended the illegal discharge or the act of pollution, and that the concept of monetary penalties means the full array of civil remedies.

#### *E. Environmental Protection in the Contiguous Zone*

Article 33.1 of UNCLOS provides that in the contiguous zone, a coastal state may exercise the control necessary to “(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea . . .”

There is a need to clarify the term “sanitary laws” to ensure these include environmental measures to protect human or ecosystem health within the territorial sea. These would include, for example, laws to prevent the contamination of fish or shellfish consumed by people, waters used for recreation, and the Clean Air Act standards which protect human health from the impairment of air quality from vessel emissions. International agreements negotiated in the time since UNCLOS have adopted a similarly broad definition of “sanitary.”<sup>11</sup>

We urge the Senate to include an interpretive statement on this issue as part of its advice and consent, to be included with the instrument of accession. The statement must clarify that “sanitary laws” under Article 33.1 include all laws and regulations that provide direct or indirect protection to human health, welfare or the marine environment.

#### *F. Regulation of Industrial and Other Polluting Operations At Sea*

The U.S. currently regulates certain industrial facilities such as seafood processing vessels, aquaculture facility discharges, and offshore oil and gas operations under the permitting requirements of Sections 402 and 403 of the Clean Water Act. The U.S. also regulates certain cruise ship operations in the waters around Alaska.

<sup>10</sup> National Invasive Species Act of 1996, P.L. 105-332, 16 U.S.C. 4711 (1996). Both the Senate and the House are currently considering legislation to substantially strengthen this program to require ballast water treatment for ships coming into all U.S. ports (S. 525 and H.R. 1080).

<sup>11</sup> E.g. Article XX(b), General Agreement on Tariffs and Trade, (1994): Agreement on the Application of Sanitary and Phytosanitary Measures, World Trade Organization.



Additional measures will likely be necessary to address environmental issues arising from other industrial activities on vessels.

UNCLOS, if interpreted too narrowly, could constrain the United States' ability to adopt and enforce these important measures. As noted earlier, Article 21.2 imposes limits on laws and regulations relating to "innocent passage." Article 211 also raises similar issues. We urge the Senate to include an interpretive statement on this issue as part of its advice and consent, to be included with the instrument of accession. The statement must clarify that these vessels are not engaging in or innocent passage as defined in Articles 18 and 19, and that the U.S. is free to regulate vessels operating in a capacity other than innocent passage as necessary to protect against polluting discharges from these vessels.

#### *G. Defining Clear Grounds for Inspection*

Article 226 of UNCLOS limits port state inspections to "required documents" except in certain cases, such as where there are "... [c]lear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents. This would make many enforcement cases difficult, such as those brought by the U.S. to determine whether a vessel is treated with a toxic antifouling agent such as tributyltin, or to determine whether a vessel is in compliance with a ballast water management performance standard.

We urge the Senate to include in the record an interpretive statement which establishes that "clear grounds" includes at least "probable cause" and "reasonable suspicion," and that it is not intended to preclude the right or ability of a port state to take appropriate samples or tests.

#### *H. Dispute Settlement Provisions as a Potential Bar to Protective National Action*

UNCLOS is one of the few international environmental agreements requiring binding settlement for many environmental and conservation disputes. States may choose among four options for binding settlement: the International Court of Justice, the Tribunal for the Law of the Sea, an arbitral tribunal, or a special expert arbitral tribunal constituted to hear a dispute over navigation, fisheries, marine environmental protection, or marine scientific research.

There is some concern that the Convention's dispute settlement provisions could be used "politically" to try to prevent a state from enforcing domestic laws that authorize or mandate trade measures. With regard to trade-related challenges, these kinds of laws often are placed into one of two categories, i.e. U.S. laws that apply unilateral standards to foreign actions (e.g., MMPA, Sea Turtle amendments), and U.S. laws addressed to nations that are diminishing the effectiveness of an international agreement (e.g., Pelly Amendments).

The U.S. has taken the position, and TOC agrees, that UNCLOS was not intended to cover trade measures. It imposes no obligations on states relating to such measures, and the history of its negotiation makes it clear that conservation measures were not intended to encompass trade measures. There is therefore no substantive basis in the Convention for challenges to trade measures based on national standards.

We remain concerned, however, that other nations may attempt to challenge trade measures or sanctions under the Convention's dispute settlement provisions in order to try to discredit those standards and gain an advantage in the World Trade Organization, where trade measures based on the standards could be challenged. Where multilateral processes fail to resolve pressing environmental problems, national action remains a necessary and effective option. The U.S. may both serve to protect against the problem, and to encourage positive international action and raise awareness of the problem.<sup>12</sup>

Therefore, TOC urges the Senate to include interpretive language clarifying that there is no substantive basis in the Convention for those kinds of challenges, and that the Convention does not affect U.S. authority to utilize these measures.

<sup>12</sup> For example, in 1991, TOC and other groups petitioned the United States to certify the Government of Japan under the Pelly Amendments. The certification was for "undermining the effectiveness of international programs for the conservation of sea turtles" due to Japan's annual import of 20,000 kg of hawksbill sea turtle shell, and thousands of skins of the olive ridley turtle from Mexico. Mexico shortly thereafter ended the olive ridley harvest in order to avoid trade sanctions, and Japan agreed to phase out the trade by the end of 1992. The threat of Pelly Amendment sanctions, while never imposed, in conjunction with international pressure, played a crucial role in preventing the extinction of the hawksbill sea turtles and in ending the illegal harvest of olive ridley turtles in Mexico.

IV. ISSUES REQUIRING LEADERSHIP FROM THE U.S. IN THE IMPLEMENTATION AND THE FUTURE OF UNCLOS

The vision of UNCLOS as a constitution was introduced at the beginning of this testimony, and it must be revisited here. As a constitution, UNCLOS is not meant to be an inflexible, stagnant document. Rather, its provisions must be interpreted over time, and its processes applied to our expanding environmental awareness about our world's oceans and the resources within them. In fact, subsequent multilateral environmental agreements have both reaffirmed and expanded upon UNCLOS's regime for the marine environment.<sup>13</sup>

The United States will be in a better position to address the existing deficiencies or limitations in the rule of law for the oceans if it becomes a signatory to UNCLOS. In its 1998 joint statement, which provides the basis for my next remarks, the environmental community urged the United States to embrace its leadership role in the world by ensuring that UNCLOS serves as a framework for securing more protective regimes for the conservation of marine ecosystems and wildlife. This role must continue beyond accession to participation and negotiation for improved international environmental practices over time. I would like to take this opportunity to briefly mention a few of these emerging and important issues.

A. *Precautionary approach*

The U.S. Commission on Ocean Policy and the Pew Oceans Commission on which I served have both confirmed that our oceans are in crisis.<sup>14</sup> While we wait for the final recommendations of the Federal Oceans Commission, the Pew Oceans Commission recognized that to address the problems confronting our oceans, a new ethic is needed, one which, in the face of uncertainty, urges caution and protection. The precautionary approach today is endorsed internationally as a fundamental policy.

It is absolutely critical that such an approach is utilized for our world's oceans. Relatively little is known about our oceans and the resources they contain. Yet we are already witnessing the consequences of failing to embrace the precautionary principle in our treatment of the marine environment. Throughout history the oceans have been treated as unlimited and resilient. We have generally exploited our resources, in the oceans as on land, in absence of unanimous agreement that these resources are at risk. As a result, proof of our error is beginning to pour in. The draft report from the federal oceans commission concluded last year that our oceans are in trouble. Specifically, the trouble comes from overfishing,<sup>15</sup> coastal development and habitat loss,<sup>16</sup> runoff<sup>17</sup> and point source pollution<sup>18</sup> and climate change.<sup>19</sup> In a larger sense, however, the trouble comes primarily from our inability

<sup>13</sup> At the time of the first meeting of UNCLOS and the Stockholm Convention in 1972, there were relatively few international agreements concerning the environment. Since 1972, almost every country has adopted at least one piece of environmental legislation, and there are more than 870 legal instruments that contain at least some provisions focusing on the environment. See Edith Brown Weiss, *Introductory Note to United Nations Conference on Environment and Development*, 31 I.L.M.814 (1992); see also Jonathan L. Hafetz, *Fostering Protection of the Marine Environment and Economic Development: Article 121(3) and the Third Law of the Sea Convention*, 15 Am. Univ. I.L.R. 583, 592 (2000).

<sup>14</sup> While the U.S. Commission on Ocean Policy's final findings and recommendations are not yet published, draft recommendations and findings are available on the Commission's Web site at <<http://www.pewoceans.org>>.

<sup>15</sup> In 2001, the U.S. Government could only assure that 22 percent of fish stocks under federal management (211 of 959 stocks) were being fished sustainably (NMFS, 2002). New England cod, haddock, and yellowtail flounder reached historic lows by 1989. Atlantic halibut are commercially extinct in U.S. waters, and populations of some rockfish species have dropped to less than 10 percent of their historic levels. (MacCall and He, 2002). A recent study in *Science* reports that highly migratory species of sharks, including blue, thresher and hammerhead sharks, have declined by as much as 60-90% in the northwestern Atlantic since 1986.

<sup>16</sup> More than one fourth of all the land converted from rural to suburban or urban uses since the time of European settlement of the United States occurred during the 15 year period between 1982 and 1997 (the last year for which figures are available) (NRI, 2000).

<sup>17</sup> More than 13,000 beaches were closed or under pollution advisories in 2001 (NRDC 2002), and a recent National Academy of Sciences study estimates that the oil runoff from land-based sources is equal to an *Exxon Valdez* oil spill—10.9 million gallons—every eight months (NRC 2002).

<sup>18</sup> In the U.S., animal feeding operations produce about three times the amount of sewage produced by the human population. Despite this, only 15% of all animal feeding operations have Clean Water Act permits to operate (EPA 2002). In one week a typical 3,000 passenger cruise ship generates about 1 million gallons of graywater (water from shower, laundries and dishwashing), which is exempt from the Clean Water Act.

<sup>19</sup> Global air temperature is expected to warm by 2.5 to 10.4 degrees F in the 21st century, affecting sea-surface temperatures and raising the global sea level by 4 to 35 inches (Intergovernmental Panel on Climate Change, 2001).

to make prudent decisions for the future in the face of uncertainty today. We have treated our oceans as an infinite resource, and now we must face the incontrovertible proof that we are devastating a finite one.

The environmental community noted in 1998 that the concept "precautionary principle" did not exist at the time UNCLOS was negotiated, and that consequently the term did not appear in the Convention. However, we urged then and TOC urges now that the United States play a leadership role in future Convention amendments to ensure the appropriate application of this principle to guide decision-making. Fortunately, the Convention, as a constitution, does establish some principles and tools that may provide a framework for future application of the precautionary approach.<sup>20</sup> Moreover, subsequent multilateral agreements related to UNCLOS do include use of the precautionary principle, including the Straddling Stocks Agreement.<sup>21</sup> We therefore believe this approach is compatible with UNCLOS and urge the United States to work to ensure that subsequent changes to UNCLOS appropriately utilize the precautionary approach.

#### *B. Fisheries Conservation Measures*

Part V of UNCLOS established the regime of the EEZ, the 200-mile area wherein coastal states have sovereign rights to explore and exploit, as well as to conserve and manage, their marine resources. The Convention recognizes the authority of the coastal state over the exploitation of living resources in its EEZ, yet qualifies this right by the overarching duty in the Convention to protect the marine environment.

UNCLOS adopts as a goal of management in Article 61(3) the Maximum Sustainable Yield, qualified by environmental and economic factors. There is some concern that harvest rates based on MSY do not take natural variability and scientific uncertainty sufficiently into account. At the time UNCLOS was negotiated, many fisheries were still expanding. As more and more fisheries become overexploited, it is clear that using MSY as a management target very often results in overfishing and depletion. Optimum fishing effort for sustainable exploitation must now be below or well below the level of effort corresponding to MSY, according to the U.N. Food and Agricultural Organization.

However, an even larger problem is in the failure of implementation to ensure accuracy in reporting, transparency and enforcement. TOC urges the United States to take a leadership role through UNCLOS and other treaties to ensure better implementation and enforcement of fish conservation measures.

In particular, UNCLOS did not resolve major issues regarding the management, exploitation and conservation of living marine resources, particularly the highly migratory species of fish and populations of fish that straddled the boundaries between EEZs or between EEZs and the high seas. The Convention's provisions related to straddling stocks and highly migratory fish stocks are extremely general.<sup>22</sup> The failure of governments and fishing industry to deal effectively with these species has led to widespread overfishing and conflicts between nations. Today several straddling and highly migratory fish stocks are in a state of collapse.

Recognizing UNCLOS's limitations for addressing these species, further environmental agreements have been negotiated and signed by the United States.

The U.N. Fish Stocks Agreement was negotiated to address some of the deficiencies of UNCLOS by elaborating on the duties of states to manage and conserve straddling and highly migratory fish stocks and ecologically related species. The Agreement's provisions are enforceable through the Convention's dispute resolution system, thus reinforcing enforcement and compliance opportunities for state parties to the Convention. The U.N. Fish Stocks Agreement has provided the basis to revise existing regional management agreements in the central and western Pacific and in the eastern Pacific Ocean. These regional management agreements are key to undertaking further reforms in relation to such critical issues as overcapacity, overfishing and unacceptable fishing practices that have contributed so greatly to the current fish crisis.

We mention them in our testimony to note that the United States has already taken leadership in the negotiation of improvements to UNCLOS and should con-

<sup>20</sup> These principles and tools may include environmental impact assessment and monitoring requirements, caution in the introduction of new technologies and new or alien species, and the establishment of critical habitat for marine life. The definition of pollution, which includes harm to living resources and marine life, is also complimentary to precautionary approaches.

<sup>21</sup> The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995).

<sup>22</sup> They require nations only to "seek . . . to agree upon the measures necessary" for cooperation (straddling stocks) and to "cooperate . . . with a view to ensuring conservation" (highly migratory species).

tinue to do so in the future.<sup>23</sup> The majority of highly migratory fish stocks lack the precautionary, transparent management programs dictated by the Straddling Stocks Agreement while shark and ray populations have no international fishery management measures whatsoever. To halt the decline of sharks and safeguard other migratory species, the U.S. must work after accession for the further progressive development of international law.

#### IV. CONCLUSION

In conclusion, we strongly support U.S. accession to the Convention. We urge the Committee to develop interpretive language as necessary in its advice and consent to reconcile UNCLOS provisions with U.S. statutory law and to preserve the ability of the U.S. to act to protect and conserve its marine environment. We also urge the Senate to include report language encouraging the United States to fully commit to its role as a world leader in advancing environmental protections for areas where UNCLOS needs further development. It is our hope that with accession, the United States will lead by example so that we may protect, maintain and restore our magnificent ocean trust for future generations.

[Attachment.]

#### RATIFICATION OF THE LAW OF THE SEA MUST ENSURE THE PROTECTION OF U.S. OCEAN RESOURCES

On October 14 and 21, 2003, the Senate Foreign Relations Committee will hold hearings on U.S. ratification of the U.N. Convention on the Law of the Sea. The Convention sets forth the nature and extent of offshore jurisdictions within national 12-mile territorial seas and 200-mile exclusive economic zones (EEZ), and preserves the rights of navigation and overflight in these areas and international straits. The Convention also contains provisions that are highly protective of the marine environment. However, due to concerns over its deep-seabed mining provisions, the U.S. never signed or ratified the Convention. Nevertheless, the Convention entered into force in 1994 and is generally regarded as customary international law.

The Convention has much to recommend it, and should be ratified. However, in certain cases ratification may be used to frustrate the enactment and enforcement of U.S. environmental, health and safety laws. To minimize the risks to domestic laws from ambiguous or inconsistent provisions in the Convention, certain questions need to be addressed by the Committee (noted below), and an interpretative statement should be included by the Senate as part of its Advice and Consent. This interpretative statement should support the authority of the states and the federal government to prescribe and enforce laws to protect health, safety and the environment in the U.S., its territorial waters and its EEZ, including those laws with provisions more stringent than international standards when the U.S. deems it appropriate. The Senate's interpretations should be submitted as understandings when the U.S. submits its instruments of ratification.

#### LAW OF THE SEA AND THE PROTECTION OF THE MARINE ENVIRONMENT

Today, nearly 140 nations have ratified the Law of the Sea Convention. The U.S. should also ratify the Convention because of provisions that protect the marine environment.

- The Convention establishes duties for all nations to conserve living marine resources in the high seas (Article 117), and conserve and maintain fish stocks within nations' 200-mile EEZs (Article 61).
- The Convention calls on nations to ensure the conservation of fish stocks that straddle national EEZs (Article 63), and highly migratory fish species and marine mammals that traverse the high seas (Article 64).
- The Convention establishes duties for all nations to protect the marine environment from pollution from vessel dumping, sea-based activities and land-based sources (Articles 192-236).

<sup>23</sup> Other recent positive actions by the United States include efforts to promote a United Nations General Assembly Resolution to stop the practice of finning, the wasteful practice of slicing a shark's fins off while at sea while discarding the rest of the shark.

## POTENTIAL CONFLICTS WITH DOMESTIC LAWS

While the Convention should be ratified, the potential effects that ratification may have on U.S. health, safety and environmental laws must not be ignored. These are more than hypothetical concerns. In *U.S. v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp.2d 1358 (S.D. Florida, 1998), Royal Caribbean Cruise Lines argued that the Convention shielded it from prosecution under the False Statements Act for presenting fabricated oil record books to the Coast Guard. Royal Caribbean argued that under the Convention the right to regulate pollution from ships belongs to the flag state (Liberia in this case) and not the U.S., regardless of whether the discharge occurred within or outside the U.S. EEZ. The U.S. District Court disagreed and found that Royal Caribbean could be prosecuted. However, the case illustrates how the Convention could be used before ratification to attempt to avoid prosecution of U.S. health, safety and environmental laws.

It is therefore prudent for the Senate as part of its Advice and Consent to include interpretations of pertinent provisions of the Convention to support the authority of the states and the federal government to prescribe and enforce laws to protect health, safety and the environment in the U.S., its territorial waters and its EEZ, including laws with provisions more stringent than generally accepted international standards. These interpretations should be submitted as understandings when the U.S. submits its instrument of ratification. Because adoption of the Convention will be "self-executing," it may be argued that certain international standards and/or provisions of the Convention take precedence over U.S. laws. This raises a number of questions that need to be addressed:

- Do Articles 21, 211 and 196 allow the U.S. to adequately control the discharge of ballast water from vessels that contain dangerous diseases, bacteria and species that endanger domestic species and impose tremendous economic costs?
- Would Article 230, which restricts criminal penalties for violating anti-pollution laws to monetary damages, impede the full and effective enforcement of U.S. laws?
- Could Article 33 impede the enforcement of laws to prevent the contamination of fish or the impairment of air quality from vessel emissions?
- Could the Convention's dispute resolution procedures be used to challenge U.S. trade measures under the Pelly Amendment, the Endangered Species Act and other laws to protect species such as sea turtles and dolphins from destructive fishing practices?
- Could Article 226 interfere with the inspection of vessel discharges, hull coatings and equipment to determine if they are harming the marine environment?
- Could Articles 21 and 211 limit U.S. laws to prevent pollution from foreign ships if those laws exceeded "generally accepted international rules or standards"?
- Would the Convention affect the ability of the U.S. to protect its coast from an environmental disaster like the sinking of the *Prestige*, a foreign-flagged single-hulled tanker carrying twice the oil of the *Exxon Valdez* that went down 150 miles off the coast of Spain in November 2002?

If the answers to these questions are yes, ratification of the Convention might result in unintended consequences unless an official U.S. interpretation clarifies that ratification would not prevent the U.S. from prescribing and enforcing more stringent standards. For example, we are concerned that absent clarifying language, an argument could be made that prevents the U.S. from stopping a foreign-flagged cruise ship from dumping wastes into U.S. waters that violates the Clean Water Act so long as it meets weaker international standards; prevents the U.S. from stopping the dumping into U.S. waters of ballast water that contains invasive species, bacteria or diseases that harm marine resources; or prevents U.S. officials from inspecting equipment on a ship that has been discharging harmful or toxic wastes on the theory that the Convention limits inspections to certificates or other documents carried by the vessel.

The CHAIRMAN. Thank you very much, Admiral, for that very important perspective. The committee looks forward to working with you and your associates on necessary language.

Admiral RUFFE. Thank you, sir.

The CHAIRMAN. Ms. Thomas.

**STATEMENT OF MS. RANDI THOMAS, NATIONAL  
REPRESENTATIVE, U.S. TUNA FOUNDATION, WASHINGTON, DC**

Ms. THOMAS. Thank you, Mr. Chairman. I first want to say that David Burney was to give this testimony today, and his statement is included in what we have sent forward, but I will summarize his remarks.

The CHAIRMAN. Thank you.

Ms. THOMAS. I wanted to tell you about the U.S. Tuna Foundation. It is a nonprofit trade association representing the legislative and international affairs of the U.S. canned tuna industry. Our membership includes all U.S. canned tuna processors and all of the U.S. flag, distant water tuna purse seine vessel owners.

The U.S. tuna industry supports the accession of the United States to the Law of the Sea. We consider this hearing to be directly relevant to our industry since the conservation and management of the highly migratory tuna resources is closely tied to the relevant provisions of the convention. Not all fish stocks are in sad shape, as has recently been reported. As a matter of fact, most tuna stocks are in a healthy to relatively good condition. This is due in no small fact to the regional tuna conservation and management regimes that have been established in all of the major tuna fisheries in the world. These regimes include the Inter-American Tropical Tuna Commission, the International Commission for the Conservation of Atlantic Tunas, the Indian Ocean Tuna Commission, the newly developing Western and Central Pacific Fisheries Commission, as well as the Fisheries Treaty between the U.S. and South Pacific Island States. We believe the U.S. accession to the UNCLOS will strengthen our abilities to continue the strong U.S. leadership positions in the tuna agreements to which the United States is party.

Article 64 of the UNCLOS has been instrumental in establishing principles of sound international fisheries conservation and management. In particular, article 64 has had an impact on the issues of coastal States' jurisdiction, the South Pacific Tuna Treaty, the U.N. Fish Stocks Agreement, and the new Western and Central Pacific Fisheries Commission.

Prior to 1982, the U.S. tuna industry agreed with the U.S. position not to recognize coastal State jurisdiction over tuna stocks. The industry had long argued that because tunas traverse the juridical zones of numerous coastal States, these stocks could only be managed and conserved through international cooperation. A coastal State does not own the highly migratory stocks exclusively. After all, these fish do not recognize borders.

Unfortunately, the coastal States did claim jurisdiction and would seize U.S. tuna vessels if they entered their 200-mile zones. The U.S. policy was coming under increased attack, especially by Latin and Central American States that believed they have preferential rights to the resources without the obligation to provide for the optimum utilization of the resource throughout its range.

The industry recognized the problem of coastal State jurisdiction over highly migratory species was not going to go away. As a result, beginning 1984, a series of meetings resulted in a precedent-setting fisheries treaty in 1987. This treaty, commonly referred to

as the South Pacific Tuna Treaty, embodies the spirit and intent of article 64 of UNCLOS.

During the negotiations leading up to the U.N. Fish Stocks Agreement, the South Pacific Tuna Treaty was referred to as the model to be followed in establishing a regional cooperative agreement for highly migratory fish stocks such as tuna. The Fish Stocks Agreement made it clear that highly migratory fish stocks can only be effectively managed as a biological unit throughout their entire range and that there was an obligation on the part of both the fishing States and the coastal States to ensure optimum utilization of the resource throughout the region.

Following the Fish Stocks Agreement, negotiations began for a new management regime for the western and central Pacific Ocean. During the negotiations, the South Pacific Tuna Treaty was again used as a model for many features of this convention. The commission itself is expected to come into effect in 2004, thereby creating a worldwide tuna management organization.

The U.S. tuna industry is especially pleased with article 5 of this convention, which follows article 64 of UNCLOS, and makes clear that members have a duty to conserve and manage tuna stocks with the objective of optimum utilization.

In summary, we believe article 64 of UNCLOS is being interpreted as intended. We urge the Senate to move to accept the Law of the Sea. Thank you.

[The prepared statement of Mr. Burney follows:]

PREPARED STATEMENT OF DAVID G. BURNEY, U.S. TUNA FOUNDATION

Mr. Chairman and members of the Senate Foreign Relations Committee, on behalf of the U.S. Tuna Foundation I want to express our gratitude for being invited to testify here today on a subject that is very important to our industry and to the highly migratory fish stocks that roam the oceans of the world. For those of you not familiar with the U.S. Tuna Foundation, it is a nonprofit trade association representing the legislative and international affairs of the U.S. canned tuna industry. Its members consist of all of the U.S. canned tuna processors and all of the U.S. flag, distant water tuna purse seine vessel owners.

We consider this hearing to be directly relevant to our industry since the conservation and management of the highly migratory tuna resource is closely tied to the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS). The recent horror stories regarding the current status of the world's fisheries notwithstanding, most tuna stocks are in a healthy to relatively good condition. This is due in no small fact to the regional tuna conservation and management regimes that have been established in all of the major tuna fisheries of the world.

In 1979, I testified before the Senate Commerce Committee on the U.S. Tuna Industry's position regarding claims by some countries that they owned the tuna stocks that were within their exclusive economic zones (EEZs) and they alone could decide if any management or conservation was necessary. I stated at the time that I did not know how you could own something that migrates through your waters. I argued that highly migratory species of fish such as tuna could not be effectively managed or conserved in the same manner as standing stocks of fish. I stated that it was shown that highly migratory tuna traverse the juridical zones of numerous coastal States as well as high seas areas beyond coastal State jurisdiction. I concluded that it was our belief that highly migratory fish stocks such as tuna could only be effectively managed and conserved through international cooperation.

Interestingly enough, several members of the Committee criticized me for taking this position. I was told that the U.S. tuna industry had used the highly migratory nature of the fish as a smoke screen to allow our distant water fishing vessels to exploit tuna stocks found in the waters of coastal States who claimed these stocks as their property. I was even told that my statement misrepresented the highly migratory nature of tuna.

Prior to December of 1982, when the UNCLOS was signed, the ownership, management and conservation of highly migratory tuna had been hotly debated. The United States neither ratified the UNCLOS, nor recognized the claims of coastal States who declared sovereignty over the migratory tuna when it was in their juridical zone. The official U.S. position at that time was that tuna belonged to no one country because of their migratory nature and they could only be effectively managed and conserved as a biological unit throughout their entire range. Needless-to-say we agreed with this position.

The UNCLOS clearly recognized the difference between managing and conserving standing stocks of fish and highly migratory fish such as tuna. Article 61 gave the coastal States the right "to determine the allowable catch of the living resources in its exclusive economic zone." It went on to obligate the coastal State to "ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over exploitation." Many coastal States interpreted Article 61 as justifying their claim of sovereignty over both standing fish stocks and highly migratory fish stocks found in their EEZs. We believed that Article 64 governed the treatment of highly migratory fish stocks, not Article 61.

Article 64 specifically provides that "the coastal State and other States whose nationals fish in the region for the highly migratory species" . . . "shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone." The coastal States blended the provisions of Article 61 and Article 64 and argued that together they granted a coastal State preference over tuna. The distant water fishing States, including the United States disagreed. They argued that Article 61 and Article 64 were mutually exclusive and international cooperation, not coastal State preference, was the overriding intent of Article 64.

In the 1990 amendments to the Magnuson Fisheries Conservation and Management Act (MFCMA), the United States for the first time claimed a form of coastal State preference over the tuna resource within its EEZ. The United States claimed the right to regulate the harvest of the resource found within its EEZ but made it clear that the resource could only be effectively managed through international cooperation. In essence, the United States did not want foreign fishing fleets to have unrestricted access to the highly migratory tuna stocks found in the U.S. juridical zone.

Although the 1990 MFCMA amendments declared U.S. jurisdiction over highly migratory fish stocks within its juridical zone, the United States continued to maintain that this jurisdiction did not amount to ownership of the resource. The U.S. position at the time was that coastal States had an obligation under Article 64 of the UNCLOS to cooperate directly or through international organizations to ensure conservation of the resource both within its EEZ and on the high seas. Additionally, the United States agreed that Article 64 required that the coastal States also promote the objective of optimum utilization of the highly migratory resource throughout the region, both within and beyond claimed juridical zones.

At the time, there were many connected with U.S. fisheries, both in and out of government, who believed this would be the demise of the U.S. high seas tuna fleet. It is true that the U.S. tuna industry had supported the earlier position of the United States, when they did not recognize any coastal State preference or jurisdiction over the resource. However, the industry also recognized that this earlier U.S. position had been considered confrontational by many coastal States and had led to the costly seizure and detention of U.S. tuna vessels when they were found fishing within the foreign juridical zones.

The penalties paid to the coastal States to get these seized vessels released had escalated significantly during the early to mid 1980s because of the U.S. non-recognition policy. The increased penalties were principally due to the increasing awareness of the coastal States that the penalties were in fact paid by the U.S. government under a program entitled the Fisherman's Protective Act. This did not mean, however, that the U.S. high seas tuna fleet was not impacted by the seizures. Lost fishing time and vessel deterioration during the detention period often resulted in substantial cost to the vessel owner.

The U.S. tuna industry never opposed or denied the need for effective tuna conservation and management programs. In fact, the industry was instrumental in the establishment of the first international tuna management organization, the Inter-American Tropical Tuna Commission, in 1945. This organization has effectively managed tuna in the eastern tropical Pacific Ocean since its inception and operates on the basis of the international cooperation envisioned in Article 64 of the UNCLOS.



It is true, that prior to the MFCMA amendments of 1990, the U.S. tuna industry did oppose the extended fisheries jurisdiction claims by most coastal States. The industry firmly believed that tuna could not be managed on a piece-meal basis and saw most coastal State preference claims as being nothing more than an effort to deny access to distant water fishing fleets. However, in the early and mid 1980s the industry realized that the U.S. government's tuna policy was coming under serious attack by the coastal States and representatives of the U.S. government. Some U.S. government officials even expressed the belief that the U.S. high seas tuna fleet was becoming a U.S. foreign policy nightmare.

As a result, beginning in 1984, representatives of the U.S. tuna industry initiated meetings with officials of several south Pacific Island States located adjacent to a very productive tuna fishery in the western and central Pacific Ocean. The purpose of the meetings was to explore the possibility of creating a regional access arrangement for the U.S. high seas tuna fleet, which up until this time had been operating primarily in the eastern tropical Pacific off of Central America. It had become clear to industry leaders that the Latin American coastal States viewed Article 64 as a one-way street—coastal States had preferential rights over tuna within their juridical zones and there was no concurrent duty or obligation to provide for the optimum utilization of the resource throughout the region.

From 1985 to 1987, the U.S. tuna industry, working cooperatively with the U.S. government, continued to pursue a regional tuna access arrangement in the western and central Pacific Ocean region. In 1987, this effort resulted in a precedent setting fisheries treaty between the United States and the sixteen Pacific Island States that comprise the western and central Pacific region (the Tuna Treaty). It was, and is, our opinion, that this treaty embodies the spirit and intent of Article 64 of the UNCLOS.

The Tuna Treaty created a licensing regime over an area that covered some 10 million nautical miles including the high seas and the juridical zones of the coastal States in the region. The Tuna Treaty recognized coastal State jurisdiction over tuna within their juridical zones but also acknowledged the obligation of the coastal States to cooperate with other States whose nationals fish in the region to ensure conservation of the resource and promote the objective of optimum utilization of the resource throughout the region. In essence, the Tuna Treaty was built on the provisions of Article 64 of the UNCLOS. The Tuna Treaty has been in effect since 1987, and was recently extended for an additional ten years commencing in 2003.

During the negotiations leading up to the 1995 U.N. Agreement for the Implementation of the Provisions of the UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the 1995 Agreement), the Tuna Treaty was referred to often as the model to be followed in establishing a regional management regime for highly migratory fish stocks such as tuna. The 1995 Agreement made it clear that highly migratory fish stocks can only be effectively managed as a biological unit throughout their entire range and that there was an obligation on the part of both the fishing States and the coastal States to ensure the optimum utilization of the resource throughout the region.

The parties to the 1995 Agreement were able to agree on a rational and effective set of management principles for highly migratory fish stocks. After lengthy debate, it became the consensus of the parties that highly migratory fish stocks such as tuna cannot be effectively managed if different management principles are promulgated by coastal States for their juridical zones and by international agreement for the high seas area. It was agreed that the management measures must be designed for the entire range of the highly migratory resource. Finally, Article 64 was getting the recognition it deserved.

Subsequent to the 1995 Agreement being adopted negotiations were commenced to establish an international tuna management regime for the western and central Pacific Ocean. In 2000, this effort culminated in the signing of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (the Convention). Again, during the negotiations leading up to the signing of this Convention, the Tuna Treaty was used liberally as a model for the management provisions that were included in the final work product. Of particular satisfaction to the U.S. tuna industry was the wording of Article 5 of the Convention dealing with the principles and measures for conservation and management. The pertinent language reads:

In order to conserve and manage highly migratory fish stocks in the Convention Area *in their entirety*, the members of the Commission shall, in giving effect to their *duty to cooperate* in accordance with the 1982 Convention, the Agreement and this Convention:

(a) adopt measures to ensure long-term sustainability of highly migratory fish stocks in the Convention Area *and promote the objective of their optimum utilization.* (emphasis added)

In summary, it has taken a long time and many debates but finally Article 64 of the UNCLOS is being interpreted as intended. The U.S. tuna industry can find no fault with the fisheries application of the 1982 UNCLOS, the 1995 Agreement or the 2000 Convention. They have collectively ensured that the principles of effective management and optimum utilization of important highly migratory fish stocks can work in harmony.

The CHAIRMAN. Well, thank you very much, Ms. Thomas.

I look forward now to hearing from you, Mr. Cox, on behalf of the Chamber of Shipping of America.

**STATEMENT OF JOSEPH J. COX, PRESIDENT AND CEO,  
CHAMBER OF SHIPPING OF AMERICA, WASHINGTON, DC**

Mr. COX. Good morning, Mr. Chairman, and thank you. I know my statement is in the record. However, sir, I did notice this morning that there are two typographical errors. I am one of the world's worst proofreaders, so lest your staff take the blame for it, I am going to say it in public here that it is my fault and I will give the changes to your staff.

The CHAIRMAN. We will make those changes with your cooperation.

Mr. COX. Thank you very much.

The Chamber of Shipping of America does trace its history back quite a bit, Mr. Chairman, to the early 1900s when we were formed in response to the British request for a Convention on Safety of Life at Sea and the American ship owners decided that we should be active on the U.S. delegation that was called for that particular convention treaty in 1914. We were very active then and I can assure you we have been very active on many maritime conventions that have been deliberated internationally since.

You have heard much testimony that this is a framework convention that we are talking about today. We certainly support the ratification of this convention. The United States exercised a great deal of leadership in this convention. We noted that U.S. leadership in our testimony, and I noted this morning that Admiral Mullen talked about the United States leadership in the maritime field, and I am sure he was reflecting the military aspects. I can assure you that from the commercial aspects the United States has exercised just as great a leadership as we have in the military framework.

Sir, I am going to comment on three aspects. We also heard this morning that Admiral Crowley from the Coast Guard referred to the environmental aspects of the Law of the Sea Treaty as it impacts our industry. Certainly it has been a very great impact and a very beneficial impact around the world to have international treaties dealing with environmental protection. The Maritime Pollution Convention, which he referred to, which we call MARPOL, does control oil and chemical and plastics pollution, to a great extent, and I think to a very large extent, that was reflected by the U.S. leadership at that convention.

We note, as the Chamber of Shipping, that we have been very active in development of an annex to the MARPOL treaty dealing with air pollution that we know is going to be coming up before

you. It is a very important annex. Sitting here this morning thinking about it, Mr. Chairman, there is a reflection on that that is very similar to the Law of the Sea, and that is that annex VI is going to come into force. It is going to be immediately put up for amendment in the way of tightening all the requirements, and we in the American industry support that tightening. However, we do not have a seat at the table unless we ratify it. So it is very similar to the Law of the Sea Treaty in that regard. So we certainly look forward to your consideration of that treaty when it comes up.

With respect to the Law of the Sea, we are extremely concerned with freedom of navigation issues, and I will connect that with a couple of incidents that have occurred very recently that we have participated in, the first one being that a vessel got into a little bit of trouble off of a European coast, and two of the States actually went out and, through force, forced the vessel out of their exclusive economic zone. Now, nations certainly have a sovereign responsibility to their people to protect their coasts, but when we deal with the international maritime community and the freedom of navigation, those rights have to be exercised with respect to international law.

We wrote to Secretary Powell with our deep concern that those nations were, indeed, violating not just customary law of the sea, but also the explicit requirements in the Law of the Sea Treaty.

As I sat here this morning thinking about this part of my testimony, it also came to my mind that—and it is not in my written testimony and I apologize for that, but the issue of piracy. In the year 2002, which is the most recent year we have statistics for, there were 372 acts of piracy, reported piracy, in the world. A lot of that is in archipelagic seaways where people can come from shore very quickly.

As we were debating the International Ship and Port Facilities Security Code last year—and the chamber was on the U.S. delegation and participated very deeply in that—we had much security concern with small boats coming up against large vessels. I think the French tanker *Limberg* showed us that a small boat can come up and do incredible damage to a large ship, not only to the ship itself and an economic burden there, but also an economic burden to the coastal State where that oil is going to be coming ashore.

So certainly there has to be some way that we deal with piracy issues which are small boats coming up and how does a master know what is going to take place. I think the connection with the Law of the Sea is we have to start putting pressure on those coastal States that by dint of no action are actually encouraging piracy to take place, and terrorism hidden as a piracy act is certainly something that I think we have to foresee.

The second area where I have some major concerns—and this is involved with the freedom of navigation—is at a recent meeting of the Marine Environment Protection Committee of the IMO, two States suggested that there be a particularly sensitive sea area declared in western Europe. Now, we recognize my friend sitting beside me here. I work with Roger and the Conservancy quite a bit on issues, but to suggest that the entire North Sea, the entire English Channel, the entire Irish Sea, 200 miles of waterways out to the west of Ireland and 200 miles off the coast of Portugal and

Spain, all the way down to the Straits of Gibraltar are a particularly sensitive sea area that is in need of specific protection we think is a stretching of the traditional way that we would look at particularly sensitive sea areas. Certainly those two countries moving vessels off of their coasts and countries declaring enormous areas where there are going to be restrictions placed on shipping are two things that we see coming down the road that we think the United States is going to have to exercise its maritime leadership. And certainly ratification of the Law of the Sea would be beneficial in that regard.

Mr. Chairman, I thank you very much for this opportunity and certainly would be pleased to respond to any questions.

[The prepared statement of Mr. Cox follows:]

PREPARED STATEMENT OF JOSEPH J. COX, PRESIDENT AND CEO, CHAMBER OF SHIPPING OF AMERICA

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. ratification of the U.N. Convention on the Law of the Sea. We realize that you have heard testimony in support of ratification. We are very pleased to add the Chamber of Shipping of America (CSA) to the support column.

The Chamber of Shipping of America represents 22 American owners and operators of ocean-going vessels. Our members operate both U.S. and foreign-flag ships in the domestic and international trades. While we have undergone a number of name changes over the years, CSA proudly traces its founding to 1914 when the British Government invited a small group of countries to develop the first international treaty regarding safety at sea. The American ship owners were involved in that first maritime treaty. It was prompted by a legendary incident—the sinking of the steamship—*Titanic*. While that treaty failed due to World War I, it plotted the course of future maritime treaties. Today, the safety, security and protection of the environment are all subjects of maritime treaties. World War I blocked the first try at a safety treaty although it led directly to development of treaties covering maritime labor conditions which are developed at the International Labor Organization (ILO). The ILO exists today under the U.N. umbrella although it was founded in 1919 as part of the League of Nations which was the brain-child of our President Woodrow Wilson.

Mr. Chairman and members, today we consider the Law of the Sea Treaty. It has been referred to as the fundamental framework governing obligations and rights of states; flag states, coastal states, and port states. Viewing it in conjunction with the many other maritime conventions shows the detailed interest the world has in the maritime industry. An import aspect of that interest is that shown by the United States. From 1914 through today, we do not know of any maritime treaties developed in any fora that did not have the active involvement of the United States. Indeed, many of the conventions, particularly those addressing environmental concerns, were undertaken at the urging of and subsequent leadership of the United States. Because the Law of the Sea Convention provides the framework for the protection of the environment, we feel comfortable in identifying another treaty that has been forwarded to your committee by the Administration, i.e., Annex VI of the Convention to Prevent Pollution from Ships. Annex VI of this convention covers the issue of air pollution from ships. It will soon be ratified by the requisite number of states to bring it into force. As with the Law of the Sea further development of Annex VI requires ratification. The U.S. led the effort on development of Annex VI. All of us recognize, and by all, we mean private sector and government, that Annex VI is not perfect although, if we wait for the perfect, we can be waiting a long time. We look forward to your positive consideration of Annex VI and the U.S. involvement in the continuing strengthening of this very important environmental measure.

The Law of the Sea, Annex VI of the pollution treaty and the newly adopted amendments to the safety of life at sea treaty dealing with security involve vital U.S. interests. The world looks to our leadership in these matters. We must respond, and respond vigorously and positively, to that expectation. The credibility of the U.S. in international fora where these agreements are made depends on it.

There are reasons why the U.S. benefits from a ratification of this treaty. It provides the framework for the essential concepts of freedom of navigation. The origina-

tion of the process leading to the treaty was occasioned by states exercising sovereignty in waters where the legal basis of that sovereignty was questionable to put it kindly. In recent months, we in the maritime industry saw states take action to forcibly remove a ship from their exclusive economic zone. It was reliably reported that the ship *Prestige*, listing and in imminent danger, was forced to go further out to sea under extremely dangerous conditions. We considered this very important and wrote to Secretary of State, Colin Powell expressing our grave concern. Nations can claim to interpret the law of sea. Those claims, unless challenged can stand. The Law of the Sea Tribunal is the appropriate place to adjudicate those claims and we want the U.S. to be able to participate and that requires ratification.

Protection of the crew is also a vital component of the treaty. The Master of the *Prestige*, after taking heroic steps to save his ship, was imprisoned by coastal state authorities when the all-too-predictable pollution occurred. After months of captivity, he was freed on bail that the press reported at over three million dollars. Once again, a step which CSA believes conflicts with provisions of the treaty.

Mr. Chairman, and members of the committee, these are not theoretical concepts or law school questions. These are topical circumstances involving developed nations. We must rely on our nation to call these actions to account. The U.S. should place itself in a position to be the effective force for adherence to treaty obligations by all. The only way we can do that is by ratifying the treaty. It is certainly unfortunate that states have taken dramatic action to control ships' off their coasts. It is also a measure of "deja vu" as similar actions led to the initiative of the law of the sea to begin with!

We also have to be vigilant concerning recent actions which are purported by their adherents to be in concert with the law of the sea. Under the framework of the law of the sea, the International Maritime Organization (IMO) developed the concept of "particularly sensitive sea areas" or PSSAs. These are areas which a state can declare as eligible for special protection. At the July meeting of the Marine Environment Protection Committee, it was determined that the entire sea area off Western Europe from the upper reaches of the English Channel to the Straits of Gibraltar were a particularly sensitive sea area. While the area was determined to be a PSSA, steps were not adopted to protect the area. The steps will be discussed at an upcoming meeting of the Marine Environment Protection Committee of IMO. We will be involved in these deliberations and believe that any measure is inappropriate. It is clear that states are beginning to feel comport in stretching the interpretations of the law of the sea into unrecognizable forms. It is time the U.S. decided that such antics are unacceptable.

The CHAIRMAN. Well, thank you very much, Mr. Cox.

Let me just say parenthetically that one of the reasons for our committee's interest in this area, given longtime work of so many before us, is this business of maritime leadership and the need to be at the table, particularly at a time in which the amending process is coming up next year and in which there may be others who will be offering leadership, hopefully constructive, but nevertheless important enough for us to be offering our leadership and to be thoughtful about their suggestions.

In a much more dire set of circumstances, probably not covered by the treaty, but of interest to many people with whom I have been working, there has been a problem left over from the cold war, and that is the problem of submarines that were first created by the Soviet Union. They have now been inherited by Russia. They are not abandoned, as far as we know, but on the other hand, they are in dire straits.

One of the interesting aspects of the G-8 process is that they are taking a look at weapons of mass destruction and things that they may do in cooperative efforts with Russia on the nuclear cores of these submarines. There has been suspicion in the past that some of that material may have gotten into the seas in any event. It is very clear, looking at 150 submarines at the Nerpa shipyard near Murmansk, that a good many more might disappear or leak into the sea without there being very substantial intervention. To say

the least, leadership on the part of a lot of people is going to be required so that there is not a massive danger to the seas that could last for some time and be of catastrophic import.

I appreciate your mention that there are issues that go well beyond those we have discussed today in terms of national security, the environment, the commercial rights and privileges.

I just want to follow up partially for my own curiosity, as well as for the committee record. I was intrigued, Mr. Kelly, by your statement in your testimony that world oil demand in 2001 was 76.9 million barrels per day. You mentioned by 2025, sort of 24 years down the trail, that that may be 119 million barrels per day, based upon the development of the economies of various countries that have much greater energy needs.

Without knowing all of the shipping aspects, on the vessels that will carry that energy, it does strike any observer that it is going to be a whole lot more than whatever the dangers are with regard to oil spills or other difficulties at the 76.9 figure. At 119 they are increased. I am just, I suppose, hopeful—and perhaps that is the dint of your testimony on that page—that one of the reasons for the Convention, for all the parties being around the table rather continuously, is that the amount of activity and the potential for very severe difficulty is likely to increase not only incrementally but actually rather dramatically in this period.

Could you amplify at all the point that you made here?

Mr. KELLY. Well, Mr. Chairman, you have put your finger on a very important point. If one looks at the rising economies of China and India just alone, India has been in the news recently for its rapidly growing economy, which everyone is happy to see. We have been hearing about economic growth in China. And if you just look at the population growth projections in both countries, we see in both those countries rising levels of expectations on the part of the populations. They want mobility. So we are going to see increasing demand for petroleum products to give them increased mobility.

Another thing that many people do not realize is that energy is behind the Internet, and as both those countries have rapidly growing Internet participation and that, with the desire to stay warm in the wintertime, is going to be driving the demand for electricity, which in turn will drive increased demand for oil and natural gas.

The point you make is a very good one, as we live in a world with these kind of developments, our leaders should be in a position to make adjustments as they go along to adopt what we might call adaptive management, which is used in business these days. And being a party to this convention and being a player at the various meetings I think is very important so that those adjustments can be made.

The CHAIRMAN. Well, I thank you for that testimony. Obviously, your business is involved with petroleum drilling and what have you. If we had other witnesses, perhaps they could suggest fuel cells or hydrogen or other ways in which the energy may be met. On the other hand, those suggestions have been coming for a long time, and the amount of oil that has been required seems to have increased through each year of hearings on the subject. That is why I was intrigued by the straight lines you were drawing into the future there.

Mr. KELLY. Yes. All these alternate sources of energy are coming, but I think these projections include assumptions with respect to how much alternatives can contribute. I think that when it is all said and done for the next 25 years, we are still going to be highly dependent on fossil fuels.

You know, another comment I was going to make, the comments by Admiral Rufe and Mr. Cox and yourself reminded me of the importance of the fact that the Law of the Sea Convention recognizes the leadership of the International Maritime Organization, IMO, on environmental and safety issues. I had the privilege of serving as an advisor to the U.S. delegation to IMO in London during the mid-1980s when I was resident in London managing my company's North Sea operations. When you look at the accomplishments of IMO, it should give one great satisfaction that maritime safety and environmental protection is really given careful consideration. Over the years, IMO has dealt with issues like invasive species, port security, pollution from vessels, safety of life, and annex VI to MARPOL that Mr. Cox mentioned is an example of this. It deals with air pollution from vessels, and my group of companies supports ratification of that as well.

But IMO has taken such initiatives as to develop a safety code for the whole class of vessels in our industry, a safety code for mobil offshore drilling rigs by themselves which requires companies that own them to follow very specific safety and environmental standards. And I think that such codes have been applied to other vessels as well.

Moreover, the United States Coast Guard, working with the State Department, has provided excellent leadership for the United States at all these meetings of IMO, and I know they will continue to do that in the future. And ratification of the convention gives us even more standing to do that.

The CHAIRMAN. Thank you, Mr. Kelly.

Admiral, you mentioned, quite appropriately, in addition to The Ocean Conservancy, the Pew Foundation which has offered leadership in this area. I really commend both for helping. A group of Members of the House and Senate met under the auspices of the Aspen Institute in a conference in Rome this summer. The purpose of the conference was really to take a look at the seas in terms of conservation of fish and fishing resources essentially. One of the large studies that was presented to us showed that unlike tuna that Ms. Thomas has mentioned, a good number of other species have disappeared in fairly large areas. Now, they reappear given proper management of the situation, but that is sometimes difficult to undertake without there being specific international cooperation that can govern fleets of fishing vessels or the ambitions of particular groups of people who understandably want the fish, but at the same time, sort of drive the population close to zero in some cases.

We looked carefully at national security this morning. We also considered some way of adjudicating disputes or, long before that, bringing about cooperation among commercial interests. Clearly at the heart of the value of this convention is conservation of the resources of the seas that are our collective heritage and that many persons in that area have found can be maintained doing vigorous

fishing. In the event that we are not thoughtful about this, we could, in fact, substantially depleted some of the nutritional resources of the world at a time when our populations are still increasing.

When you speak of the precautionary principle, to what extent is this reflected in the convention now? To what extent should it be reflected, or can you amplify what we ought to do with regard to that?

Admiral RUFÉ. Thank you, Mr. Chairman. Yes, thanks for your comments there.

The concern that we have is that the U.S. EEZ is the largest EEZ in the world. It is 20 percent larger than our U.S. land mass. It is the largest public resource that we own, and it is all in the public domain. None of it is privately held. And it is a rich resource that is held in trust for all Americans.

What the precautionary principle says is that in the absence of sound or final scientific information, that you should always err on the side of precaution rather than on exploitation. That is not covered in the convention currently. We think it is an accepted principle now internationally. It is certainly accepted, I think, in the U.S. in science and in conservation circles, but it often is ignored in the way we manage our fish stocks, as an example. We think that it ought to be part of the convention. We also think that the convention speaks to terms like generally accepted international rules and standards, that in the absence of those standards, that the U.S. not be precluded or restricted from taking unilateral action to protect our marine environment, our own marine resources, and using the precautionary principle in that context.

The CHAIRMAN. Now, just in a technical sense, on the precautionary principle—as well as—the second idea that you presented—are these ideas that can be made a part of our accession? or are these in the form of amendments that after we have acceded to the treaty, if we are members next year when we get together around the table, we offer? What advice can you give us technically on this?

Admiral RUFÉ. I would say, Mr. Chairman, do both. I think at least initially in the accession process, I think many of the things that we mention in our full written comments talk about the precautionary principle, as well as some other things, they should all be made part of the record I think as far as stating the U.S. position. But far stronger certainly is to have the official amendment adopted and accepted by all other countries. I actually think that the precautionary principle would be one that most countries would agree to and would be a good effort I think in terms of a strong amendment subsequently to the convention.

The CHAIRMAN. Did you have a thought about that, Mr. Cox?

Mr. COX. Thank you, Mr. Chairman. Thank you for recognizing me.

Certainly we, I cannot say, agree with the precautionary principle because I do not think it is defined in such a way that you could read it and say I agree with that or disagree with it. We agree with the principle that you do not have to have definitive scientific proof before you take some action to try and alleviate a problem. But there should be some connection, and I think that is



where we get into some disagreements with our colleagues in the environmental movement. Just how direct is that connection going to be and what would it mean?

Certainly the actions we take, particularly if they are going to have a large economic impact on an industry or on a people in a particular society, should be taken with some understanding that there is the potential for something positive coming out and not just taking the action because we think it might have some effect.

But these are activities where Roger and I certainly sit down across a table and have at it and discuss and come to some resolution. I think that to actually try and put this into writing in an international instrument at this moment could be done on a principle basis, but I think in a specific line basis where we could look at it and say, yes, that is what we agree to and all future actions will be predicated on that line, I do not think we are quite there yet.

The CHAIRMAN. Well, I appreciate your mentioning that. I would encourage some movement to see if there is not some reconciliation of the views. I suppose that there has not been that much opportunity for discussion because, as was pointed out at the last hearing, neither this committee nor any other committee that I know of has considered the Law of the Sea for 9 years. It was only considered at that point 9 years ago because we at least got our way in terms of the seabed negotiations. The presumption was that that would lead to the United States becoming a party. That was a for-gone conclusion. Having missed that opportunity, why, things foundered subsequently.

In any event, why, now this is sort of back on the table. My hope is that conceivably, we can have, even within all of our parties here in the United States, a considerable degree of thoughtful compromise and movement.

Let me ask Ms. Thomas—because you have at least cheerful news that tuna are still out there and through statesmanship the numbers have not been depleted substantially or in a catastrophic way—I am still intrigued as to how that came about. Now, maybe this is because as sort of an amateur in this area, I have been listening to people talking about one species after another disappearing temporarily from various blocks of the ocean. So we have sat down and looked at areas that have been under attack, so to speak, and dire things have happened to the fish population. I am amazed that tuna have been spared this fate. Why have the tuna been different? Why are these agreements that you have described that effective?

Ms. THOMAS. Well, I believe, Mr. Chairman, that when it comes to the tuna organizations that we have existing, that it gives all of the countries an opportunity to sit down and talk about this and bring some kind of decision on how they are going to manage it.

Now, there is certainly room for improvement, and there are things that we think should be done, such as dealing with the issue of over-capacity and fishing too much is a concern. Luckily for the fish for canning, it is not for tuna.

The CHAIRMAN. Are there some nations that seem to be egregious violators of this situation? In other words, do they really go after

the tuna with a vengeance without regard to your other agreements?

Ms. THOMAS. There are some, and that is part of the problem that we are trying to deal with, is how to enforce these agreements. We can have all of these rules and regulations, but then how do you actually enforce them? How do you get the countries to stop?

ICAT, the Atlantic Tunas Commission, has begun this slowly. They have had some success in it, not great. Their major problem has been blue fin tuna which is the large tunas that are used for sashimi mostly. They do use this trade mechanism.

IATTC, the eastern tropical Pacific organization, just recently also decided that they could start looking at trade measures to block fish if they are caught incorrectly or if they exceed a quota.

Those are the things that we still need to work on. There is generally success, but it does not mean that it is all done. That is where the Law of the Sea could help us because we would be then a member of the party and can say this is what is in the convention, and in particular in article 64.

The CHAIRMAN. So for the moment, the United States exercises leadership anyway. You believe that is likely to have more standing and more success.

Ms. THOMAS. The State Department and the Department of Commerce do a wonderful job when we go to these meetings.

The CHAIRMAN. Mr. Cox, you mentioned an interesting, rather alarming point that there may have been, allegedly, 372 acts of piracy last year. Amplify that some more. Where does this happen? What sort of people are involved in this and how does the convention speak to that?

Mr. COX. Well, Mr. Chairman, the 372 acts were reported piracy acts and they actually did occur. I said reported because there are probably many more that are not reported.

The CHAIRMAN. I see.

Mr. COX. But they actually happen in areas close to shore, of course, and in straits like the Straits of Malacca where vessels are coming by and small boats come up and actually—in essence, it can be perceived as a mugging at sea. However, we see that they are getting much more brazen of late, and they are taking much stronger activity.

Now, the industry itself, through its associations—there is an organization called BIMCO that has a piracy guideline which is actually put on vessels, and it outlines for the master what actions he should take in a piracy situation. It also describes what we would do to try and prevent piracy, what type of watch standing do we have, what do we do with the vessel to try and protect it. And the interesting connection that I made to myself was that some of the very same things that we put into the security code were the very same things that the industry already had in its piracy code.

Mr. Chairman, the missing link here is we have been trying to get these coastal States that seem to be the epicenter of these piracy attacks to take some action against these pirates. We have been unsuccessful. I think that the Law of the Sea, of course, if nothing else, I think would hopefully say that piracy is not to be supported or condoned by any coastal State, and certainly ratification of that by the United States and some attention paid by the

U.S. administration with regard to piracy attacks would certainly, I think, be beneficial in getting those nations that should be taking action to take that appropriate action.

The CHAIRMAN. What nations specifically are involved in this? To state it another way, what nations are not doing the job in terms of enforcing the situation?

Mr. COX. Mr. Chairman, nations in western Africa, nations bordering the Straits of Malacca, some nations in South America, both the——

The CHAIRMAN. Is this beyond the capability of their authorities? In other words, are these pirates operating there in ways in which they evade whatever law enforcement mechanism those States might have?

Mr. COX. I am not sure about what law enforcement mechanisms they may be evading, but my intuition would say that there is very little law enforcement going on, and so therefore, they do not have to take too much evasive tactics.

Interestingly, there is a part of the International Ship and Port Facilities Security Code which places on the vessel an alarm button. It is a silent alarm which is meant to notify a coastal State and the flag State of the vessel that an imminent terrorist incident is taking place or about to take place. We have cautioned the U.S. Government that when we put that alarm on board the ship, we are certainly going to instruct the masters that when they are in a circumstance where they feel that someone is coming up against a vessel, they are not in a position to determine whether or not there is a terrorist incident, let us say, against an LNG tanker that is about to take place or whether that is simple piracy where they are going to come on and actually threaten the life of the people on board and rob the vessel. The master does not know what that is. So we are going to instruct him or her to press that alarm button. When that is pressed, we feel that we should have some expectation that the coastal State is going to take some action.

The CHAIRMAN. Do something about it, yes.

Mr. COX. And I think there is nothing worse than having that alarm saying here is an imminent circumstance occurring and you press a button in the hopes that someone is listening.

The CHAIRMAN. Mr. Kelly.

Mr. KELLY. Mr. Chairman, mobil drilling rigs do not carry cargo, so our industry has not been as subject to piracy as other vessel owners have, but we have had some incidents. I heard of one recently where a drilling rig was in a harbor in Brazil and pirates came aboard and robbed all the crew and took food supplies and anything of interest. This is a subject that is getting far too little attention in the news media and among government policymakers.

If you look at Lloyd's List, which is the leading maritime newspaper that is published out of London but gets considerable distribution here in the United States, you look at any issue of Lloyd's List and you are apt to see two columns of piracy incidents. They are reported because claims are filed with insurance companies and I think they are disclosed and listed for the information of insurance underwriters, but it is quite startling to see the volume of incidents that are now appearing in that publication.

The CHAIRMAN. Well, we appreciate your testimony today. It has illuminated that situation for a much broader audience. I think it is an important issue. I suspect as we study the Law of the Sea Convention further, we will all be apprised of a much more comprehensive picture than we commenced with. You certainly brought a number of points to our attention and provided some excellent testimony for our record. We look forward to staying in touch with you.

In reference to that, I just want to mention that formally the committee record will remain open for 48 hours following today's hearing so that other members of the committee who wish to do so may submit further statements or questions for the witnesses. If such Senators should do so, please respond as promptly as you can to their inquiries. We will thank you for that additional service to our committee.

Unless you have further testimony, why, the hearing will adjourn, and many thanks again to all who have contributed to us today. Thank you.

[Whereupon, at 11:32 a.m., the committee adjourned, to reconvene subject to the call of the Chair.]

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ADDITIONAL MATERIAL AND STATEMENTS SUBMITTED FOR THE  
RECORD

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GENERAL COUNSEL OF THE  
U.S. DEPARTMENT OF COMMERCE  
*Washington, DC, December 18, 2003*

The Honorable RICHARD G. LUGAR  
*Chairman, Committee on Foreign Relations  
United States Senate  
Washington, DC 20510-6225*

DEAR MR. CHAIRMAN:

This letter provides the views of the Department of Commerce on accession to the Law of the Sea Convention and ratification of the 1994 Agreement on deep seabed mining. In the Department's view, joining the Convention offers the best means to protect and to promote U.S. ocean interests and to strengthen U.S. leadership in ocean policy. Indeed, the Department is concerned that failure to do so will increasingly detract from the ability of the United States to chart the direction of ocean policies, including policies for protection of marine resources, in years to come.

The Department's comments will focus primarily on fisheries and living resource matters, because the recent hearings on the Convention addressed other issues extensively. At the outset I note that the Convention is consistent with the fisheries and other living marine resource laws that the Department administers through the National Oceanic and Atmospheric Administration (NOAA). Joining the Convention would not require amendments to any of those laws.

NOAA administers a host of ocean fisheries laws, including the Magnuson-Stevens Act, which governs fisheries in the Exclusive Economic Zone (EEZ). NOAA also implements many international fishery agreements.

It is vital that we protect our valuable coastal resources and find means to protect the world's fish biomass in the face of increasing demands. The fishing industry contributes significantly to the U.S. economy. In 2002, U.S. commercial landings totaled over 9.4 billion pounds, worth \$3.1 billion. U.S. commercial fisheries generated \$28.4 billion (in value added) to the U.S. Gross National Product, and 73.3 million recreational fishing trips occurred. In 2000 (the most recent year for which information is available), recreational fishing added another \$18.9 billion. The Food and Agriculture Organization predicts that the global annual demand for fish will continue to increase rapidly, to 100-120 million tons by 2010.

Acceding to the Convention would increase protection of U.S. coastal interests by creating specific U.S. treaty rights. For instance, it would confirm and reinforce U.S. sovereign rights and jurisdiction with respect to natural resources in the U.S. EEZ and continental shelf, including the right to prohibit the take of marine mammals. Of special interest to the United States, the Convention protects the primary rights of the coastal State over anadromous species, such as salmon that originate in its rivers, by banning high seas fishing for such species. It imposes conservation obligations, applicable to all States, that are the basis for the ban on high seas drift net fishing and international protection of resources of great value to the United States, such as salmon and Bering Sea pollock. The Convention also affords coastal States a high degree of discretion in managing their EEZ fishery resources, underscored by the exemption from binding dispute resolution for a coastal State's resource management decisions, such as decisions about allowable catch and allocations.

The Convention protects high seas fishing rights while imposing duties upon States to conserve and manage living resources of the high seas and to cooperate with other States to do so. It has special measures to protect straddling stocks and highly migratory species. These provisions are important because the United States has significant distant water fishing interests. Highly migratory stocks such as tuna and billfish are among the most valuable fish for the United States. In 2002, the United States landed almost 340 million pounds of tuna worth \$200 million.

The United States has played a leading role in the search for ways to conserve straddling stocks and highly migratory species, some of which are seriously overfished. To this end, we already have negotiated agreements that implement the fundamental principles in the Convention, including the Fish Stock Agreement (FSA) covering straddling stocks and highly migratory species, the Food and Agriculture Organization Compliance Agreement addressing flag State duties, the U.N. Resolution banning high seas drift nets, the Donut Hole Agreement regarding straddling stocks in the central Bering Sea, and, most recently, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. The Law of the Sea Convention provides the foundation and legal framework for these agreements. U.S. policy has been to urge all fishing States, and States that offer their flag to fishing vessels, to become party or to adhere to these agreements and to regional fishery agreements. Acceding to the Convention will further the policy objective by showing that the United States leads by example.

As a party to the Convention, the United States would be in a much stronger position to influence how its fundamental conservation rules are implemented and maintained, as well as how they are applied in new circumstances. One such new circumstance, the increase in flags of convenience in the fishing industry and widespread illegal, unreported and unregulated fishing (so-called "IUU fishing"), poses a new and alarming threat to both coastal and high seas resources.

United States membership in the Convention will become more significant in the future as we seek to find new ways to curb IUU fishing and to promote conservation throughout the oceans. Fishing vessels that fly flags of States that refuse to join the FSA or regional agreements have seriously undermined conservation. When the United States urges these "flag of convenience" States to comply with the Convention's obligation to cooperate in conservation, they are often quick to respond that the United States, a non-party, cannot invoke the Convention. While this view is incorrect, it has become increasingly clear that being a party to the Convention would substantially advance U.S. coastal and global interests in the long term.

Finally, this letter briefly addresses two other areas. First, NOAA licenses U.S. deep seabed mining under the Deep Seabed Hard Mineral Resources Act. As such, Commerce Department officials have attended the meetings of the International Seabed Authority (ISA) since its inception. The United States has always been the strongest voice for private mining interests. While deep seabed mining is not imminent, we believe it is in the long-term interests of the United States to ensure that the ISA continues to implement properly the provisions of the 1994 Agreement on deep seabed mining. The United States cannot simply leave this responsibility to others. Acceding to the Convention, including ratifying the 1994 Agreement, will ensure continued U.S. leadership in this field.

Second, NOAA has begun coordinating the acquisition of detailed bathymetric data to support a U.S. claim under Article 76 of the Convention to the extensive continental shelf area that lies beyond the U.S. EEZ. The United States' extensive technical expertise in bathymetry and geophysics will provide critical support to a U.S. claim. It will also have a significant influence on future policies of the Commission on the Limits of the Continental Shelf, but only if the United States becomes a party to the Convention. Furthermore, the clock is ticking for States Parties to

submit claims to the Commission and, unless it joins the Convention, the United States will have no role in reviewing those claims.

The Department of Commerce appreciates the opportunity to present views on the Law of the Sea Convention. The Office of Management and Budget has advised that there is no objection to the transmittal of this letter from the standpoint of the Administration's program.

Sincerely,

THEODORE W. KASSINGER

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PREPARED STATEMENT OF DENNIS W. ARCHER, PRESIDENT, AMERICAN BAR ASSOCIATION, WASHINGTON, DC

The American Bar Association welcomes this opportunity to express its support for ratification of the United Nations Convention on the Law of the Sea. As members of this Committee are aware, there are several commissions—one private, the Pew Foundation study, and the other governmental, the statutorily-created U.S. Commission on Ocean Policy—both currently addressing the great variety of American interests in the oceans. However, no view of U.S. ocean interests can be considered comprehensive that does not deal with the oceans beyond our shores and the rules by which all nations may accommodate their differing interests beyond the reach of national laws. That is why both the Pew Foundation Oceans Report and the U.S. Commission on Ocean Policy are both supporting the United States' ratification of the 1982 U.N. Convention on the Law of the Sea. The American Bar Association strongly agrees.

The Law of the Sea Convention provides that essential universal framework within which issues respecting the future stewardship of our common oceans may be equitably and peacefully resolved. The American Bar Association has therefore supported ratification of this Convention since 1994 when necessary changes to the 1982 Convention were adopted at the United Nations.

I would like to comment briefly on the importance of this Convention and address specifically the issue of the consequences of failure of the United States to ratify a Convention to which 143 states are now party, and which has thus achieved the near-universality that was an important objective of the United States in negotiating this agreement over a period of twenty years and six administrations.

In August 1994 the ABA approved a resolution recommending that the United States become party to the 1982 United Nations Convention on the Law of the Sea, and to the Agreement relating to the Implementation of Part XI of that Convention, which had been adopted and signed by the United States just the month before, in July 1994. These two documents were then submitted to the Senate in November of 1994.

Members of your Committee who are familiar with the history of the negotiations of the Law of the Sea Convention will recall that the United States did not sign the Convention, when it was finally negotiated and opened for signature in 1982, because of concerns relating to certain deep-seabed mining provisions of Part XI that did not adequately protect possible U.S. future interests. With the exception of these provisions there has been broad agreement that the Convention greatly served the interests of the United States in providing a stable legal framework for, among other things, preserving customary freedoms of navigation vital to ocean powers such as the United States for both strategic and commercial reasons.

Because of the importance the ABA attaches to such a rule of law respecting the oceans, the ABA early supported efforts to find ways to fix the controversial provisions of the deep-seabed mining regime and, in 1990, recommended that a new effort be made to determine what changes and clarifications would make Part XI acceptable to the United States and to its negotiating partners. Such an effort was undertaken by the first Bush administration and ultimately resulted in the 1994 Agreement. At that time the ABA thoroughly reviewed these new provisions and concluded that the objections set forth by the United States in 1982 had been fully satisfied by this new Agreement, which, in effect, substitutes for any differing provisions in the original text. The ABA then adopted the resolution, noted above, recommending that the United States become a party to the Convention. Following the adoption of the 1994 Agreement, many of our allies including the United Kingdom, France, Germany, Japan, and others who had earlier signed, but had not yet become a party to the Convention, then did so. The United States, virtually alone among significant maritime nations, has yet to ratify.

Some now suggest that since this Convention has been ratified by 143 states, including both friends and adversaries, it does not matter whether or not the U.S. is

formally a party to it. In the case of the Law of the Sea Convention, the answer to the question of whether formal acceptance matters is both specific, as to activities and institutions created by the Convention, and general, with respect to the nature of American leadership in promoting the rule of law in an increasingly lawless world.

As to specifics, the Convention codifies rules with respect to freedom of navigation and overflight that were not necessarily universally recognized as customary international law. While the United States continues where necessary to assert rights of freedom of navigation, protests of violations or encroachments based upon universally understood and accepted provisions in the Convention are obviously more precise—and effective. The Convention also defines limits of, and the resource specific nature of, coastal state jurisdiction in an exclusive economic zone beyond the 12 mile territorial sea. The Convention created a Law of the Sea Tribunal but, absent ratification, the United States cannot offer a judicial candidate, nor staff the specialized arbitral panels available under the Convention regime. Similarly, the United States is ineligible to put forth a candidate for membership on the Outer Continental Shelf Commission that is reviewing proposals and making recommendations on how states should define the boundaries of the outer continental shelf in places where the shelf extends beyond 200 miles. As oil exploitation had become possible in these distant areas, certainty of jurisdiction is essential to stability, and perhaps also to the energy security of this nation. Likewise, the United States may not currently officially participate in the work of the International Sea-Bed Authority, and thus directly influence and control the course of rule-making for deep ocean resource exploitation. Lastly, it is by no means clear that the United States may take full advantage of the Convention's provisions on protection of the marine environment without being a party to the treaty. In short, the Convention is living up to its original intended function as a framework within which rules governing new and peaceful uses of the oceans might be developed, and the United States should be an active participant in its implementation.

More important than specifics, however, is the Convention's role as the foundation of public order with respect to the oceans. In that sense the treaty is an extraordinary achievement in the annals of global rulemaking. However universally accepted the Convention's provisions may now appear they will surely erode over time if the United States fails to exercise the kind of continuing leadership and participation which led to this extraordinary achievement in the first place. There does not now appear to be any rationale which would support our continuing nonparticipation in an agreement that so effectively stemmed the rising tide of claims of national jurisdiction in the oceans, and that will continue to serve our interests as long as the United States is flanked by two great oceans.

The American Bar Association therefore welcomes this opportunity to urge this Committee to give its advice and consent to ratification of this Convention. Thank you.

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#### COUNCIL ON OCEAN LAW

*October 18, 2003.*

#### STATEMENT BY THE COUNCIL ON OCEAN LAW TO THE COMMITTEE ON FOREIGN RELATIONS OF THE UNITED STATES SENATE ON THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The Council on Ocean Law welcomes the hearings of the Senate Foreign Relations Committee on the United Nations Convention on Law of the Sea and hopes that the Committee will proceed expeditiously to the preparation of an advice and consent resolution for a vote of the Senate on this important treaty originally submitted for the Senate's advice and consent to ratification in November 1994. The Council particularly welcomes the leadership of Senator Lugar in his efforts to reassert the leadership role of the United States in the future of the world's oceans.

The Council on Ocean Law was initiated in 1980 by the late Elliot L. Richardson, the former special representative of the President to the Law of the Sea treaty negotiations, who remained its chairman until his death in 1999. The Council's purpose is to further public understanding and support of this extraordinary effort to create a framework of law to govern the increasing and often conflicting uses of the oceans. The Council's role as a resource of information on continuing developments in ocean law was of significant importance during the 1980's when it became evident that new negotiations would be necessary to meet the concerns of the United States outlined by the Reagan Administration, and of other developed states, to Part XI of the

1982 treaty dealing with any prospective deep seabed mining beyond the limits of national jurisdiction.

The Council believed that it was important to keep before the public the many achievements of the 1982 treaty: Safeguarding traditional freedoms of navigation and overflight of great strategic importance to the United States, defining and stabilizing the jurisdiction of coastal states over resources seaward of the territorial sea in a 200 mile Exclusive Economic Zone, conserving living resources and protecting the environment throughout the world's oceans, and promoting peaceful settlement of disputes. The Council therefore strongly supported the efforts undertaken by the first Bush Administration at the United Nations in 1990 to renegotiate provisions of Part XI, negotiations which resulted in the adoption in July 1994 by the United Nations General Assembly of a new Agreement, signed by the United States, which modified and essentially substituted for the original Part XI in the 1982 treaty. This Agreement satisfactorily addressed all of the specific concerns outlined by the Reagan Administration in 1982 and included guarantees regarding the U.S. role in future mining arrangements—guarantees which the United States cannot take advantage of until it becomes a party to the Convention. The Convention and the Agreement were then transmitted by President Clinton to the Senate in November 1994 for its advice and consent to accession to the 1982 Convention and to ratification of the 1994 Agreement.

Today 143 states and the European Community have become parties and will continue to shape the new institutions created by the Convention, such as the Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf. That Commission is addressing the question of the outer limits of the continental shelf in places where it may extend beyond 200 miles, an issue of major interest to the U.S. as, for example, in the Arctic.

In short there remains no reason for the United States not to join the international community consensus represented by this treaty. On the contrary, the treaty regime, which has created a stable framework of law governing the uses of the oceans, could well erode over time if the United States fails to exercise the leadership that made possible the successful outcome of these negotiations in the first place. Furthermore, the development of ocean law is a continuing process which requires the active participation of the United States to ensure that our national interests are protected.

Two years ago, at the United Nations, the George W. Bush Administration announced its support for ratification by the U.S. of Convention and the Agreement, noting that the Convention serves the national security, economic, and environmental interests of the United States. The American Bar Association, and the presidential U.S. Commission on Ocean Policy, among others, have urged the Senate to act. So have Secretaries of State both Republican and Democratic. In transmitting the Convention to the Senate in 1994 then President Clinton wrote "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 the uses of the oceans." Those enduring interests have led both Republican and Democratic Administrations to support this treaty. The Senate now should act.

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PREPARED STATEMENT OF THE HUMANE SOCIETY OF THE UNITED STATES, PATRICIA FORKAN, EXECUTIVE VICE PRESIDENT

THE LEGISLATIVE HISTORY AND INTERPRETATION OF ARTICLE 65 OF THE LAW OF THE SEA CONVENTION

Hon. RICHARD G. LUGAR, *Chairman,*  
*Senate Foreign Relations Committee,*  
*United States Senate,*  
*Washington, DC.*

DEAR CHAIRMAN LUGAR:

The Humane Society of the United States (HSUS) appreciates your leadership in convening hearings on the UN Law of the Sea Convention. We believe that the United States' involvement in this Convention is crucial. With your permission, I am including testimony on the history and meaning of article 65 and would like to request your permission to include my statement in the Committee's record on this important matter.



ARTICLE 65, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA  
MARINE MAMMALS

*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.*<sup>1</sup>

*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—one influencing the other.

As the 1982 UN Convention on the Law of the Sea is largely considered a “constitution for the oceans,”<sup>2</sup> 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.<sup>3</sup> Nevertheless, 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.<sup>4</sup>

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 revising the Informal Composite Negotiating Text (ICNT) provisions. The states were clearly aware of the need to conserve and protect marine mammals.<sup>5</sup>

Initially, the agreed upon language, for the second sentence of Article 65, referred to “the appropriate international organization”. At a meeting of the informal negoti-

<sup>1</sup> [www.globelaw.com/LawSea/ls82\\_2.htm#article\\_65\\_marine\\_mammals](http://www.globelaw.com/LawSea/ls82_2.htm#article_65_marine_mammals)

<sup>2</sup> John Temple Swing, “What Future for the Oceans?”, *Foreign Affairs*, September/October 2003, p. 139.

<sup>3</sup> 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.

<sup>4</sup> 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”.

<sup>5</sup> U.S. General Accounting Office, “The Law of the Sea Conference—Status of the Issues, 1978”, March 9, 1978.

ating 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 re-negotiation of the ICRW to make it 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.<sup>6</sup>

In a letter to Ambassador Richardson,<sup>7</sup> 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."<sup>8</sup>

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 non-governmental 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 organization."<sup>9</sup> 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.

<sup>6</sup>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, D.C. It was co-sponsored 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".

<sup>7</sup>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.

<sup>8</sup>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.

<sup>9</sup>Sierra Club, International Report, Volume VIII, Number eight, April 28, 1980.

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."<sup>10</sup>

As Ambassador Richardson indicated, the revised Article 65 received ample support in the Committee from non-whaling<sup>11</sup> 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."<sup>12</sup>

Norway and Iceland, also pro-whaling nations, merely stated their support for Article 65 without any further comments.<sup>13</sup> 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 a legitimate organization, and in fact most countries view it as nothing more than an exclusive whalers club. 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 international 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 join-

<sup>10</sup> Letter from Ambassador Elliot L. Richardson to Patricia Forkan, 4/29/1980.

<sup>11</sup> Netherlands, a country in 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.

<sup>12</sup> Committee II, Deliberations on Article 65 amendment, Floor Statements, 3/21/1980.

<sup>13</sup> *Ibid.*

ing NAMMCO because they are displeased with the recently adopted conservation measures at the IWC.<sup>14</sup>

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."<sup>15</sup>

The protection and conservation afforded to marine mammals in the exclusive economic zone<sup>16</sup> 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,<sup>17</sup> 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.<sup>18</sup> It has done this mainly through the 1971 Pelly Amendment<sup>19</sup> 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) agreements. 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.<sup>20</sup> In addition, the 1979 Packwood-Magnuson Amendment<sup>21</sup> 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.<sup>22</sup> 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 to join

<sup>14</sup> Japan Plans to Create Rival Organization of International Whaling Commission (IWC). From Atuna.com, Japan, October 10, 2003.

<sup>15</sup> Drafted by George Taft (State Department) et al at the last session of the Law of the Sea Conference, 8/22/1980.

<sup>16</sup> 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.

<sup>17</sup> CRS Report 97-55, "Norwegian Commercial Whaling: Issues for Congress", Carl Elk, December 31, 1996.

<sup>18</sup> CRS Report 97-588, "Whale Conservation and Whaling", Eugene H. Buck.

<sup>19</sup> 22 U.S.C. 1978.

<sup>20</sup> Section 201 of P.L. 102-582.

<sup>21</sup> 16 U.S.C. 1821.

<sup>22</sup> The threat of Packwood-Magnuson sanctions is no longer influential, since no foreign whaling nation currently fishes in U.S. waters.

the IWC.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

As recently as June of this year, members of the Senate reaffirmed that at the 55th Annual Meeting of the IWC the U.S. should “remain firmly opposed to commercial whaling.”<sup>26</sup>

*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 an International Cetacean Commission) is understood to be the “appropriate international organization”, there is also international support for this interpretation.<sup>27</sup>

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.”<sup>28</sup>

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.”<sup>29</sup>

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

<sup>23</sup> *Supra* n. 17

<sup>24</sup> 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](http://www.publicaffairs.noaa.gov/pr96/dec96/noaa96-r194.html)

<sup>25</sup> President William J. Clinton, Message to Congress on Canadian Whaling Activities, 2/10/1997, 33*Weekly Comp. Pres. Doc.* 175 (1997).

<sup>26</sup> S. Con. Res. 55 (108th Congress), 6/12/2003.

<sup>27</sup> 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 US, all the main EU (European Union) states, most major western countries, including most Nordic countries.” Steinar Andresen, The Fridtjof Nansen Institute, Oslo Norway, 11NAMMCO, 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](http://www.highnorth.no/Library/Publications/Iceland/na-iw-an.htm)

<sup>28</sup> Agenda 21, para. 17.61 at [www.on.org/esa/sustdev/documents/agenda21/english/agenda21chapter17.htm](http://www.on.org/esa/sustdev/documents/agenda21/english/agenda21chapter17.htm)

<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> 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 at least fifteen resolutions whose purpose is to improve the welfare of whales, and the most recent meeting of the World Parks Congress agreed that marine species require "protection" and that their habitat needs "conservation" through domestic and high seas protected area systems.<sup>32</sup>

At this year's 55th annual IWC meeting, the Berlin Initiative was passed, strengthening the IWC's conservation agenda by forming an official committee to deal with such issues as by-catch and pollution. The initiative provides for the creation of a conservation committee to draft a "Conservation Agenda" as well as the means to implement it. This finally brings the IWC into the 21st century, and seems to settle the question of the IWC's future direction.

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, the IWC is evolving from an industry based organization to one of conservation. 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 cannot now alter or rewire 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.<sup>33</sup> 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 five years working on Article 65 and thirty years at the IWC, I am very pleased that the United States intends to ratify UNCLOS. I thank you on behalf of our 8 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.<sup>34</sup>

<sup>30</sup> 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.

<sup>31</sup> Kitty Block and Sue Fisher, "Legal precedents for whale protection."

<sup>32</sup> 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.

<sup>33</sup> 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).

<sup>34</sup> I would also like to thank Bettina Camcigil, Director of Research, Investigative Services, HSUS and Kitty Block, Special Counsel to the United Nations and Treaties Department, HSUS, for their help and assistance in the researching and the drafting this testimony.

## PREPARED STATEMENT OF SENATOR JOHN F. KERRY

I am very pleased, Mr. Chairman, that you have called these hearings on the United Nations Convention on the Law of the Sea, or UNCLOS. I have been a long-time supporter of this treaty. The Law of the Sea secures important rights for our military, for our commercial interests, and for the protection of our marine environment. Senate consideration of this comprehensive international agreement has languished over the years, and I am encouraged that we might begin to make some progress toward ratification.

UNCLOS establishes important international rules for freedom of navigation and the use and conservation of ocean resources. Several international fisheries agreements have also been developed under its auspices for highly migratory species and straddling stocks. The treaty establishes much needed international rules on the rights and obligations of countries, as well as limits, for using the world's oceans.

However, as we proceed, we must also consider the potential implications of ratification on our coastal interests. We must ensure that we will continue to be able to enact laws necessary to protect our environment, manage our natural resources, secure our coasts from threats, and for similar priorities.

As the ranking member of the Senate Commerce Committee's Subcommittee on Oceans, Fisheries and Coast Guard, I am particularly interested in matters related to the protection of our living marine resources and the quality of our marine environment. I agree with my friend Senator Stevens that we must be extremely careful that UNCLOS not be used by other nations to weaken U.S. measures to sustain and manage our fisheries.

Likewise, we must ensure that becoming a party to UNCLOS would not hamper Congress from enacting important laws to protect such resources and the marine environment, including laws such as the Oil Pollution Act of 1990, which required double hulls on tank vessels to prevent future spills like Alaska experienced with the *Exxon Valdez*. While the U.S. must continue to be firmly engaged in the multilateral process, Congress must also be assured that we will have the flexibility to enact protections here at home in the absence of international action, or that are more stringent than those that can be agreed upon internationally.

Ambiguities in some parts of UNCLOS warrant the development of clear understandings of how we will interpret its provisions to ensure that our ability to enact such laws are not compromised. For example, Article 21 provides strong authority to coastal States to adopt laws and regulations related to the management and protection of living marine resources and the marine environment for ships in innocent passage that pass through their territories. However, it also provides that such laws and regulations shall not apply to the "design, construction, manning or equipment of foreign ships," unless they are implementing "generally accepted international rules or standards." Many environmental laws that regulate impacts to the marine environment could result in changes to equipment, e.g., performance standards that could be met through operational changes or through innovative technology developments. If "design, construction, manning or equipment" measures are interpreted as any measure that may result in the use of new technologies, the right of countries to enact domestic laws that regulate such impacts under Article 21 could be severely undermined.

Similarly, on security issues, UNCLOS strikes a careful balance between the rights of free passage and the ability of coastal States to protect their borders. We must ensure that UNCLOS will not interfere with our ability to protect our ocean borders from terrorist threats.

I strongly advocate that the Senate move forward to provide its advice and consent on the Law of the Sea Convention. However, as part of that process, we must make it clear how the U.S. will interpret various provisions of the convention so as to protect our interests both internationally and as the coastal State with the largest EEZ in the world.

I look forward to working with you, Mr. Chairman, with you, Senator Biden, and with the rest of my colleagues on both the Foreign Relations Committee and the Commerce Committee to develop a full record of our concerns and agreement on such understandings, and to moving this treaty forward.

NATIONAL MARINE MANUFACTURERS ASSOCIATION,  
1819 L STREET, NW, SUITE 700,  
Washington, DC, November 10, 2003.

The Honorable RICHARD G. LUGAR, *Chairman,*  
*U.S. Senate Committee on Foreign Relations,*  
*450 Dirksen Senate Office Building,*  
*Washington, DC.*

DEAR CHAIRMAN LUGAR:

Mr. Chairman, on behalf of the National Marine Manufacturers Association (NMMA), I want to commend you and the Senate Foreign Relations Committee for holding the two hearings on Tuesday, October 14, 2003 and Tuesday, October 21, 2003 addressing the topic of the United Nations Convention on the Law of the Sea (UNCLOS). NMMA, the nation's leading recreational marine trade association, urges the Senate to support ratification of UNCLOS. NMMA represents over 1,500 member companies that are involved in every aspect of the recreational boating industry and our members manufacture over 80 percent of all recreational boats, engines, trailers, and accessories purchased by the boating community in the United States. NMMA urges Senate ratification of UNCLOS to complete the accession process and afford the U.S. a full participatory role in formulation and implementation of a uniform, worldwide law of the seas.

U.S. accession to UNCLOS is vitally important for several reasons. While NMMA did not have an opportunity to testify at either of the hearings, it offers the following comments for consideration. First, the United States traditionally has been the world leader in protecting the rule of law of the oceans to protect navigational freedom upon the high seas. Second, accession will provide the U.S. a platform from which to better protect U.S. oceans interests. Third, accession will enhance U.S. foreign policy by bolstering its commitment to multilateralism. NMMA addresses each issue and provides the recreational boating perspective on each for your consideration.

NMMA believes that the single most compelling reason for accession is to ensure the freedom of movement of naval, commercial, and recreational vessels upon the high seas, which is the most important U.S. oceans interest and is threatened by U.S. non-adherence. U.S. interests have been undermined because the U.S. has been precluded from participation on the various councils, commissions, and tribunals established under UNCLOS. Accession will allow the U.S. to participate fully in the annual meeting of States Parties. The mere presence of the U.S. at this meeting, absent an active role, has seriously jeopardized critical navigational freedoms, which were hard won by U.S. negotiators during early UNCLOS deliberations. NMMA is concerned that continued non-adherence will erode the recreational boating community's freedom of movement and from piracy upon the high seas, which, at its most basic, means access or the lack thereof.

Today, there are more recreational boaters than ever before in U.S. history. Many in the boating community have benefited greatly from technological enhancements in boat design, navigation, and communications. Presently, there are nearly 400,000 recreational boats 65 feet in length or longer in the U.S. alone, and recreational boats between 300 and 400 feet in length are not uncommon. All of these boats have the capability to travel on the high seas, and provide their owners the opportunity to travel to many interesting and exciting ports of call. Like their naval and commercial brethren, U.S. recreational boaters benefit from freedom of navigation upon the high seas as well as freedom from piracy. U.S. involvement in the protection of these interests is a vital concern to the entire recreational boating community including the recreational boating industry. Of course, navigational freedoms are not the only benefit of accession to UNCLOS.

U.S. accession to UNCLOS also will ensure other vital U.S. oceans interests. These interests are varied, but they all have one thing in common, the need for a coherent, standard, well-vetted worldwide rule of law—a constitution of the sea.

- Accession to UNCLOS will ensure protection of U.S. economic interests by allowing for the stability necessary to foster economic development of the seabed including oil, gas, and mineral exploration and exploitation as well as protecting the burgeoning recreational marine industry in the United States.
- UNCLOS also provides a stable atmosphere for scientific exploration and discovery, another issue of access that will affect the recreational boater because allowing access sets a precedent of freedom of navigation and use of the world's oceans.



- UNCLOS provides for meaningful environmental protection and monitoring because it establishes a mechanism for the coordination and implementation of a worldwide environmental policy, which impacts the recreational boater directly and positively by providing for a cleaner more pristine environment in which to engage in the pursuit of boating.
- UNCLOS promotes the strong obligation for resource management including fisheries management, a vital interest for many recreational boaters. UNCLOS provisions on fisheries management are consistent with U.S. domestic fisheries laws as well as U.S. international fisheries agreements and understandings.
- Finally, accession will signal to the international community the U.S. commitment to multilateralism, and will foster an atmosphere conducive to the rule of law, which will impact the recreational boater by providing a structure and mechanisms to address international concerns that may affect the recreational boater, particularly the world traveling boater.

NMMA is hopeful that the U.S. will soon take its rightful seat at the table and strongly urges the Senate to support ratification of UNCLOS. NMMA is offering its services in an effort to ensure ratification. Please do not hesitate to contact Jeffrey Gabriel of my staff or email [jgabriel@nmma.org](mailto:jgabriel@nmma.org)

Sincerely,

MONITA W. FONTAINE, ESQ.,  
Vice President, Government Relations.

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PREPARED STATEMENT OF U.S. ARCTIC RESEARCH COMMISSION, GEORGE B. NEWTON, JR., CHAIRMAN

Chairman Lugar, Senator Biden, members of the Senate Committee on Foreign Relations, thank you for this opportunity to enter my comments into the record of your hearings. I speak on behalf of the United States Arctic Research Commission which I chair. The Arctic Research Commission is an independent agency of the U.S. government created by the Arctic Research and Policy Act of 1984 (as amended). By the Act, we report to both the President and Congress. Our principal responsibility is to recommend to the President and to the Congress Arctic research policies and priorities for the United States. Other duties include: promotion of inter-agency research cooperation; promotion of international, state, and local research activity; facilitation of data sharing; and enabling improved Arctic research logistics. The Commission does not fund research. In fact the Commission budget just pays for its administration. Our effectiveness comes from the "bully pulpit", our ability to put the hand of one research organization into the hand of another, or similarly, our ability to convince someone that a specific area of research should be undertaken. One last item: we are one of the smallest agencies in our Government.

Given the foregoing, why is the Arctic Research Commission interested in accession of the United States to the UN Convention on the Law of the Sea?

The Commission wishes to address you for two reasons. The first is our concern for the future of U.S. research in the Arctic Ocean, particularly in areas that may be claimed by other nations as extensions of their continental shelf under the provisions of Article 76 of the Law of the Sea Treaty.

We will address specific concerns for Arctic Ocean research and the Law of the Sea later in this statement. However, at the outset we must accept that the Arctic is the most poorly understood Ocean on earth. What little we do know clearly indicates that it has significant influence on the world climate, and is right now changing dramatically. With an increasingly accessible Arctic, exploitation opportunities will follow with attendant environmental impacts. The knowledge produced by our research efforts underlies these factors, and thus, leads to the other areas of national concern that we address in the following paragraphs.

The second reason therefore is as American citizens. The evolving conditions in the Arctic Ocean which we address (in addition to research) will affect the U.S. in the following areas: international security (our term for terrorism), national security, economic development, commerce and diplomacy. Specifically, if this country does not accede to the Law of the Sea Treaty, each of these necessary and/or productive areas of national interest will be complicated or worse yet, be precluded in the Arctic Ocean.

Through our accession to the Law of the Sea Treaty we as a Nation can make a statement that we will be preeminent in the Arctic Ocean. If we do not, we effectively cede the Ocean, which touches our border, to the rest of the world.

Why is the Arctic Ocean so critical? And why now?

1. Up to now, the Arctic Ocean has been largely ignored and under appreciated. The Arctic Ocean has never been seen as an economic contributor to our Nation.

2. Thus, it is an ocean we do not understand. However, emerging signs say its exploitation may yield great national opportunities.

3. The Arctic climate is changing. Some experts predict that the Arctic Ocean will be ice free for ninety days or more in the summer by the year 2050. Less ice means greater accessibility and therefore, demands our consideration of all things that are now considered routine in and on the temperate oceans of the world.

Please allow us to address the six areas of our concern for the nation's role in the Arctic and our accession to the Treaty.

#### RESEARCH

Russia is at this time the only country to have submitted a claim to extend the outer limits of her continental shelf, as allowed under Article 76 of the Treaty. It has not yet been approved. Russia's submitted claim covers roughly 45% of the Arctic Ocean bottom. Article 76 grants to nations with approved claims control over all resources on or under the seabed, all ocean bottom research, cables and pipelines. The body that adjudicates all claims, the Commission on the Limits of the Continental Shelf (CLCS), is composed of representatives of states party to the Treaty. Its meetings are closed and no observers are allowed. The U.S. is therefore, unable to comment on Russia's (or any other nation's) claim. Ultimate approval of Russia's claim will convey authority in the approved area to access for any nation to conduct research on and/or beneath the ocean seabed. It is of concern that Russia has not granted access to U.S. research vessels seeking clearance to work inside the Russian 200 mile EEZ in nearly 10 years where, under the Treaty, similar clearance requirements exist. Knowledge of the ocean bottom and sub-bottom is fundamental to understanding the Arctic Ocean itself.

#### NATIONAL SECURITY

With more open water in the Arctic will come greater use of that ocean by all nations. More than a score of nations have active Arctic research programs. The U.S./Alaska coastline on the Arctic Ocean is over 1000nm ( $\approx$  1850km). These two facts carry with them the need to exercise sea control and protection on another ocean, or cede that role to whichever nation is willing to assume it.

#### INTERNATIONAL SECURITY

With a long, unprotected and essentially unmanned border in the Arctic, drug trafficking, illegal immigration and potential terrorist entry become relevant issues.

#### ECONOMIC DEVELOPMENT

The U.S. claim under Article 76 of UNCLOS is expected to add an area of about 62,000 sq. km on the Chukchi Cap (This is an area roughly equal to the area of West Virginia). With accession to the treaty and a successful claim the U.S. would have the sole right to the exploitation of all the resources on or under the ocean bottom. Of relevance is the fact that oil/gas potential of the area is estimated to be high.

One naturally thinks that the challenge of producing oil and gas offshore in the harsh, dynamic and ice infested Arctic is too difficult to overcome. But oil is produced safely and effectively in other ocean areas that experience rough weather, namely the North Sea and the Gulf of Mexico. Furthermore we believe that if viable oil prospects are discovered, existing technologies will be adapted and new techniques developed which will enable access to the Chukchi Cap and offshore the North Slope for ocean drilling and production safe from sea ice.

As examples: an appraisal well was recently drilled in the Gulf of Mexico in a water depth of 2951 meters (9682 feet). Other producing wells exist at depths of up to 2197 meters (7208 feet) and some floating platforms receive oil from wells that are over 200nm away. These potential resources could make large contributions to U.S. energy independence in the lives of our children and grand children.

#### COMMERCE

As environmental change proceeds in the Arctic, greater accessibility, driven by less ice will allow a longer shipping season. With more open water and a longer season, ocean commerce is sure to increase, for the distance between Seattle and Ham-

burg, Germany (for example) it is just about 40% shorter than it is via either of the canals. With such a clear savings, the Arctic becomes the faster, cheaper equivalent of either the Panama or Suez Canals and, in the case of the Northwest Passage, is entirely in the control of well established allies.

Similarly it is logical to expect a desire to extend the shipping season even more using ice strengthened ships. This in turn means cargo will be transferred from the ice strengthened ships to normal cargo carriers at the first port opportunity after completing the Arctic Ocean passage. We see great opportunity for the U.S. to develop cargo transfer facilities at ports such as Dutch Harbor and Adak, in the Aleutian Island chain.

#### DIPLOMACY

Lastly, we offer a few thoughts about the impact on diplomacy gained by acceding to the treaty and conducting the Article 76 surveys in the Arctic.

First of all, a recent international meeting on extending continental limits under the Law of the Sea, attended by representatives from over 50 nations, included 11 of the 21 members of the CLCS. Three of the CLCS members in attendance sought us out to encourage us to do all we can to gain U.S. accession. The reasons cited were U.S. leadership in general and the data quality standard the U.S. could set through submission of our claim under Article 76.

Secondly, our Western Arctic neighbors are getting very close to accession. The Danish parliament has approved the Treaty and they await final (and apparently imminent) approval by the Greenland Home Rule government. Representatives within the Canadian government indicate that accession may well occur early in the coming year. The Commission believes that we should join them, as it is in our mutual interest to work cooperatively in the Arctic.

Finally, without acceding to the treaty we are unable to use the dispute resolution process created under the treaty and, as a consequence, are unable to effectively interact with other nations in solving the difficulties that from time to time arise in our maritime enterprises ranging from research, through commerce and fishing, to military activities and border security.

#### IN CONCLUSION

The aforementioned changes to the Arctic Ocean are becoming apparent now and will develop over the next forty plus years, well beyond the horizon of preparation and planning we normally practice in this country. We entreat you to take the long view. The time to start is NOW. The progress and development needed to exploit the Arctic fully when we are able, will take time but if we start now we can avoid playing expensive catch up ball in a crisis mode. Securing our interests by acceding to the Law of the Sea Treaty is the critical first step.

Thank you very much for this opportunity to convey to you the recommendations of the United States Arctic Research Commission. Please feel free to contact the Commission if there is any further information we can provide.

UNITED STATES ARCTIC RESEARCH COMMISSION,  
4350 NORTH FAIRFAX DRIVE, SUITE 510,  
Arlington, VA 22203, February 23, 2004.

The Honorable RICHARD G. LUGAR,  
*Chair, Senate Foreign Relations Committee,*  
*United States Senate,*  
*Senate Dirksen Office Building, Room SD-450,*  
*Washington, DC 20510*

DEAR SENATOR LUGAR:

Incident to your hearings held to address accession by the United States to the United Nations Convention on the Law of the Sea (UNCLOS), as Chair of the U.S. Arctic Research Commission, I provided testimony for the record in support of such action.

In mid-November, the full Commission met in formal session in Washington and agreed unanimously that the United States should ratify the UNCLOS Treaty at the earliest practicable opportunity and directed Staff to prepare a formal resolution confirming that position to our reporting Seniors—the President and the Congress.

Forwarded herewith are copies of the Commission resolution sent earlier to the President, the President (Pro tem) of the Senate, and the Speaker of the House.

The U.S. Arctic Research Commission remains at your disposal to assist your efforts leading to timely accession to UNCLOS.

Sincerely,

GEORGE B. NEWTON, JR., *Chair*

UNITED STATES ARCTIC RESEARCH COMMISSION,  
4350 NORTH FAIRFAX DRIVE, SUITE 630,  
Arlington, VA 22203, January 14, 2004.

The Hon. TED STEVENS,  
*President pro tempore,*  
*The United States Senate,*  
*Senate Hart Office Building,*  
*Washington, DC, 20510*

DEAR SENATOR STEVENS,

At its meeting on the 19th and 20th of November 2003 the Arctic Research Commission heard a series of witnesses on the importance of the United Nations Convention on the Law of the Sea (UNCLOS). The Commissioners concluded that it was in the nation's interest that we become a party to the Convention.

The benefits of acceding to UNCLOS include:

- The opportunity to participate in the dispute resolution systems established by the Convention.
- The opportunity to serve on bodies such as the Commission on the Limits of the Continental Shelf which will consider claims for extensions of the continental margin of all nations applying.
- The opportunity to participate in decisions regarding amendments to the Convention which will open for amendments in the coming year. The opportunity to represent the nation's interests in freedom of navigation through strategic straits.

In particular, the Commissioners recommend that we proceed to collect the information necessary for a claim to increase the area of influence of the United States under UNCLOS Article 76 which allows for national claims to extensions of their continental margins.

A copy of the Commission's resolution is attached. Please feel free to call on the United States Arctic Research Commission for any information we may be able to provide.

Sincerely,

GEORGE B. NEWTON, JR., *Chair*

#### RESOLUTION

At its recent meeting in Washington the Arctic Research Commission heard from several witnesses concerning the importance of accession to the United Nations Convention on the Law of the Sea (UNCLOS) by the United States. The Commission has been studying the implications of UNCLOS for some time. In addition, the Commissioners and Staff have participated in several international meetings on the Convention. The provisions of UNCLOS Article 76 are particularly important to the Commission as the potential for an extension of the US continental margin in the Arctic Ocean is substantial and the necessary data must be acquired soon in order to support a US claim. As a consequence of our studies:

**the United States Arctic Research Commission supports United States accession to the United Nations Convention on the Law of the Sea.**

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Fact Sheet  
The White House, Office of the Press Secretary  
Washington, DC  
September 4, 2003

PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES

The Proliferation Security Initiative (PSI) is a response to the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide. The PSI builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes. It is consistent with and a step in the implementation of the UN Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the UN to prevent proliferation. The PSI is also consistent with recent statements of the G8 and the European Union, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials. PSI participants are deeply concerned about this threat and of the danger that these items could fall into the hands of terrorists, and are committed to working together to stop the flow of these items to and from states and non-state actors of proliferation concern.

The PSI seeks to involve in some capacity all states that have a stake in non-proliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. The PSI also seeks cooperation from any state whose vessels, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern. The increasingly aggressive efforts by proliferators to stand outside or to circumvent existing nonproliferation norms, and to profit from such trade, requires new and stronger actions by the international community. We look forward to working with all concerned states on measures they are able and willing to take in support of the PSI, as outlined in the following set of "Interdiction Principles."

INTERDICTION PRINCIPLES FOR THE PROLIFERATION SECURITY INITIATIVE

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.
2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:
  - a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
  - b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.

c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.

d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

[Also: *Principles for the Proliferation Security Initiative and Proliferation Security Initiative—Paris Meeting of Core Participants, September 3-4, 2003*]

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PREPARED STATEMENT OF WORLD WILDLIFE FUND, BROOKS B. YEAGER, VICE  
PRESIDENT, GLOBAL THREATS PROGRAM

1. The UN Law of the Sea (LOS) Convention establishes an important foundation for the further development and implementation of effective measures for sustainable ocean use. In important respects, the Convention serves as a dynamic, living constitution for the oceans. The Convention provides a legal framework for virtually all activities in over two-thirds of the Earth's surface. It sets forth the rights and obligations of nations in using the ocean and its resources. Agenda 21, in its chapter 17 on oceans and coasts, recognizes LOS Convention provisions as "the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources" (17.1).<sup>1</sup>

2. Summarily stated, the LOS Convention covers navigation and overflight, fishing and conservation of marine living resources, marine mammals, the development of minerals in offshore and deep seabed areas, marine environmental protection, marine scientific research, maritime boundaries, the laying of submarine cables and pipelines, artificial islands and seabed installations, piracy, illicit drug trafficking, and dispute settlement. It substantially modifies the pre-existing ocean law regime as codified in the four 1958 Geneva Conventions. It expands coastal state sovereign rights over resources and other activities related to the economic exploration and exploitation within a 200-mile exclusive economic zone (EEZ). Where the legal continental shelf extends beyond 200 miles, the coastal state enjoys sovereign rights over seabed resource activities further offshore.

3. The benefits of the LOS Convention are substantial. They outweigh any real or perceived drawbacks. The Convention's 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 framework of principles and objectives it establishes for that development, represent significant steps forward. These benefits advance global objectives in environmental protection and resource conservation. It would be far more difficult to negotiate the Convention's fundamental obligations on environmental protection and species conservation in more limited-purpose regional and global agreements.

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<sup>1</sup> This statement is drawn from a more detailed statement initially prepared by Clifton Curtis in 1995, updated in December 1998, with the statement endorsed by WWF and more than 60 other U.S.-based environmental organizations. See also: The United Nations Convention on the Law of the Sea and the Marine Environment: A Non Governmental Perspective, Clifton E. Curtis, *Geo. Int'l Envtl. L. Rev.* 7:739-743 (1995).

4. Part XII of the LOS Convention ("Protection and Preservation of the Marine Environment") is the first comprehensive statement of international law on this subject, going well beyond the 1958 conventions. It establishes unqualified obligations for all states to protect and preserve the entire marine environment, subject to compulsory, binding dispute settlement. All states are obliged to prevent, reduce, and control marine pollution from all sources, including the release of toxic, harmful or noxious substances.

5. The unique relationships established between the Convention and other international marine agreements leverage the continual development and upgrading of international rules and standards and of recommended practices and procedures, which in turn are to form the basis for national laws and regulations. The articles on marine pollution control establish a symbiotic relationship between the LOS Convention and other issue-specific environmental agreements, such as the London Convention (LC), vessel-source pollution agreements like MARPOL 73/78, and regional seas agreements.

6. Pursuant to Articles 210(6), 216, and 237 of the LOS Convention, international rules and standards agreed pursuant to global agreements such as those on vessel-source pollution, dumping, and pollution from seabed development are generally considered applicable to states parties to the LOS Convention. Those states must adopt and enforce laws and regulations and other measures that are no less effective than the global rules and standards. Moreover, the obligation to enact and enforce national laws that are no less effective than these international rules is an ongoing one as regards future changes in relevant issue-specific treaty regimes. Governments may enact more stringent laws for their own nationals, but the international rules and standards establish a common floor.

7. The relationship between international rules and national laws is, unfortunately, not as advanced in relation to land-based and airborne sources (LBS) of marine pollution. Nonetheless, national LBS measures must take into account any international LBS rules and standards or recommended practices and procedures. Moreover, evolving international measures, binding and non-binding, will inform and may be taken into account as relevant rules of international law (as per Art. 31(3) of the Vienna Convention on the Law of Treaties) in related dispute settlement proceedings. Such evolving measures include, among others, the Global Program of Action adopted at the Washington Conference for the Protection of the Marine Environment from Land-Based Activities (23 October-3 November 1995).

8. Parts V and VII of the Convention govern the conservation, protection, and management of marine species. They establish fundamental obligations to conserve marine living resources. Article 65, for example, specifically exempts marine mammals in general and cetaceans in particular from any general requirements of maximum usage by providing that appropriate international organizations, such as the IWC, may prohibit or limit the exploitation of marine mammals. In this regard, the Earth Summit's Agenda 21 (17.62a and 17.90a) specifically recognizes the IWC as the international organization responsible for the conservation and management of whales.

9. Coastal states are required to conserve and manage EEZ living resources to ensure that they are not endangered by over-exploitation, and they are to cooperate with other states in managing species that migrate into areas under other states' jurisdiction or the high seas. All states have the duty to apply to their nationals fishing on the high seas measures necessary to conserve living resources and to cooperate with others in conserving and managing these resources. While there are limitations on the application of compulsory binding dispute settlement to national measures regarding EEZ fisheries, there are no limitations regarding conservation measures enacted by states fishing on the high seas.

10. Like those on marine environmental protection, the fisheries provisions establish important principles for further development of regional/global fisheries agreements. These provisions promote sustainable use, based on "best available" scientific evidence, and, as considered below, they set the stage for a more fully-articulated ecosystem management approach. Today, this is best exemplified by the ecosystem conservation standard set forth in the 1980 Convention on the Conservation of Antarctic Marine Living Resources. Similarly, the 1995 UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fisheries Agreement) contains important advances, among them its commitment to a precautionary approach to fisheries management, and its strong compliance and enforcement measures for high seas areas—measures that will help ensure effective application of that regime's conservation measures.

11. Also like the marine environmental protection provisions, general fisheries conservation and management obligations in the LOS Convention are reinforced by specific requirements, practices, and criteria established in other sub-regional, re-

gional, and global agreements. These “generally recommended” international minimum standards must be taken into account in the conservation measures set by coastal states and by states fishing on the high seas (Arts. 61.3 and 119.1). They also may be taken into account as relevant rules of international law in related dispute settlement proceedings.

12. At the same time, substantial further developments, building on LOS Convention provisions, are warranted. Clearly, the LOS Convention does not, in our view, address all ocean uses adequately. For matters such as the application of the precautionary approach, fisheries conservation measures, protections against invasive species, land-based sources of marine pollution, deep seabed mining, liability, and polar-related initiatives, among others, there is a clear need for more focused and more effective requirements.

13. Moreover, safeguards need to be taken to ensure that the Convention’s dispute settlement or other provisions are not used to vitiate or curtail more stringent environment and conservation measures and standards, such as those matters referenced in paragraph 12, above. For that purpose, WWF believes that when United States deposits its instrument of accession, it should attach a note clarifying the United States’ understanding that the Convention does not affect its right to utilize such measures as it, in its sole discretion, considers appropriate for the preservation of the marine environment, including but not limited to the living resources thereof.

14. As stated at the outset of this statement, the LOS Convention establishes an important foundation, or framework, for the further development and implementation of effective global, regional, sub-regional and national measures for protection, conservation and sustainable use of the ocean. At the same time, substantial further developments are warranted in relation to matters such as those addressed above. Despite these areas requiring further attention, WWF is firmly convinced, overall, that U.S. support for and accession to the Convention is merited, serving as the foundation for further progressive development of ocean-related international law and policy.

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## RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

RESPONSES OF WILLIAM H. TAFT, IV, LEGAL ADVISER, AND HON. JOHN F. TURNER, ASSISTANT SECRETARY OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR RICHARD G. LUGAR

*Question 1.* Describe the circumstances under which the Convention would provide for the United States to permit foreign fishers to fish in waters subject to U.S. jurisdiction. Has the United States ever had an unharvestable surplus of any relevant fish species that would be subject to allocation under the treaty? Is the United States likely to have any such surplus in the future?

*Answer.* During the 1970s and 1980s, U.S. fishermen did not have the capacity to harvest all of the allowable catch in waters within 200 miles of our coast. Indeed, one of the driving forces behind the Fishery Conservation and Management Act of 1976 was to develop U.S. capacity and eventually to replace foreign fleets with American ones in the U.S. 200-mile zone. The Act requires the regional fishery management councils to determine the optimum yield from each fishery, and then to estimate what part of that yield could be harvested by U.S. fishermen (16 U.S.C. § 1821(d), § 1853(a) (3) and (4)). The surplus, or “total allowable level of foreign fishing” (TALFF), is then to be allocated to foreign fleets (16 U.S.C. § 1821(e)). This scheme is completely consistent with the treaty, which gives each coastal State the discretion to determine the allowable catch within its EEZ (article 61(1)), to ensure that resources are not overexploited (article 61(2)), and to determine its capacity to harvest such resources and to give other States access to any surplus under reasonable conditions (article 62(2)); see also article 297(3)(a).

The United States achieved the goal of full capacity in the early 1990s. With one small exception (Atlantic mackerel and herring in 2001), no regional fishery management council has identified a TALFF in more than a decade. The United States is unlikely to have any surplus in the future, as American capacity to take most species far exceeds the allowable catch.

Senator Stevens, in his testimony before the Committee, raised this question in the context of Alaska fisheries, where the council sets an “acceptable biological catch” for each fishery, and then sets an annual “total allowable catch.” The difference between the ABC and the TAC is not considered surplus. The difference between the two is a cushion dictated by conservative management, in accordance



with article 61(2). Only if U.S. fishermen could not harvest the entire TAC would the question of surplus arise (article 62(2)).

It should be noted that no other party to the Convention could bring the United States to binding dispute resolution over the issue of fisheries allocations within the U.S. exclusive economic zone (article 297(3)(a)).

*Question 2.* The Executive Branch's 1994 transmittal package indicates that, at that time, the United States had Governing International Fishery Agreements (GIFAs) in force with five nations. Has the United States concluded any additional GIFAs since then? Is the United States currently negotiating any additional GIFAs?

Answer. No new GIFAs have been negotiated or concluded since 1994. Those in force are with Lithuania, PRC, and the Russian Federation. The Russian GIFA, under which a mackerel and herring joint venture has been conducted in Narragansett Bay, will expire December 31, 2003, unless it is extended. A GIFA with Estonia expired June 30, 2003, and is in the process of being renewed; an expired GIFA with Latvia might also be renewed.

*Question 3.* How, if at all, would the Convention require the United States to change its regulation of fisheries under the Magnuson-Stevens Fishery Conservation and Management Act?

Answer. No change would be required. The Act fully enables the United States to exercise its rights and to implement its obligations with respect to the provisions of the Convention relating to fisheries. U.S. law and practice are also fully consistent with the provisions of the Convention relating to fishing on the high seas and dealing with particular categories of species, such as straddling fish stocks and anadromous stocks.

*Question 4.* Beyond the specific oceans policy advantages of joining the Convention mentioned in the administration's testimony, are there also more general advantages for U.S. policy to joining the Convention at this time?

Answer. Yes. We believe that U.S. accession to a major multilateral treaty such as the Law of the Sea Convention would yield foreign policy benefits. U.S. adherence would signal that we remain engaged in multilateral regimes that address important environmental and economic issues. U.S. accession would also demonstrate to the international community that, when the United States asks for a treaty to be modified to address particular concerns and those modifications are made, we will join the treaty.

*Question 5.* What issues are raised for U.S. interests by the claim filed by Russia with the Commission on the Limits of the Continental Shelf to define the extent of its outer continental shelf? How would being party to the Convention affect the ability of the United States to protect such interests?

Answer. As reflected in the Convention, a coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources, including, e.g., oil and gas. The Convention permits a coastal State to claim continental shelf beyond 200 miles from its baselines, provided it meets certain criteria. For example, the continental margin does not include the deep ocean floor with its oceanic ridges.

A coastal State claiming shelf beyond 200 miles from its baselines is to make a submission to the Commission on the Limits of the Continental Shelf, which makes recommendations to coastal States related to establishing the outer limits of their shelf. To the extent a coastal State establishes its outer limits based on such recommendations, its outer limits are final and binding.

The United States has an obvious stake in the effective functioning of the Commission, which only recently received its first submission. The United States expects to submit scientific evidence to support its own extended shelf, e.g., off the Atlantic Coast, in the Bering Sea, and in the Arctic Ocean off Alaska. We also have a strong interest in ensuring that the submissions of other States meet the Convention's criteria. Finally, the proper interpretation and application of the Convention's provisions are important for the stability and general acceptability of the law of the sea regime reflected in the Convention.

Specifically with respect to Russia's submission, the United States is concerned that it included certain extensive ridges in the Arctic Ocean that we do not consider meet the Convention's criteria for the continental shelf. The United States submitted its views, with supporting documentation, to the Commission (posted on the CLCS Web site). The resolution of this issue has implications for natural resource development, scientific research, and strategic interests in the Arctic.

By becoming party to the Convention, the United States would be better able to protect its interests in several ways. U.S. comments on other parties' submissions

to the Commission would carry added weight. The United States would be able to nominate a commissioner, whose expertise would help shape the Commission's recommendations. Finally, a U.S. submission of scientifically sound information on the outer limits of the broad continental shelf off our coasts would enable us to establish our outer limits as final and binding in accordance with article 76(8).

*Question 6.* What effect, if any, would the Convention have on the ability of the United States to implement its existing regulations requiring oil tankers calling at U.S. ports to be double-hulled?

Answer. The Convention does not affect our ability to implement the provision of the Oil Pollution Act of 1990 (OPA 90) that requires oil tankers intending to enter a U.S. port to be fitted with a double hull, in accordance with a statutorily established phase-in schedule. Concerning U.S. tankers, article 211(2) of the Convention in fact affirmatively calls upon States to adopt laws and regulations for the prevention, reduction, and control of pollution of the marine environment from vessels flying their flag or of their registry. Concerning foreign tankers, article 211(3) specifically recognizes the right of port States to establish their own requirements relating to vessel source pollution as a condition of entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals. It obligates States to give due publicity to any such requirements and to communicate them to the International Maritime Organization (IMC).

Therefore, implementation of the double hull provisions in OPA 90 for oil tankers, whether foreign-flagged or domestic, is fully consistent with and supported by the Convention.

*Question 7.* When does the administration expect to submit to the Congress proposed implementing legislation for Annex VI of the International Convention for the Prevention of Pollution from Ships?

Answer. The draft implementing legislation for Annex VI is scheduled to undergo interagency review and clearance in December 2003. Pending resolution of any issues identified in the review and procedural considerations for formal submittal of the legislation, we expect the draft legislation will be ready for consideration by Congress in early 2004.

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RESPONSES OF REAR ADMIRAL JOHN E. CROWLEY, CHIEF COUNSEL AND JUDGE ADVOCATE GENERAL, U.S. COAST GUARD, TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

#### ARTICLE 27

*Question 1.* Article 27 indicates that a coastal State has criminal jurisdiction over a foreign ship that is passing through the territorial sea if the consequences of the crime extend to the coastal State.

- How is this interpreted with respect to transnational crimes that we believe affect all states, like terrorism and the illicit trafficking of people and arms?
- Is there any corollary right on the high seas or in the contiguous zone? If not, are there other legal regimes that do provide such a right?

Answer. Article 27, concerning criminal jurisdiction on board a foreign ship, is taken almost verbatim from Article 19 of the 1958 Territorial Sea Convention, to which the United States is a party. As such, it continues the codification of a long-standing principle of international law.

This Article attempts to strike a reasonable balance between the criminal jurisdiction of the coastal State and that of the flag State. On the one hand, States with shipping interests wish to suffer as little disruption or interference as possible as their vessels transit through the territorial waters of another State. On the other hand, coastal States may regard certain actions by or aboard the transiting ship as so inimical to their interests that they require invocation of their criminal laws. Article 27 is the result of international negotiation that resolves these competing interests.

Article 27 sets forth several bases for coastal State exercise of criminal jurisdiction on board a foreign ship passing through the territorial sea, including crimes where the consequences of the crime extend to the coastal State and where the crime was of a kind to disturb the peace of the country or the good order of the territorial sea. Depending upon the particular facts, there are a host of criminal statutes primarily contained within Title 18 of the United States Code that could be applied to prosecute those involved in terrorist acts and the trafficking of persons and arms in our territorial sea.

On the high seas, there are various circumstances under which the United States could exercise jurisdiction over a foreign flagged vessel, including, among others, where the flag State consents, or in situations involving acts of piracy, unauthorized broadcasting, or slavery. In the contiguous zone, a coastal State may, without flag State consent, exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.

It should also be noted that the Convention does not affect the inherent right of self-defense under international law.

#### ARTICLE 99: SLAVE TRADER SHIP BOARDINGS

*Question 2.* Article 99 allows for the boarding of ships on the high seas if they are engaged in the slave trade.

- Is this right being used to effectively help stem the tide of trafficking of women and girls? If not, are there other legal regimes that do provide such a right?
- Is there any similar right on the high seas if the ship is thought to be preparing for an act of terrorism? If not, are there other legal regimes that do provide such a right?

Answer. Article 99 is identical to Article 13 of the High Seas Convention and relates to the Convention to Suppress the Slave Trade and Slavery of September 25, 1926, 46 Stat. 2183, TS No. 778, 2 Bevans 67, 60 LNTS 253; the Protocol of December 7, 1953 Amending the Slavery Convention of September 25, 1926, 7 UST 479, TOAS No. 3532, 182 UNTS 51; and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of September 5, 1956, 18 UST 3201, TIAS No. 6418, 266 UNTS 3. This obligation is implemented in 18 U.S.C. §§ 1581-88 (1982), and gives effect to the policy enunciated by the Thirteenth Amendment to the Constitution of the United States. The Slavery Convention, Amending Protocol, and Supplementary Convention do not authorize non-consensual boarding of foreign vessels. Nevertheless, Article 22(1) of the High Seas Convention authorized non-consensual boarding by a warship where there exist reasonable grounds for suspecting that a vessel is engaged in the slave trade. Article 110(1)(b) of the LOS Convention reaffirms this approach. Given that the instruments cited above authorize boarding of ships that are engaged in the slave trade, those provisions can be used to authorize boarding of ships used to traffic any person for any type of forced labor.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which is a supplement to the UN Convention Against Transnational Crime, includes “slavery or practices similar to slavery” as a form of “exploitation” that the Protocol seeks to prevent. See Article 3(a), UN Doc. A/55/383, pages 54-55 (2000). This Protocol does not contain provisions on the boarding of ships in international waters. In addition, since this Protocol (1) addresses a wide range of human exploitation and (2) has not yet entered into force, the non-consensual boarding provisions of Article 110 are dependent upon the particular facts.

It should also be noted that the Protocol Against the Smuggling of Migrants by Land, Sea and Air, another supplement to the UN Convention against Transnational Organized Crime, provides a framework for States parties to request and obtain authorization to stop and board vessels engaged in the smuggling of migrants by sea. Additionally, any State may request from any other State on an ad hoc basis authorization to board and search the other State’s vessels on the high seas. Thus, the ship-boarding provisions of Migrant Protocol could be used if the persons being transported are believed to be smuggled migrants. Because many, if not most, trafficking victims are smuggled migrants, the ship-boarding provisions of the Migrants protocol could be effective tool in identifying trafficking victims and combating trafficking in persons.

With respect to ships on the high seas that are preparing for an act of terrorism, the Convention does not affect the right of self-defense under international law.

#### ARTICLE 19(2)

*Question 3.* Article 19(2) provides that a foreign ship shall be considered prejudicial to the peace, good order, or security of the coastal State if it engages in any of the enumerated activities.

- Who determines whether the foreign ship is undertaking any of the proscribed activities?
- Would, in the case where the ship’s purpose was clearly a terrorist act or an act threatening to the coastal State, the provision of subparagraph (a) apply?

Answer. The Convention does not accord priority to either the coastal or flag State in terms of determining whether a ship is engaged in one or more of the activities set forth in Article 19(2). To the extent that a coastal State sought to assert authority beyond that provided in the Convention with respect to innocent passage, for example, it would need to conclude that a ship was engaged in activities rendering its passage non-innocent within the meaning of Article 19. As appropriate, a coastal State that questions whether the particular passage of a ship through its territorial sea is innocent might inform the ship of the reasons why it questions the innocence of the passage and provide the ship with an opportunity to clarify its intentions or change its conduct in a reasonably short period of time.

As to the applicability of Article 19(2)(a) to a terrorist act or act threatening the use of force, this subparagraph would likely apply, recognizing that it would ultimately depend upon the precise facts.

It should also be noted that nothing in the Convention restricts the inherent right of individual or collective self-defense or rights during armed conflict, and the administration is recommending that the United States express such an understanding.

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RESPONSES OF MARK T. ESPER, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR NEGOTIATIONS POLICY, TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

*Question 1.* Please elaborate on the basis of your assertion, on page 4 of your testimony, that it is “clear” that whether an activity is “military” is for each State Party to determine for itself.

Answer. Article 298(1) (Section 3 of Part XV) of the Convention unambiguously allows a State to “declare in writing that it does not accept any one or more of the procedures provided for in section 2” of Part XV with respect to disputes involving, among other things, military activities and certain law enforcement activities.

The determination of whether an activity is of a military nature inherently involves subjective as well as objective elements and the evaluation of potentially sensitive and important national security activities and information. Whether a State’s particular activity constitutes a “military” activity is thus a determination that the State Party undertaking the activity is uniquely situated to make.

*Question 2.* I understand that, during the last administration, an analysis was prepared by the General Counsel of the Department of Defense regarding the effect of the Convention on intelligence activities. Please provide a copy of this analysis.

Answer. The document to which you refer was prepared in response to a classified inquiry by the Chairman and Vice Chairman of the U.S. Senate Select Committee on Intelligence. We will communicate with you separately regarding this document.

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RESPONSES OF ADMIRAL MICHAEL G. MULLEN, VICE CHIEF OF NAVAL OPERATIONS, JOINT CHIEFS OF STAFF, DEPARTMENT OF THE NAVY, TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

*Question 1.* Article 50 states that activities in the EEZ must be done with “due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal States . . .”

a. What happens when a coastal State claims that military exercises are being performed that do not meet this criteria?

b. In particular, if a coastal State’s environmental protection laws conflict with the operation of military equipment, how is this resolved?

Answer. First, it is the duty of the flag State, not the right of the coastal State, to enforce the “due regard” obligation to comply with laws and regulations adopted by a coastal State.<sup>1</sup> The Convention reflects the particular sensitivity of military activities and the special status of warships and other sovereign immune vessels (see, e.g., Articles 95, 236 and 298). Consistent with U.S. policy, the Department of Defense operates with the appropriate “due regard.” The Department dedicates the resources necessary to operate in a responsible manner, including from an environmental point of view, as well as to set a standard that other nations will follow.

The concept of “due regard” in the Convention balances obligations of both the coastal State and other States in the exclusive economic zone (see, e.g., Articles 56 and 58). This balance permits coastal States to adopt certain measures to protect

the marine environment close to their shores and the right of a flag State to exercise its high seas freedoms in waters beyond the territorial sea.

Article 58 preserves recognized high seas uses including the full range of military activities, such as anchoring, launching and, landing of aircraft, operating military devices, intelligence collection, exercises, operations, and conducting military surveys. Under Article 58, all States have the right to conduct military activities within the exclusive economic zone, and may do so consistent with the obligation to have due regard to coastal State resource and other rights, as well as the rights of other States as set forth in the Convention.

Despite the status of warships and other sovereign immune vessels as reflected in the convention (see, e.g., Articles 95, 96 and 236), in accordance with U.S. policy, the Department of Defense has emphasized that protection of the marine environment is an integral component of the national security strategy. This commitment is consistent with the obligation of all parties, under Article 236, to ensure that their public vessels and aircraft operate in a manner consistent with the Convention, insofar as is reasonable and practicable and does not impair operations or operational capabilities of such vessels and aircraft. As discussed above, the Department of Defense had dedicated significant resources to operate in an environmentally sound manner worldwide.

*Question 2.* What would be the difference in scope and duration of the biennial reviews and the comprehensive evaluations you describe in your testimony?

Answer. The question of periodic reviews of the Convention involves matters of national policy on which I would defer to our civilian leadership.

*Question 3.* What are the advantages and disadvantages of a sunset provision that you reference on page 10 of your testimony?

Answer. The advantages and disadvantages of a sunset provision is a matter of national policy on which I would defer to our civilian leadership.

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<sup>1</sup>U.S. Commentary on the LOS Convention, Sen. Treaty Doc. 103-39, at 24, 34 ILM 1411 (1995), Appendix 7.

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RESPONSES OF HON. JOHN F. TURNER, ASSISTANT SECRETARY OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

*Question 1.* What is the purpose of the Commentary regarding Article 10(6) (set forth at pages 11-12 of Treaty Doc. 103-39) regarding the Delaware and Chesapeake Bays?

Answer. The referenced portion of the Commentary notes that, while the United States in the past has claimed Delaware Bay and the Chesapeake Bay as historic bays, these bodies of water satisfy the criteria for juridical bays reflected in Article 10 of the Convention.

The U.S. claim to the waters of the Delaware and Chesapeake Bays dates back to the late 17th and 18th centuries. See 4 Whiteman, Digest of International Law 235 (1965). Prior to 1958 there was no accepted international rule, except the law pertaining to historic bays, as to the circumstances in which the waters of a bay could be considered as internal waters.

Article 7 of the 1958 Convention on the Territorial Sea and the Contiguous Zone provides that the waters of a bay meeting specified geographic criteria (including a mouth no more than 24 nautical miles wide) may be considered internal waters. Article 10 of the 1982 Convention similarly sets forth criteria for considering the waters of a bay as internal waters.

The Delaware and Chesapeake Bays have mouths 10 and 12 nautical miles wide respectively, and meet the other criteria for a juridical bay set forth in Article 10. Thus, these waters are indisputably internal waters of the United States.

*Question 2.* The Commentary also indicates that there is a "prohibition on regional agreements in areas that restrict the exercise of these rights and freedom by third States without their consent."

*a.* What areas are referred to?

*b.* How does this affect regional agreements aimed at controlling immigration flows or countering terror?

Answer. The quotation is apparently from page 13 of the Commentary, which includes "the prohibition on regional arrangements in areas that restrict the exercise

of these rights and freedoms by third States without their consent” as one of five elements of the Convention essential to maintaining the balance between freedom of navigation and protection of offshore areas.

This passage provides one example of the type of agreement that would not be consistent with Article 311(3) of the Convention. That Article, which reflects customary international law of treaties, allows two or more States Parties to conclude agreements modifying or suspending the operation of provisions of the Convention; however, such agreements may not, among other things, affect the enjoyment by other States Parties of their rights or the performance of their duties under the Convention.

For example, coastal States bordering an international strait could enter into an agreement establishing a regime to reduce pollution from ships in the strait, but could not include any measures that, e.g., had the practical effect of denying or impairing the right of transit passage.

Regional agreements and arrangements aimed at immigration control can be, and have been, constructed within the framework of international law of the sea, as reflected in the Convention. (It should be noted that, among other things, the Convention accords coastal States considerable control over loading and unloading of persons. See Articles 19(2)(g), 21(1)(h), 33(1)(a), and 42(1)(d).) Likewise, regional and international arrangements for effective counter-terrorism measures can be, and have been, constructed within the framework of the international law of the sea as reflected in the Convention.

*Question 3.* Article 61 of the Convention says that a coastal state shall determine the allowable catch in its EEZ. It also makes reference to determining the “maximum sustainable yield, as qualified by relevant environmental and economic factors.”

- a. What method does the United States use to determine allowable catch in the EEZ?
- b. How does the United States define maximum sustainable yield? Is it consistent with the provision in Article 61?
- c. Is there any way in which another nation could use the Convention to change or alter U.S. determinations and definitions in this area?
- d. What other methodologies are available to measure the best method of protecting fisheries? (For example some have suggested that the model must be based on fishing below the maximum sustainable yield as essential due to advances in technology and increased consumer demand).
- e. Would other methodologies be allowed under the Convention?

*Answer.* The Regional Fishery Management Councils established by the Magnuson-Stevens Fishery Conservation and Management Act, in conjunction with the Secretary of Commerce, determine the allowable catch for EEZ fisheries. The allowable catch must be consistent with the “optimum yield” specified in an approved fishery management plan. 16 U.S.C. 1853(a)(3). Optimum yield is based on maximum sustainable yield, as reduced by any relevant economic, social, or ecological factor. 16 U.S.C. 1802(28). The Secretary of Commerce issues regulations to implement an approved fishery management plan or amendment.

Maximum sustainable yield (MSY) “is the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions.” 50 C.F.R. 600.310(c)(1)(i). Article 61 does not define MSY, but the definition in the NOAA guidelines quoted above is the generally accepted one.

Article 61 gives each coastal State the discretion to determine the allowable catch within its EEZ, to ensure that resources are not overexploited, and to determine its capacity to harvest such resources.

No other party to the Convention could bring the United States to binding dispute resolution with respect to the living resources in its EEZ, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its conservation and management laws and regulations. Article 297(3)(a). Another party could, however, request submission of a dispute on certain of these issues to conciliation. Article 297(3)(b).

With respect to other methodologies for protecting fisheries, the Sustainable Fisheries Act of 1996, Pub.L. 104-297, recognized that setting catch levels above those that would produce MSY, as allowed in the original Magnuson-Stevens Act, allowed too much fishing effort and sometimes resulted in overfished stocks. The definition of “optimum yield” was amended so that the allowable catch cannot be set above MSY.

NOAA guidelines (50 C.F.R. 600.310(c) (2) and (3)) offer numerous options for estimating MSY through choice of an MSY control rule (e.g., removal of a constant catch; removal of a constant fraction of the biomass; allowance of a constant level of escapement; variance of the fishing mortality rate as a function of stock size). In mixed-stock fisheries, or where there is insufficient data, an indicator or proxy MSY is acceptable. The guidelines also list a number of factors that can be used to set the allowable catch ("optimum yield") below MSY.

These and other methodologies are acceptable under Article 61. Article 61(3) provides that measures are to be designed to maintain or restore fish populations to levels that can produce MSY, but lists many factors that may qualify that requirement, in either direction. Other paragraphs in the same article require managers to take into account the best scientific evidence available, to consider the effects of the fishery on bycatch species and predator-prey relationships ("associated or dependent species"), and to ensure that living resources are not over-exploited. Article 61 thus gives coastal States a great deal of discretion in methods of setting allowable catches and methods of measuring the success of management measures.

*Question 4.* Article 62 of the Convention indicates a coastal State "shall . . . give other States access to the surplus of allowable catch."

a. Who determines if there is surplus allowable catch?

b. How would another State enforce its right to that surplus?

Answer. The coastal State determines if there is surplus allowable catch. Article 62(2). In the United States, the Regional Fishery Management Council or the Secretary of Commerce makes that determination. 16 U.S.C. 1853(a)(4). Another State cannot force the United States to identify surplus or to allocate it (see Answer 3 above).

*Question 5.* Article 210(5) requires the express prior approval of the coastal State for dumping within the territorial sea and the EEZ or the continental shelf. The provisions of the Ocean Dumping Act (e.g., 33 U.S.C. 1411) with regard to material outside the United States extend only to the territorial sea and the contiguous zone. What legal authority exists for the United States to implement this provision?

Answer. Article 210(5) does not require a coastal State to have a mechanism in place to grant its approval for dumping in the EEZ. To the extent a coastal State has not exercised its authority to grant such approval, dumping would not be permitted. The Ocean Dumping Act currently applies to ocean dumping in the EEZ (and beyond) of matter transported from the United States for the purpose of dumping, or of matter transported from any location by a vessel or aircraft registered in the U.S. or flying the U.S. flag. It also prohibits the dumping of industrial waste and sewage sludge in the territorial sea and EEZ. The President has inherent authority to grant permission on behalf of the United States but, of course, cannot waive any applicable restriction under domestic law.

*Question 6.* Article 210(6) requires that national laws, regulations and measures to implement that article shall be "no less effective" than "global rules and standards" in this regard. What is the meaning of the term "global rules and standards" as used in this paragraph?

Answer. The analysis of whether there are "global rules and standards" needs to be carried out on a case-by-case basis, taking into account a variety of factors, such as: whether the rule/standard has been formally adopted; whether it is in force; the number and type of the States adopting the standard; the extent to which the group represents States whose vital interests are affected by the standard; and State practice. The global regime addressing pollution of the marine environment by dumping is long-established; the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention) governs the ocean dumping of all wastes and other matter.

*Question 7.* Article 211(2) requires States to adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag, and that such laws and regulations shall "at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference." Does the term "generally accepted international rules and standards" have a different meaning than the term "global rules and standards" in Article 210(6)? Please elaborate.

Answer. Despite the difference in phraseology between "generally accepted international rules and standards" and "global rules and standards," it does not appear from the negotiating history or relevant commentary that a legal distinction was intended. It appears, rather, that the absence of the term "generally accepted" before

“global rules and standards” in the article on pollution by dumping reflected the fact that the 1972 London Convention already covered the relatively narrow (compared to vessel source pollution) field of ocean dumping. With respect to new ocean dumping rules and standards, the same analysis would apply as for generally accepted international rules and standards.

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RESPONSES OF HON. WILLIAM H. TAFT, IV, THE LEGAL ADVISER, DEPARTMENT OF STATE, TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

*Question 1.* On September 19, 1996, Secretary of State Christopher wrote to Chairman Helms to urge favorable action on the Convention, and stated “we have reviewed existing laws and have determined that implementing legislation is not necessary before United States accession.”

*a.* Does the Executive Branch continue to support the statement by Secretary Christopher?

*b.* Please elaborate on the basis of this statement by Secretary Christopher. Describe the scope of the review undertaken, the period of time during which the review was conducted, and whether it was conducted on an inter-agency basis, by each relevant agency separately, or by the Department of State only.

*c.* Seven years have passed since Secretary Christopher’s letter was sent to the committee. Has a review of domestic law as compared to the obligations of the Convention been conducted since 1996? If so, please elaborate. If not, why not?

*d.* Did the Bush administration’s review of the Convention in 2001 or in the last year (as described by Mr. Esper) focus, in any respect, on the current domestic legal framework for implementing the Convention? Please elaborate.

*e.* Please provide a copy of the 1996 review, and any subsequent review.

*Answer.* The Executive Branch continues to consider that implementing legislation is not necessary before U.S. accession. Given that the U.S. is a party to the 1958 law of the sea convention, that the U.S. heavily influenced the development of the 1982 Convention, and that the U.S. has since 1983 been acting in accordance with the provisions of the Convention governing traditional uses of the oceans, U.S. law and practice are already compatible with the Convention.

Between the time the Convention was transmitted to the Senate in 1994 and Secretary Christopher’s letter in 1996, Executive Branch agencies reviewed the provisions of the Convention in light of U.S. law and practice and concluded that implementing legislation was not necessary before U.S. accession. The involvement of particular agencies depended upon the provisions in question. NOAA was particularly involved, for example, in considering whether U.S. obligations related to deep seabed mining could be met under the Deep Seabed Hard Minerals Resource Act. Concerning Part XII on protection of the marine environment, many agencies were engaged in an interagency review led by the State Department.

The Administration is considering whether Article 39 of Annex VI of the Convention (concerning the Sea-bed Disputes Chamber) needs to be implemented through legislation and may be proposing an understanding in this regard. In any event, given the current undeveloped state of deep seabed mining, such legislation would not be necessary before U.S. accession.

Although the Administration’s decision to support the Convention did not specifically address the current domestic legal framework, its support for the Convention was facilitated by the longstanding ability of the United States to act in accordance with the Convention within the framework of U.S. domestic law and practice.

*Question 2.* In submitting the Convention to the Senate, the Executive Branch provided an extensive Commentary on the Convention.

*a.* Is this Commentary to be considered an authoritative representation of the Executive Branch insofar as any information in the Commentary is directing to the meaning and legal effect of a term or provision of the Convention?

*b.* Has the Commentary been reviewed since 1994 by the Executive Branch? Is it still accurate, or does it require modification? If it requires modification, please provide it to the committee.

*Answer.* Generally, the Commentary appropriately analyzes and interprets the Convention. The Administration has engaged in a detailed multi-agency review that has resulted in an initial package of proposed declarations and understandings that further refine the Commentary; the Administration’s proposed declarations and understandings will prevail over the Commentary in the case of any inconsistency.



In addition, certain factual points have been overtaken by more recent events. For example, there are now 145 Parties to the Convention; additional agreements have been concluded (e.g., Annex VI to the MARPOL Convention, which is before the Senate as Treaty Doc. 108-7); and the United States claimed a 24-nautical mile contiguous zone by Presidential Proclamation 7219, 2 September 1999.

It should also be noted that the GPO print of the treaty texts and the Commentary contained some typographical errors and omitted the text of Article 19 of Annex VI (Expenses of the Tribunal); these errors were corrected in the version contained in the Dispatch Supplement of February 1995.

*Question 3.* Does the Executive Branch regard any of the provisions of the Convention as self executing? If so, which provisions? Please elaborate.

Answer. The Convention does not itself create private rights of action in U.S. courts. (Although Article 39 of Annex VI might be read to create such a right directly, the Administration's view is that it does not. However, it would obligate the United States to render Sea-bed Disputes Chamber decisions enforceable in U.S. courts, including through private causes of action. As noted in the answer to Question 1, the Administration is considering an understanding concerning this provision.)

Whether a Convention provision would otherwise be self-executing, including whether it would be directly enforceable as U.S. law, would depend upon the provision in question, as well as upon whether the Senate and Executive Branch express a view concerning such provision. In this connection, some provisions of the Convention would clearly not be self-executing, such as those contemplating future action by a State Party or those addressing administrative or institutional matters. The Administration would consider as self-executing those provisions setting forth various privileges and immunities to be accorded by States Parties (such as Articles 177-183); such provisions are generally treated as self-executing, and current U.S. law would not otherwise be adequate for the U.S. to implement its obligations under such provisions.

With respect to other provisions, the Administration will be proposing language for the Senate's resolution of advice and consent that would ensure, among other things, that criminal defendants in U.S. courts, such as those accused of environmental pollution, will not be able to invoke the Convention's provisions.

*Question 4.* Does the Executive Branch believe that any provisions of the Convention may pre-empt state laws? If so, which provisions? Please elaborate.

Answer. Most of the Convention addresses marine areas that are beyond the purview of the states. Within the territorial sea, the Convention contains certain obligations, such as with respect to innocent passage of foreign flag vessels. Such provisions are reflective of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, to which the United States is already a party, and customary international law. We are not aware of any state laws that infringe upon freedom of navigation in the territorial sea.

Concerning Article 39 of Annex VI, while this provision might be read to be directly enforceable some instances, potentially preempt state contract would otherwise be applicable to deep seabed mining transactions, the Administration does not consider it directly enforceable. However, it would obligate the United States to make Sea-Bed Disputes Chamber decisions enforceable through some means, e.g., implementing legislation, and enforceable Sea-bed Disputes Chamber decisions would prevail over any otherwise applicable state laws. As noted in the answer to Question 1, the Administration is considering an understanding concerning the provision.

*Question 5.* Does the Executive Branch expect to issue any Executive Orders following U.S. accession to the Convention in order to implement U.S. obligations under the Convention? If so, please elaborate on the subjects that would be addressed in such Executive Orders and the relevant obligations of the Convention that would be covered by such Orders.

Answer. The Administration does not have current plans to issue any particular Executive Orders following U.S. accession. The Executive Branch may decide over time to make more formal various mechanisms for ensuring that U.S. Executive Branch actions are consistent with the provisions of the Convention; however, if so, there are a variety of mechanisms from which to choose, ranging from informal guidance documents to more formal Executive Orders.

*Question 6.* Does the Executive Branch believe that any provisions of the Convention provide a private right of action? If so, which provisions?

Answer. The Convention does not itself provide for private rights of action in U.S. courts. Article 187 provides for access by private parties to the Sea-bed Disputes Chamber. Article 292(2) would not preclude a private person from seeking the prompt release of a vessel on behalf of the flag State in an international tribunal, as set forth in Article 292(1). As noted in the answer to Question 3, although Article 39 of Annex VI might be read to create such a right directly, the Administration's view is that it does not; however, it would obligate the United States to render Sea-bed Disputes Chamber decisions enforceable, including through private causes of action, through some means, e.g., implementing legislation. As noted in the answer to Question 1, the Administration is considering an understanding concerning this provision.

*Question 7.* Which agencies and departments of the Executive Branch will have the lead responsibility for interpreting and enforcing the provisions of the Convention? Please provide details by Part of the Convention.

Answer. As has been the case during the past two decades of following the Convention as a matter of policy, numerous agencies and departments are actively engaged in developments regarding, and implementation of, the Convention's provisions. We would expect this to continue.

State will continue to lead U.S. delegations to international negotiations and meetings regarding the Convention, as well as coordinate U.S. positions on many aspects of the Convention. NOAA has a lead role in the elaboration of international rules regarding deep seabed mining, as well as domestic implementation; NMFS has a lead role regarding fisheries management; State and DOD have lead roles in implementing the diplomatic and operational components of the U.S. Freedom of Navigation Program, which enforces navigational provisions of the Convention; NOAA, Coast Guard, EPA, and Justice have lead roles regarding marine pollution regulation and enforcement; and Coast Guard and Justice also have lead roles regarding other types of enforcement, e.g., drugs.

Specifically regarding non-military actions that could have implications under international law, including the law of the sea (such as enforcement actions against foreign flag vessels), existing interagency mechanisms are routinely employed to ensure full consideration of international law obligations of the United States.

*Question 8.* What does the Executive Branch understand to be the meaning of the relevant "generally accepted international rules or standards" under Article 21(2)?

Answer. The analysis of whether there is a "generally accepted" international rule or standard needs to be carried out on a case-by-case basis, taking into account a variety of factors, such as: whether the rule/standard has been formally adopted; whether it is in force; the number and type of the States adopting the standard; the extent to which the group represents States whose vital interests are affected by the standard; and State practice.

*Question 9.* How does the Executive Branch interpret the prohibition on laws relating to the "design, construction, manning or equipment of foreign ships" in Article 21(2) with respect to environmental regulation of matters like contaminated ballast water and double-hulls?

Answer. A double-hull requirement would be considered a law relating to the "design, construction, manning or equipment" (or "CDEM") of a ship. With respect to potential restrictions on the discharge of ballast water for ships transiting the territorial sea, there are many types of restrictions that would, in fact, not apply to the design, construction, manning or equipment of a ship. For example, we would not consider prohibitions on the discharge and/or uptake of ballast water to apply to CDEM of a ship. Thus, the United States could potentially establish no-discharge zones and/or specially designated discharge zones for vessels in transit through the territorial sea or impose a requirement that such ships perform ballast water exchange prior to discharge, without hampering innocent passage. Moreover, most foreign vessels in the U.S. territorial sea are traveling to or from U.S. ports; the United States can and does impose CDEM restrictions as a condition of entry to U.S. ports.

*Question 10.* Is there any conflict between the Convention and enforcement of the Oil Pollution Act of 1990 with regard to, in particular, the requirements related to double-hulled vessels? If so, what is it?

Answer. There would be no inconsistency with the Convention concerning the double-hull requirement of the Oil Pollution Act of 1990. The House Conference Report indicates that section 3703(a) ". . . is not intended to apply to vessels transiting U.S. waters or transiting the Exclusive Economic Zone . . . ."

*Question 11.* Article 33 allows coastal states to exercise the control necessary in the contiguous zone to prevent and punish infringement of its “customs, fiscal, immigration or sanitary laws and regulations.”

- a. How does the United States interpret “sanitary laws,” as used in this article?
- b. Does “sanitary laws” include all the direct and indirect protection of human health and the marine environment?
- c. How does the United States interpret “customs and fiscal laws,” as used in this article?

*Answer.* The term “sanitary laws” is not a defined term in the Convention. It tracks Article 24 (the contiguous zone provision) of the 1958 Territorial Sea and Contiguous Zone Convention, to which the United States is already a party. The term does not have as wide a scope as all laws aimed at the protection of human health and the marine environment, although there are likely areas of overlap. Regarding the term “customs and fiscal laws,” this is also not a defined term but would include, for example, illegal importation of drugs.

*Question 12.* Article 56 provides a coastal state the right to protect and preserve the marine environment in the EEZ. Article 211, paragraphs 5 and 6, regulating pollution in the EEZ provide specific rules for regulating pollution in the EEZ.

- a. Do any current U.S. laws regulate pollution by ships in the EEZ?
- b. Does the Executive Branch anticipate that, within the first five years of U.S. accession to the Convention, it would invoke the provisions of Article 211(6)(a)?

*Answer.* Several U.S. laws, e.g., the Clean Water Act (as amended by the Oil Pollution Act of 1990), the MPRSA, the Act to Prevent Pollution from Ships, and the Outer Continental Shelf Lands Act, apply to marine pollution in the EEZ in various circumstances. There is no currently anticipated need to seek additional authority under Article 211(6)(a).

*Question 13.* Article 69 provides for specific access rights for land-locked states in a region.

- a. For purposes of the Convention, how is a region defined?
- b. Does the region in which the United States is located contain any land-locked states?

*Answer.* The Convention does not define “region” for the purposes of Article 69. In the context of an article providing for access rights to the surplus of living marine resources in the EEZs of coastal States in the same “region,” it is reasonable to interpret the term to extend, at most, to the continent of the land-locked State.

As set forth in the Commentary, there are 42 landlocked States, 39 of which are in Africa, Asia, and Europe. In the western hemisphere, the land-locked states are Bolivia and Paraguay. The United States has interests in trade with landlocked states and in their economic development; those interests are furthered by Part X of the Convention.

*Question 14.* Article 70 provides for specific access rights for geographically disadvantaged states in a region.

- a. Does the region in which the United States is located contain any geographically disadvantaged states?

*Answer.* Article 70(2) defines a geographically disadvantaged State as one that either can claim no EEZ of its own or one whose geographical situation makes it dependent upon the exploitation of living resources in the EEZs of other coastal States in its region or subregion. The Convention does not define “region” for purposes of Article 70, which, like Article 69, concerns exploitation of the surplus of living marine resources in EEZs. In this context, as in the context of Article 69, it would be reasonable to interpret the term to extend, at most, to the continent of the geographically disadvantaged State. The United States is not located in a region containing geographically disadvantaged states.

*Question 15.* Article 196 requires States to prevent or control the accidental or intentional introduction of alien or new species which may cause significant and harmful changes to the marine environment.

- a. Does this Executive Branch regard this Article as the only provision in the Convention permitting regulatory measures with regard to invasive species?
- b. How will the United States satisfy its obligations under this provision?
- c. What is the standard that will be used to determine “significant and harmful changes”?

*Answer.* Other provisions of the Convention (e.g., in Section 6 of Part XII) potentially provide authority with regard to invasive species, depending upon, among

other things, the method by which the invasive species are introduced into the marine environment.

The United States has taken steps, both domestically and internationally, to address invasive species. Domestically, ships bound for the St. Lawrence Seaway and the Great Lakes or the upper Hudson River are required to conduct a mid-ocean exchange of ballast water, outside the U.S. EEZ, to minimize the risks of introducing aquatic invasive species into the Great Lakes and Hudson River ecosystems. Ships unable to conduct this exchange for safety reasons are required to retain their ballast water onboard. Regulations are being developed to adopt a mandatory national program as soon as possible for ships calling at any port in the United States. Work is also being done to promote acceptable ballast water treatment technologies for use in meeting national ballast water discharge standard for ships calling on the United States.

Internationally, the United States is actively participating in the negotiation of a new agreement under IMO auspices to address ballast water management. This agreement, scheduled to be adopted in February 2004, is likely to establish a stringent ballast water discharge standard for ships and require other important shipboard ballast water management practices, as part of a global regime to reduce the spread of aquatic invasive species from international shipping.

*Question 16.* Article 211(4) permits coastal states, within the territorial sea, to adopt laws and regulations for the prevention, reduction, and control of marine pollution from foreign vessels, provided such laws and regulations do not “hamper innocent passage” of such vessels. Would, in the view of the Executive Branch, current U.S. laws affecting the territorial sea that regulate marine pollution hamper the right of innocent passage?

Answer. No. We would not regard existing U.S. laws and enforcement practices as hampering the right of innocent passage. It should be noted, in this regard, that passage is not considered innocent under Article 19 of the Convention if a foreign ship engages, in the territorial sea, in any act of willful and serious pollution contrary to the Convention in the territorial sea.

*Question 17.* Article 226 limits the physical investigation of foreign vessels. What is the U.S. interpretation of the meaning of the term “clear grounds” as used in paragraph (a)(1)(i)? How does it compare to the standard currently used by the Coast Guard for inspecting foreign vessels of “probable cause” and/or “reasonable suspicion”?

Answer. Both Articles 220 and 226 use the term “clear grounds for believing.” When the Convention was transmitted to the Senate, it was determined that the United States could legitimately interpret the “clear grounds” requirement as being satisfied by our domestic “reasonable suspicion” standard. The Letter of Transmittal notes the issue, and we continue to take this view in a proposed understanding that the Administration has recommended to the Senate. The understanding harmonizes U.S. law and practice with the Convention.

*Question 18.* Article 228(1) provides for suspending of proceedings related to enforcement of rules against pollution by foreign vessels in certain instances if the flag state is undertaking proceedings against the vessel. How would this provision be implemented in the United States?

Answer. The United States could move to continue, stay, or dismiss an enforcement action without prejudice to allow the flag State an opportunity to take proceedings to impose penalties in respect of corresponding charges. Based on the significant experience in enforcing U.S. law and the limited scope of this provision, we anticipate that such a case will be exceedingly rare. In policy and practice, the United States has the greatest interest in enforcing domestic law closest to its shore. Article 228(1) is strictly limited to enforcement actions involving pollution from foreign flag vessels beyond the territorial sea, i.e., beyond 12 nautical miles from shore. As such, Article 228(1) has no bearing on an enforcement action involving pollution from foreign flag vessels within the territorial sea or internal waters.

Additionally, and as is reflected in proposed understandings, Article 228(1) has no impact on enforcement actions brought against foreign flag vessels for non-pollution offenses, such as the making of false statements in ship records (even when those statements are about pollution that may have occurred outside U.S. waters).

Article 228(1) would be implemented after consultation among cognizant federal agencies and after careful consideration of the exceptions to this provision (a case of major damage to the coastal State or if the flag State in question has repeatedly disregarded its obligation to enforce applicable international rules and standards in respect of violations committed by its vessels).

*Question 19.* Article 228(2) provides for a three year statute of limitations with regard to penalties on foreign vessels for pollution. What is the current U.S. statute of limitations in this regard? If the statutes are different, which will govern? Does the Executive Branch intend to propose legislation to harmonize them?

*Answer.* Article 228(2)'s three-year statute of limitations, which is shorter than the five-year statute of limitations that applies to many criminal environmental offenses, would apply to a narrow category of cases (e.g., involving foreign flag vessels and pollution beyond the territorial sea of the United States). Article 228(2) can be implemented by Executive Branch action rather than by a limitation on existing environmental statutes, which apply to a larger class of offenders.

*Question 20.* Article 230 allows for non-monetary penalties if violations of law are committed in the territorial sea that are "a willful and serious act of pollution" in the territorial sea.

*a.* Please describe the current U.S. legal framework governing enforcement of measures related to marine pollution in the territorial sea.

*b.* Does current U.S. law permit civil penalties or use of a court's injunctive powers? Are such penalties permitted under Article 230?

*c.* How does the United States interpret "willful and serious act of pollution"? What is the applicable standard under U.S. law? Are these standards, in the view of the Executive Branch, equivalent? Why or why not?

*d.* Are there any applicable state laws in this regard? How, if at all, would they be affected by Article 230?

*Answer.* There are a variety of U.S. environmental statutes that regulate pollution from vessels in the territorial sea. Not all of these statutes are relevant to Article 230, which applies only to pollution from foreign flag vessels and not, for example, to other types of pollution, such as by dumping. Most of these domestic statutes authorize a range of penalties, sanctions, and other remedies, including administrative, civil, and criminal.

Consistent with the Commentary submitted to the Senate in 1994, and with a proposed understanding on Article 230, we interpret the references to "monetary penalties only" to exclude only imprisonment and not the range of other administrative, civil, and criminal penalties, sanctions, and other remedies available under domestic statutes.

The "willful and serious" standard set forth in Article 230(2) uses terminology different in two respects from relevant U.S. environmental criminal laws:

- most environmental statutes make it a crime to "knowingly" engage in the conduct; the Clean Water Act, as amended, also criminalizes certain negligent violations of that statute; and
- most environmental statutes do not impose a requirement that an offense be "serious," although some prohibit pollution that is harmful or hazardous.

In essence, however, U.S. law is largely consistent with the Convention, and U.S. interpretations of key terms, as reflected in the proposed understandings, will harmonize the terminology.

We have recommended that the United States express its understanding, with respect to Article 230:

- that it applies only to natural persons aboard the foreign vessels at the time of the act of pollution;
- that the references to "monetary penalties only" exclude only imprisonment;
- that the requirement that an act of pollution be "willful" in order to impose non-monetary penalties would not constrain the imposition of such penalties for pollution caused by gross negligence;
- that, in determining what constitutes a "serious" act of pollution, a State may consider, as appropriate, the cumulative or aggregate impact on the marine environment of repeated acts of pollution over time; and
- that, among the factors relevant to the determination whether an act of pollution is "serious," a significant factor is non-compliance with a generally accepted international rule or standard, e.g., such a rule or standard under the MARPOL Convention.

In addition, the Administration has recommended that the United States express its understanding that sections 6 and 7 of Part XII (which include but are not limited to Article 230) do not limit the authority of a State to impose penalties, monetary or non-monetary, for nonpollution offenses, such as false statements, obstruction of justice, and obstruction of government or of judicial proceedings, wherever they occur, or for any violation of national laws and regulations or applicable international rules and standards for the prevention, reduction, and control of pollution of the marine environment that occurs while a foreign vessel is in the internal waters or in any port or offshore terminal under the jurisdiction of that State.

*Question 21.* The Secretary of State's Letter of Submittal indicates that when the United States signed the Agreement, it stated that doing so would ensure the implementation of regimes that would be consistent with U.S. seabed mining interests and consistent with existing U.S. laws and regulations.

*a.* Please describe existing U.S. seabed mining interests and how the regime

is consistent with them.

*b.* Please detail which U.S. laws and regulations impact seabed mining and how the regime is consistent with them.

Answer. The United States is interested in both a secure supply of the materials found in manganese nodules (nickel, copper, manganese, and cobalt) and in an acceptable law of the sea regime covering a broad range of ocean uses, including deep seabed mining. A full presentation of U.S. deep seabed mining interests, how the Convention and the Agreement meet these interests, and the relationship to domestic law and regulations can be found on pages 33-43 of the Commentary accompanying the 1994 Letter of Transmittal.

There is one U.S. company with a U.S. deep seabed mining license. The 1994 Agreement provides for recognition of the exploration rights of this consortium by considering it under the treaty regime based on arrangements no less favorable than those granted to holders of claims already registered by Japan, France, Russia, India, Japan, China, South Korea, and an Eastern European consortium. If the United States, as a party to the Convention, certified that the U.S. license holder is financially and technically qualified, and the license holder paid a \$250,000 application fee, the consortium would be entitled to exploration rights to areas as large as 150,000 sq. km. for 15 years, rights that can be renewed in five-year increments.

The Deep Seabed Hard Mineral Resources Act (30 U.S.C. 1401-1473; "DSHMRA") and its implementing regulations (15 CFR Parts 970, 971) establish the permitting and licensing regime governing the U.S. citizens engaged in exploration and commercial recovery of deep seabed hard mineral resources. Although the DSHMRA predated the Convention and Agreement, basic principles embodied in the Convention and the Agreement are consistent with those in the DSHMRA (e.g., disclaimer of sovereignty over the deep seabed; establishment of a mining regime based on first-in-time priority of right; nondiscriminatory criteria; and security of tenure through granting of exclusive rights for a fixed period of time and with limitations of the ability to modify authorizations).

The DSHMRA also provides for transition to an international agreement that enters into force for the United States, with a view to assuring continuity of any ongoing U.S. mining operations (30 U.S.C.1442). The only one existing U.S. exploration license holder has not applied for commercial development permits under the DSHMRA. At this time, there is no conflict between the area covered by the existing U.S. license and those authorized for other States under the Convention.

*Question 22.* Article 312 allows amendments to be adopted as part of the Convention if a conference is convened. Article 313 allows amendments to be adopted as part of the Convention if no nation objects in a 12 month period. Article 316 provides for the ratification of amendments by State parties.

*a.* Please describe the U.S. understanding of the process that would be used during a conference to accept or reject amendments.

*b.* What process will be used to ensure adequate Senate consultation prior to an amendment conference convened under Article 312?

*c.* What process will be used to ensure adequate Senate consultation prior to a U.S. decision to object or not object to a proposed amendment under Article 313?

*d.* Would any amendment approved under Article 312 and 313 be submitted to the Senate for its advice and consent?

Answer. Concerning a conference convened pursuant to Article 312, the decision-making procedure would be the same as that applicable at the Third UN Conference on the Law of the Sea, unless decided otherwise by the conference. The procedure used at that Conference, which is set out in the Rules of Procedure contained in UN Document A/CONF.62/30/Rev.3, provided for decision-making on matters of substance by consensus wherever possible, with voting to take place only when a two-thirds majority had determined that all efforts at reaching agreement had been exhausted; in such case, approval of decisions required a two-thirds majority. Decisions on matters of procedure are taken by majority vote.

The Executive Branch would expect to consult with the Senate regarding amendments proposed under either Article 312 or Article 313. Amendments adopted under Articles 312 and 313 would be subject to ratification or accession, noting that Article 316(5) provides that two categories of amendments are to enter into force for all States Parties one year following the deposit of instruments of ratification or acces-

sion by 3/4 of the States Parties; such an amendment would under the terms of the Convention enter into force for the United States even where the Senate had rejected it. The Administration is considering the constitutional aspects of this provision.

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RESPONSES OF WILLIAM H. TAFT, IV, LEGAL ADVISER, DEPARTMENT OF STATE, TO  
ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR JOHN F. KERRY

*Question 1.* If the U.S. becomes a party to UNCLOS, it will become the "law of the land." Please provide a detailed analysis of all provisions that could raise issues of consistency with current U.S. laws and regulations, including our enforcement practices, with respect to the protection of the marine environment. Please include a description of any obligations under UNCLOS for which additional domestic authorities will be needed. Will the Administration be seeking implementing legislation for any of these provisions and, if not, will any steps be taken to address any such inconsistencies?

Answer. The Executive Branch, through the Department of Justice, the Coast Guard, and the Environmental Protection Agency, has pursued a vigorous, successful enforcement initiative to detect and deter pollution from ships. In line with the policy of successive Administrations since 1983 to act in accordance with the balance of interests reflected in the Convention's provisions regarding traditional uses of the oceans, U.S. marine pollution enforcement efforts have been undertaken in a manner consistent with the Convention as a matter of policy, including through appropriate consultations with the State Department.

The United States has been able to maintain an effective marine pollution enforcement program consistent with the Convention's provisions.

Part XII of the Convention establishes a legal framework for the protection and preservation of the marine environment. It addresses sources of marine pollution, such as pollution from vessels, seabed activities, ocean dumping, and land-based sources. It promotes continuing improvement in the health of the world's oceans. It also effectively balances interests of States in protecting the environment and natural resources with their interests in freedom of navigation and communication.

The United States would implement Part XII through a variety of U.S. laws, regulations, and practices, as noted below. We do not see a present need for implementing legislation in this regard.

The provisions in Sections 1 through 4 of Part XII are quite general, relating to, e.g., global and regional cooperation, technical assistance, and monitoring and do not raise issues concerning implementation under U.S. law.

Section 5 of Part XII sets forth the framework for the substantive rules applicable to various sources of marine pollution. The provisions contain a variety of obligations and authorizations relating to coastal States, flag States, and/or all States (such as to cooperate to develop global standards). The United States would meet its obligations under these provisions through a host of existing laws, including, e.g., the Clean Water Act; the Marine Protection, Research, and Sanctuaries Act; the Solid Waste Disposal Act; CERCLA; FIFRA; the Coastal Zone Management Act of 1972; the Outer Continental Shelf Lands Act; the Deep Seabed Hard Minerals Resources Act; the Ports and Waterways Safety Act; the Act to Prevent Pollution from Ships; the Oil Pollution Act; the National Environmental Policy Act; and the Clean Air Act. The United States is also an active participant in the development, principally through the IMO, of cooperative agreements and arrangements to address various sources of marine pollution.

Concerning Section 5's provisions on pollution from ships, you specifically ask, in Question 4 below, about the double hull requirement in the Oil Pollution Act of 1990 and its consistency with Article 211. The United States applies and enforces these requirements with respect to all ships entering the ports of the United States and has that right under the Convention and general principles of international law. Article 211 provides that coastal States may, with respect to their EEZs, adopt laws to regulate pollution from vessels "conforming to and giving effect to generally accepted international rules and standards. . . ." As noted in the answer to Question 4, the House Conference Report relevant to the double hull requirement indicates that section 3703(a) ". . . is not intended to apply to vessels transiting U.S. waters or transiting the Exclusive Economic Zone. . . ." As such, there would be no inconsistency between the U.S. requirement and Article 211 of the Convention.

Concerning Section 6, these provisions deal specifically with the allocation of enforcement responsibilities among coastal States, flag States, and port States in various situations. In line with the policy of successive Administrations since 1983 to

act in accordance with the balance of interests reflected in the Convention's provisions regarding traditional uses of the oceans, U.S. practice has been to enforce its marine pollution laws in a manner consistent with the Convention, including the provisions in Section 6.

Certain issues do arise concerning the interaction between provisions of Section 6 and U.S. law. As noted in your Question 5 below, both Articles 220 and 226 use the term "clear grounds for believing." When the Convention was transmitted to the Senate, it was determined that the United States could legitimately interpret the "clear grounds" requirement as being satisfied by our domestic "reasonable suspicion" standard. The Letter of Transmittal notes the issue, we continue to take this view, and the Administration will recommend to the Senate that this understanding be among those reflected in the resolution of advice and consent.

Concerning the safeguards set forth in Section 7:

As you note in your Question 5 below, there are a few issues raised by Article 230. For example, certain interpretations of this provision were attached to the Letter of Transmittal, such as that the "willful" requirement would not constrain penalties for gross negligence and that Article 230 applies only to natural persons aboard the vessel at the time of the discharge (and not, for example, to shore-based personnel or corporate entities). The Administration will recommend to the Senate that these understandings be among those reflected in the resolution of advice and consent.

As you note in your Question 5 below, Article 228 sets forth certain limitations on the institution or continuation of proceedings, consistent with the notion that the flag State is primarily responsible for ensuring compliance with the Convention by vessels flying its flag or of its registry. Article 228(2)'s three-year statute of limitations, which would be shorter than the federal five-year statute of limitations, would apply to a narrow category of cases and would not require implementing legislation.

Sections 8 through 11 of Part XII, such as provisions related to liability, sovereign immunity, and ice-covered areas, do not raise particular issues of conflicts with U.S. law.

*Question 2.* Article 21 provides strong authorities to coastal States to adopt laws and regulations for ships in innocent passage that pass through their territories related to the management and protection of living marine resources and the marine environment. However, it also provides that such laws and regulations shall not apply to the "design, construction, manning or equipment of foreign ships," unless they are implementing "generally accepted international rules or standards."

- Are the terms "design, construction, manning or equipment" defined in the Convention?
- Please provide examples of measures that the U.S. would clearly view as not constituting "design, construction, manning or equipment" measures.
- Please discuss whether any restrictions on the discharge of ballast water are necessarily "design, construction, manning or equipment" standards that would prevent the U.S. from regulating the discharge of ballast water from transiting ships without international approval.
- If the IMO does finalize an international agreement addressing ballast water discharges, please confirm that the U.S. will be able to enact measures that are more stringent than those in the agreement.

*Answer.* The LOS Convention does not define the phrase "design, construction, manning or equipment" or its constituent terms. Examples of measures that the United States would not view as applying to the design, construction, manning or equipment of ships (commonly referred to as "CDEM") would include reporting requirements, record-keeping requirements, quantitative restrictions on discharge of substances, regulation of dumping of substances, ship routing measures, traffic separation schemes, and speed limits.

With respect to potential restrictions on the discharge of ballast water for ships transiting the territorial sea, there are many types of restrictions that would, in fact, not apply to the design, construction, manning or equipment of a ship. For example, we would not consider restrictions on the discharge and/or uptake of ballast water to apply to CDEM of a ship. Thus, the United States could potentially establish no-discharge zones and/or specially designated discharge zones for vessels in transit through the territorial sea or impose a requirement that such ships perform ballast water exchange prior to discharge, without hampering innocent passage. Moreover, most foreign vessels in the U.S. territorial sea are traveling to or from U.S. ports; the United States can and does impose CDEM restrictions as a condition of entry to U.S. ports.



Concerning the IMO ballast water agreement currently under negotiation, the United States is pushing for stringent standards to address the environmental challenges posed by ballast water discharges. Although we are hopeful that the agreement will be sufficiently rigorous that additional measures will not be necessary, the agreement would not affect the right of the United States under the Convention to put in place a variety of more stringent measures, e.g., with respect to U.S. vessels; as a condition of entry into U.S. ports; and with respect to non-ODEM measures regulating innocent passage through the territorial sea.

*Question 3.* There is an increasing focus on the oceans as a vector for health risks to humans and the marine environment. Articles 21 and 33 provide that coastal States can prevent the infringement of their sanitary laws and regulations. The Convention does not define “sanitary measure.” However, other international instruments, such as the WTO agreement on sanitary and phytosanitary measures, include measures to protect animal or plant life or health from “risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms,” as well as from risks arising from “additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.”

- Consistent with this language, please discuss whether the U.S. could enforce laws aimed at restricting the introduction of invasive species into the environment, discharges from vessels of pollution such as sewage that can carry diseases, and similar measures? Under this provision, could the U.S. also enforce laws aimed at protecting fisheries, as a major source of food, from discharges from ships of contaminants and diseases?

*Answer.* The question refers to two articles of the Convention, which present somewhat different issues. Article 21 addresses the authority of a coastal State to adopt laws and regulations relating to innocent passage through its territorial sea. Such laws may relate to many coastal State interests, including, for example, conservation of living resources of the sea, prevention of infringement of its fisheries laws, preservation of the marine environment and the prevention of pollution thereof, and prevention of infringement of its sanitary laws and regulations. The hypothetical examples you give would appear to fall within one or more of these categories of permissible coastal State laws and regulations, provided they are applied in a manner that is consistent with various other provisions of the Convention (such as those relating to non-discrimination and non-impairment of innocent passage).

Article 33 addresses the so-called “contiguous zone,” which is an area adjacent to and seaward of the territorial sea that may extend out to 24 nautical miles from coastal baselines. In the case of the United States, which has declared an EEZ, the contiguous zone is located within the EEZ. Article 33 provides that, in the contiguous zone, the coastal State may exercise the control necessary to “prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations *within its territory or territorial sea* (emphasis added).” In this respect, Article 33 tracks almost verbatim (“laws and regulations” versus “regulations”) Article 24 of the 1958 Territorial Sea and Contiguous Zone Convention, to which the United States is a party. Accordingly, one of the purposes of this provision is to permit the coastal State to take certain actions against foreign vessels *in its contiguous zone* to prevent infringement of the coastal State’s sanitary laws and regulations *within its territory or territorial sea*. In the case of the examples you cite, the location and nature of the conduct would be relevant to the consideration of which provisions of the Convention would apply. With respect to activities subject to Part XII of the Convention, the regime of the EEZ set forth in the Convention includes elaborate provisions regarding the right of the coastal State to protect and preserve the marine environment. Moreover, most foreign vessels in the U.S. contiguous zone are traveling to or from U.S. ports; consistent with the Convention, the United States can and does impose restrictions as a condition of entry to U.S. ports.

*Question 4.* Article 56 provides that in the EEZ, the coastal State has sovereign rights for the purpose of “exploring and exploiting, conserving and managing the natural resources, whether living or non-living,” and jurisdiction with respect to the “protection and preservation of the marine environment.” Please provide examples of such measures.

*Answer.* Your question refers to subparagraphs 1(a) and 1(b) of Article 56 of the Convention. Examples of measures implementing subparagraph 1(a) include those asserting exclusive management authority over fisheries. For the United States, such measures are contained, for example, in the Magnuson-Stevens Fishery Conservation and Management Act, which provides for exclusive U.S. fisheries management authority over all fishery resources up to the 200-mile limit of the U.S. EEZ. Concerning Article 56(1)(b), which accords jurisdiction as provided for in the rel-

evant provisions of the Convention with regard to the protection and preservation of the marine environment, an example of a measure would be a coastal State law regulating pollution by dumping in the EEZ, consistent with Articles 210 and 216 and other relevant aspects of Part XII of the Convention.

For the United States, dumping is controlled by the Marine Protection, Research, and Sanctuaries Act (Ocean Dumping Act), which implements U.S. obligations under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the so-called London Convention). Oil and gas operations in the U.S. EEZ are controlled by the Outer Continental Shelf Lands Act, which establishes, among other things, rigorous pollution prevention requirements.

*Question 5.* Article 211 states that coastal States may adopt laws and regulations for the prevention, reduction and control of pollution from vessels in EEZ “conforming to and giving effect to generally accepted international rules and standards established through the competent international organization.”

- Is it clear that this clause means that in the absence of any international agreement, the U.S. could regulate pollution from vessels not entering a U.S. port in the EEZ, outside of the territorial sea? Would the double-hull requirements of the Oil Pollution Act of 1990 be consistent with this clause? Is it clear whether “conforming to” sets a ceiling or merely a floor on what the U.S. can do domestically?

*Answer.* The Convention’s provisions relating to pollution from vessels are a significant part of the overall balance between coastal and maritime interests the Convention is designed to maintain over time. Paragraph 1 requires States to establish international rules and standards to prevent, reduce and control vessel source pollution. In that regard, the IMO has developed several conventions that, directly or indirectly, address vessel source pollution, including the MARPOL Convention and its several annexes, as well as the SOLAS Convention, the International Convention on Standards of Training, Certification and Watchkeeping (STCW), and the International Convention on Oil Pollution Preparedness, Response, and Cooperation.

In recognition of a coastal State’s sovereignty within its territorial sea, Article 21 affirms the authority of the coastal State to establish requirements relating to pollution from foreign vessels, including vessels exercising the right of innocent passage, with certain provisos. In the EEZ, where all States’ interest in navigation is greater than in the territorial sea, a coastal State’s requirements relating to pollution from foreign vessels must conform to and give effect to generally accepted international rules and standards. This approach is designed to avoid a global patchwork of unilateral requirements in various EEZs and to protect freedom of navigation.

There are two respects in which generally accepted international rules and standards (or the absence of any such rules and standards) set a “floor.”

- First, States are free to adopt laws for the regulation of pollution from vessels flying their flag that have “at least” the same effect as that of generally accepted international rules and standards; thus, a State could choose to impose more stringent standards upon its own vessels.
- Second, where the international rules and standards are inadequate to meet special circumstances and a coastal State considers that a particular area of its EEZ requires greater protection, a coastal State may pursue IMO approval for designation of one or more special areas, as well as mandatory measures that exceed international rules and standards.

Concerning the double-hull requirement of the Oil Pollution Act of 1990, there would be no inconsistency with Article 211. The House Conference Report indicates that section 3703(a) “. . . is not intended to apply to vessels transiting U.S. waters or transiting the Exclusive Economic Zone in innocent passage . . .”

*Question 6.* UNCLOS includes a number of provisions that seem to have the potential to limit our ability to enforce domestic law, e.g., the requirement of Article 220(5) of a showing of “substantial discharge causing or threatening significant pollution of the marine environment,” the requirement of Article 226 that inspections of foreign vessels be limited to a paper review, unless there are “clear grounds” for believing that the vessel condition does not comport with its certificates, and the restriction in Article 230 of non-monetary (e.g., criminal penalties) for violating national pollution laws to cases of “willful or serious acts.” Please explain how the U.S. can interpret Articles 220, 226, 228 and 230 in a manner that will not limit our current practices and our ability to enforce U.S. laws.

*Answer.* See answer to Question 1.

The Convention’s provisions relating to pollution from vessels, including its provisions concerning coastal State enforcement against foreign flag vessels, are a significant part of the overall balance between coastal and maritime interests. In line with

the policy of successive Administrations since 1983 to act in accordance with the balance of interests reflected in the Convention's provisions regarding traditional uses of the oceans, U.S. practice has been to enforce its marine pollution laws in a manner consistent with the Convention.

The specific issues you raise were considered in the context of transmitting the Convention to the Senate and were addressed in the commentary attached to the Letter of Transmittal:

- Concerning the “clear grounds” requirement in Articles 220 and 226, when the Convention was transmitted to the Senate, it was determined that the United States could legitimately interpret the “clear grounds” requirement as being satisfied by our domestic “reasonable suspicion” standard. The Letter of Transmittal notes the issue.
- Concerning Article 230, the Letter of Transmittal noted that “[t]he requirement that the act be ‘willful’ would not constrain penalties for gross negligence” and further that “Article 230 applies only to natural persons aboard the vessel at the time of discharge.”
- The Letter of Transmittal further notes, with respect to Article 228, that the requirement that a coastal State suspend enforcement proceedings against a foreign vessel if the flag State institutes its own proceedings within a specific time period is consistent with the notion that the flag State is primarily responsible for ensuring compliance with the Convention of vessels flying its flag or of its registry.

The Administration will recommend to the Senate that these understandings be among those reflected in the resolution of advice and consent.

*Question 7.* Please discuss whether UNCLOS could be used to challenge U.S. trade measures under the Pelly Amendment, Section 609 of P.L. 101-162, and other laws to protect species such as sea turtles and dolphins from destructive fishing practices?

*Answer.* The Convention would not provide a basis for a challenge to U.S. trade measures designed to promote or require compliance with conservation and environmental laws, norms, and objectives, such as the protection of sea turtles and dolphins. The Administration will recommend to the Senate that the resolution of advice and consent reflect that nothing in the Convention limits the right of a State to prohibit or restrict imports into its territory in order to, *inter alia*, promote or require compliance with environmental and conservation laws, norms, and objectives.

