S. HRG. 108–498

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

ON

MARCH 23, 2004

Printed for the use of the Committee on Environment and Public Works

U.S. GOVERNMENT PRINTING OFFICE

94–598 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED EIGHTH CONGRESS
SECOND SESSION

JAMES M. INHOFE, Oklahoma, *Chairman*

JOHN W. WARNER, Virginia
CHRISTOPHER S. BOND, Missouri
GEORGE V. VOINOVICH, Ohio
MICHAEL D. CRAPO, Idaho
LINCOLN CHAFEE, Rhode Island
JOHN CORNYN, Texas
LISA MURKOWSKI, Alaska
CRAIG THOMAS, Wyoming
WAYNE ALLARD, Colorado

JAMES M. JEFFORDS, Vermont
MAX BAUCUS, Montana
HARRY REID, Nevada
BOB GRAHAM, Florida
JOSEPH I. LIEBERMAN, Connecticut
BARBARA BOXER, California
RON WYDEN, Oregon
THOMAS R. CARPER, Delaware
HILLARY RODHAM CLINTON, New York

ANDREW WHEELER, *Majority Staff Director*
KEN CONNOLLY, *Minority Staff Director*

C O N T E N T S

Page

MARCH 23, 2004

OPENING STATEMENTS

Chafee, Hon. Lincoln, U.S. Senator from the State of Rhode Island 12
Inhofe, Hon. James M., U.S. Senator from the State of Oklahoma 1
Jeffords, Hon. James M., U.S. Senator from the State of Vermont 2
Murkowski, Hon. Lisa, U.S. Senator from the State of Alaska 29

WITNESSES

Gaffney, Frank, Jr., president and CEO, The Center for Security Policy 19
Prepared statement 77
Responses to additional questions from:
Senator Inhofe 80
Senator Jeffords 83
Senator Murkowski 82
Kelly, Paul L., senior vice president, Rowan Companies, Incorporated; member, U.S. Commission on Ocean Policy 21
Prepared statement 85
Responses to additional questions from:
Senator Inhofe 88
Senator Jeffords 91
Senator Murkowski 90
Leitner, Peter, author, "Reforming the Law of the Sea Treaty: Opportunities Missed, Precedents Set, and U.S. Sovereignty Threatened" 24
Article, A Bad Treaty Returns 129–145
Prepared statement 92
Report, Law of the Sea Treaty: A Defective Document That Should Not Be Ratified 95–126
Responses to additional questions from:
Senator Inhofe 147
Senator Jeffords 152
Oxman, Bernard H., professor of law; director, Ocean and Coastal Law Program, University of Miami School of Law 27
Article, The American Journal of International Law, Vol. 88:477; Vol. 88:488; Vol. 88:687 166–187
Prepared statement 155
Responses to additional questions from:
Senator Inhofe 188
Senator Jeffords 191
Turner, John F., Assistant Secretary, Bureau of Ocean and International Environmental and Scientific Affairs, U.S. Department of State: Accompanied by: William H. Taft IV, Chief Legal Counsel, U.S. Department of State 13
Prepared statement 66
Responses to additional questions from:
Senator Inhofe 73, 77
Senator Jeffords 75

Page

ADDITIONAL MATERIAL

Letters from:
- American Petroleum Institute, International Association of Drilling Contractors and National Ocean Industries Association 4
- Benton, David, Benton and Associates 193
- Clark, Vern, Admiral, U.S. Navy 65
- Cox, Joseph, J., president, Chamber of Shipping of America 194
- Leaders of 11 major environmental groups 9
- Panetta, Leon E., chair, Pew Oceans Commission 11
- Powell, Colin L., Secretary of State 64
- Simonds, Kitty M., executive director, Western Pacific Regional Fishery Management Council 196
- Watkins, James D., Admiral, U.S. Navy (Retired), chairman, U.S. Commission on Ocean Policy 58, 62–63

Resolution of the Commission on Ocean Policy 62

Statements:
- Cox, Joseph J., president & CEO, Chamber of Shipping of America, given before the Senate Committee on Foreign Relations on the U.N. Convention of the Law of the Sea, October 21, 2003 194
- Kelly, Paul L., senior vice president, Rowan Companies, Inc., on behalf of the American Petroleum Institute, The International Association of Drilling Contractors, and The National Ocean Industries Association before the Committee on Foreign Relation, October 21, 2003 4
- Stevens, Hon. Ted, U.S. Senator from the State of Alaska 11, 55
- Watkins, James D., USN (Retired) chairman, U.S. Commission on Ocean Policy, October 14, 2003 59

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

TUESDAY, MARCH 23, 2004

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 2 o'clock p.m. in room 406, Senate Dirksen Building, Hon. James M. Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Chafee, Jeffords, Murkowski, Thomas and Warner.

Also present: Senator Stevens.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. We will call the hearing to order. We have a policy of starting exactly on time, and we want to be consistent with that.

I want to open this hearing by thanking our witnesses in advance for their testimony. The committee will receive testimony this afternoon regarding the United Nations Convention on the Law of the Sea. The United Nations Convention on the Law of the Sea represents an international agreement. The party nations are to comply with mandatory rules related to the navigation of the seas, the use of the marine resources, and the protection of the marine environment.

The Foreign Relations Committee held two hearings on this last fall. It appears that the two hearings only vetted one side. Everyone who was testifying was for it, so we thought we would try to get a balanced hearing, and that is why we are having the hearing today.

This committee is conducting the oversight hearing because we have an obligation to ensure that this Convention is consistent with protecting human health and the environment, and does not adversely affect the sovereignty of the United States. It is time to slow down and take a critical evaluation of this Convention that deals with the outer continental shelf, which is in the jurisdiction of this committee.

I have many concerns about the flawed provisions in this Convention, specifically Article II, Section 3 that states, "The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." Also, when a Coastal State exploits non-living resources such as oil permits on the continental shelf beyond the 200 nautical miles, the Convention re-

quires a Coastal State to make annual payments starting in the sixth year of production to the International Seabed Authority. This Authority is also granted immunity and accountability from legal process, from search, and any form of seizure wherever located and held, and exempted from restrictions, regulations, controls and moratoria of any nature.

We need to critically examine these concerns to ensure the Authority cannot conduct itself in a matter outside the recommendations of the Convention.

This Convention also contains numerous provisions relating to the protection of the maritime environment, specifically addressing pollution from multiple sources including land-based pollution, ocean dumping vessels, and atmospheric pollution and pollution from off-shore activities.

We need to take a closer look at these provisions, such as Articles 208 and 210 of the Convention which requires Coastal States to adopt laws and regulations that are no less effective than international rules and recommended practices to prevent, reduce and control pollution in the maritime environment from seabed activities and dumping.

Furthermore, Article 207 requires states shall adopt laws and regulations for pollution from land-based sources to minimize to the fullest extent possible the release of toxic, harmful and noxious substances into the marine environment.

Article 196 of the Convention addresses the issue of invasive species, which is a major environmental issue facing this country. This committee recognizes the detrimental effects from introduction of invasive species and we are currently reviewing legislation to address this issue independently. Although the Convention appears to have affirmed a coastal nation's exercise of its domestic authority to regulate the introduction of invasive species into the marine environment, we must critically evaluate the ability to fully address this problem.

Although the focus of today's hearing, as a senior member of the Senate Armed Services Committee, I am very troubled about implications of this Convention on our national security, particularly in view of our continuing war on terrorism. I want to make it clear today that I intend to look into these issues more fully before the Senate considers this Convention.

I think that is essentially why we are doing this. There have been two hearings before. I want to get a broader approach, hearing all sides. I am probably more than anything else concerned about perhaps some national security problems that could come up with the adoption of this Convention.

With that, I will give it to the Ranking Member of the Environment and Public Works Committee, Senator Jeffords.

OPENING STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Senator JEFFORDS. Thank you, Senator.

I want to express my strong support for the U.N. Convention on the Law of the Sea. I would urge that the full Senate give its advice and consent to the Convention as soon as possible. The United

States can no longer afford to postpone full participation in this important international agreement.

Simply put, becoming a party to the Convention is vital to our national security interests. It is vital to our economic interests. It is vital to our efforts to conserve ocean resources and to protect the marine environment.

Time is running out. The Convention will be open for amendment later this year. If the United States is not a party by that time, we will not be at the table when important decisions are made regarding the future direction of the Convention. This will obviously inhibit us from pursuing and protecting our interests.

I want to thank Senator Lugar and the rest of the Foreign Relations Committee for the fine job they did in crafting a resolution for advice and consent. That resolution and the declaration that it contains regarding the official U.S. interpretation of certain provisions should dispel any concerns that Senators might have with U.S. participation in the Convention.

This is an issue that I care about a great deal and one that I have been involved in for a long time. As a former Navy officer on the first U.S. military ship to navigate the Suez Canal when it reopened, I understand the importance of freedom of navigation to our national security interests. During my tenure in the House of Representatives, I served as an adviser on the U.S. delegation to the Law of the Sea negotiations.

Since that time, I have maintained a strong interest in the Law of the Sea as a comprehensive legal framework for managing the many uses of the oceans.

My work in the Congress on environmental issues has also reinforced the importance of promoting the obtainable management of ocean resources and the protection of the marine environment.

I would also remind my colleagues that this is not a partisan issue. We must beat back any effort to make it one. Nor is this an issue that caters to the interests of one particular constituency. Indeed, I have seldom seen an issue marked by such widespread agreement across the political spectrum. A bipartisan, Presidentially appointed U.S. Commission on Ocean Policy has expressed the unanimous support for all U.S. participation, a full U.S. participation. I am sure that Paul Kelly who is here today on behalf of the Commission will have more to say on this.

I would also ask unanimous consent to submit for the record a letter from retired Admiral James D. Watkins, the chairman of the Commission, reiterating the Commission's support. I would also point out that the U.S. Department of Defense supports this treaty. Key segments of the U.S. industry, including the oil and gas industry, support the treaty. The environmental community supports it.

How often does this happen in this age? The U.S. Department of Defense, and especially the U.S. Navy, favor full U.S. participation because the Law of the Sea protects and enhances the global movement of military operations that is so critical to our national security.

As evidence of this, the Navy support, I would ask unanimous consent to submit a letter from Admiral Vern Clark, the current Chief of Naval Operations, expressing the strong support of full U.S. participation in the Law of the Sea.

Senator INHOFE. Without objection, both the Watkins and the Clark statements will be made a part of the record.

[The referenced documents can be found in Additional Material:]

Senator JEFFORDS. Thank you, Mr. Chairman.

Similarly, key industrial and commercial interests also support U.S. participation in the Law of the Sea for several reasons. The Convention codifies important navigation rights and freedoms. It confirms that Coastal States such as the United States enjoy exclusive rights to the resources of the 200-mile exclusive economic zone. It secures the sovereign rights of coastal rights such as the United States to explore and develop the natural resources of their continental shelf areas.

As testament to the support that the Convention enjoys from various segments of industry, I would unanimous consent to submit letters of support from the American Petroleum Institute, the International Association of Drilling Contractors, the National Ocean Industries Association, the Chamber of Shipping America, and the Western Pacific Regional Fishery Management Council.

Senator INHOFE. Without objection.

[The referenced documents follow:]

March 19, 2004.

Senator JAMES M. INHOFE,
Senator JAMES M. JEFFORDS,
U.S. Senate,
Washington, DC.

DEAR SENATORS INHOFE AND JEFFORDS: The American Petroleum Institute (API), the International Association of Drilling Contractors (IADC) and the National Ocean Industries Association (NOIA), are pleased to provide for the Senate Environmental and Public Works Committee a copy of our statement in support of U.S. ratification of the United Nations Law of the Sea (LOS) Convention. The statement was delivered during an October 2003 hearing before the Senate Foreign Relations Committee. We would ask that our statement be made part of your committee's record for the March 23, 2004 hearing on the LOS.

Thank you for considering the views expressed in this statement.

AMERICAN PETROLEUM INSTITUTE.
INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS.
NATIONAL OCEAN INDUSTRIES ASSOCIATION.

STATEMENT BY PAUL L. KELLY, SENIOR VICE PRESIDENT, ROWAN COMPANIES, INC. ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE, THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS, AND THE NATIONAL OCEAN INDUSTRIES ASSOCIATION BEFORE THE COMMITTEE ON FOREIGN RELATIONS, HEARING ON THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, OCTOBER 21, 2003

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[1] 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;
- 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 U.S. 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.

[1] John Westwood, Barney Parsons and Will Rowley, Douglas Westwood Associates, Canterbury, United Kingdom, Oceanography, vol. 14, no. 3/2001.

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 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. 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 1 percent and is structured to increase at the rate of 1 percent per year to a maximum of 7 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. EEZ. 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 toward 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 (EIA), 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 20 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 EIA, 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.[2]

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.

RISING 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.

[2] 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.

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.

Senator JEFFORDS. All of these are urging the United States to become a party to the Law of the Sea. Finally, the environmental community also supports U.S. participation in the Law of the Sea. This is because the Convention sets forth a comprehensive legal framework obligating states to conserve and manage living marine resources and to protect the marine environment from all other sources of pollution.

As evidence of the environmental community's strong support for the full U.S. participation, I ask unanimous consent that the following letter signed by the leaders of the 11 major environmental groups be placed in the record.

Senator INHOFE. Without objection.

[The referenced document follows:]

THE OCEAN CONSERVANCY, OCEANA, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, IUCN/WORLD CONSERVATION UNION, NATURAL RESOURCES DEFENSE COUNCIL, SCENIC AMERICA, ENVIRONMENTAL DEFENSE, NATIONAL ENVIRONMENTAL TRUST, PHYSICIANS FOR SOCIAL RESPONSIBILITY, U.S. PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF CONSERVATION VOTERS,

March 22, 2004.

DEAR SENATORS INHOFE AND JEFFORDS: On behalf of the undersigned organizations and the millions of members we represent, we urge your support for the Senate's advice and consent on the resolution of ratification developed by the Foreign Relations Committee for U.S. entry into the United Nations Convention on Law of the Sea (hereinafter UNCLOS or Convention).

UNCLOS 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. There is general agreement in the environmental community that, with the understandings and declarations recommended by the Committee on Foreign Relations, UNCLOS serves the environmental interests of the United States in providing a stable legal framework for the promotion of environmental decisionmaking over time. We urge 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. In large measure, UNCLOS is considered customary international law by the United States; therefore, we gain nothing by our failure to commit to the treaty, while we lose much.

The United States must fully engage our fellow nations and secure the cooperation of the international community if we are to be successful in protecting the oceans and their resources. 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. Both the Commission on Ocean Policy and the Pew Oceans Commission have recommended accession to secure a positive 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.

We applaud the bipartisan leadership provided by Chairman Richard Lugar and Senator Biden in, developing interpretive language, with the help of the Administration, clarifying how UNCLOS provisions will be implemented by the United States. Because of their efforts, U.S. full authority to protect our marine environment and resources will be preserved and remain capable of being exercised in the future. We urge you to fully support expeditious ratification of this international agreement to allow the United States to guide and shape international ocean policy for future generations.

Sincerely,

Roger T. Rufe, President and CEO, The Ocean Conservancy; Daniel B. Magraw, Jr., President, Center for International Environmental Law; Frances Beinecke, Executive Director, Natural Resources Defense Council; Andrew F. Sharpless, Chief Executive Officer, Oceana; Fred Krupp, Executive Director, Environmental Defense; Meg Maguire, President, Scenic America; Phillip E. Clapp, President, National Environmental Trust; Scott Hajost, Executive Director, IUCN–US, International Union for the Conservation of Nature; Robert K. Musil, Executive Director, Physicians for Social Responsibility; Gene Karpinksi, Executive Director, U.S. Public Interest Research Group; Deb Callahan, President, League of Conservation Voters.

Senator JEFFORDS. I would ask also unanimous consent to submit to the record a letter from Pew Oceans Commission supporting the Convention and urging Senator Frist to schedule floor action at the earliest possible date.

Senator INHOFE. Without objection.

[The referenced document follows:]

CENTER FOR SEACHANGE,
Arlington, VA, March 15, 2004.

Hon. WILLIAM H. FRIST, *Majority Leader,*
U.S. Senate,
Washington, DC.

DEAR SENATOR FRIST: We write to urge you to schedule a vote on the resolution of ratification for the United Nations Convention on the Law of the Sea (the Convention) at the earliest opportunity, Ratifying the Convention is of both substantive and symbolic importance in protecting and restoring the health of our oceans.

Numerous recent studies and reports, including the report of the Pew Oceans Commission, on which we served, have articulated serious concerns about the state of our living oceans. The increasing, and often conflicting, demands human society places on the oceans have resulted in problems ranging from polluted beaches to collapsed fisheries to disrupted coastal and ocean ecosystems.

Fortunately, there are solutions at hand for these problems. Their implementation will require strong leadership and commitment. An important step in exercising U.S. leadership would be ratification of the Convention, as recommended by the Pew Oceans Commission and the congressionally chartered U.S. Commission on Ocean Policy.

The United States is the world's greatest maritime power, with strong international interests in military and commercial navigation, communications, research, stewardship of living and non-living marine resources, and marine environmental protection. We exercise jurisdiction over the world's largest exclusive economic zone—an area more than 20 percent larger than our nation's land area. Yet the United States has not acceded to the treaty that provides the fundamental framework for international ocean governance.

The Convention secures the United States' rights to protect, manage and utilize the resources of its EEZ. The establishment of 200-mile EEZs, combined with nations' rights and obligations under the treaty for management and conservation of marine resources, promote international cooperation in fisheries management. Its

regime for access for scientific research supports our efforts to understand the oceans, including their significant role in regulating weather and climate.

The oceans are a public trust and we believe it is our ethical and civic responsibility to provide for their stewardship. Ratifying the Convention would affirm the United States' commitment to protection and management of the oceans and reassert our leadership on international ocean policy. We urge the Senate to act promptly to ratify the Convention.

Sincerely,

LEON E. PANETTA,
Chair, Pew Oceans Commission.

On behalf of:

John Adams, President, Natural Resources Defense Council; Carlotta Leon Guerrero, Co-Director, Ayuda Foundation; Geoffrey Heal, Ph.D., Garrett Professor of Public Policy and Business Responsibility, Columbia Business School; Tony Knowles, Former Governor, Alaska; Julie Packard, Executive Director, Monterey Bay Aquarium; Joseph P. Riley, Jr., Mayor, Charleston, South Carolina; Roger T. Rufe, Jr., President & CEO, The Ocean Conservancy; Eileen Claussen, President, Pew Center on Global Climate Change; Mike Hayden, Secretary, Kansas Department of Wildlife and Parks; Charles F. Kennel, Ph.D., Director, Scripps Institution of Oceanography; Jane Lubebenco, Ph.D., Wayne and Gladys Valley Professor of Marine Biology, Oregon State University; Pietro Parravano, President, Pacific Coast Federation of Fishermen's Associations; David Rockefeller, Jr., Vice Chairman, National Park Foundation; Kathryn Sullivan, Ph.D., President & CEO, COSI Columbus; Patten D. White, CEO, Maine Lobstermen's Association.

Senator JEFFORDS. To conclude, I want to emphasize the achieving our oceans policy objectives in all of these areas requires international cooperation. The full participation in the Law of the Sea provides the best opportunity for the United States to engage in such cooperation in a manner that protects and extends the U.S. interest. Unilateralism is simply not a viable option on this matter.

Thank you very much, Mr. Chairman.

Senator INHOFE. Thank you, Senator Jeffords.

We have been joined by Senator Stevens. I know he is a supporter of this treaty and wanted to make a statement. If it is all right, I would recognize you at this time, Senator Stevens, to make any statement you wish to make.

OPENING STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM THE STATE OF ALASKA

Senator STEVENS. Thank you very much, Mr. Chairman, and members of the committee.

I did want to testify today. My position on Law of the Sea has been varied. I recall when I came here in 1969 as a freshman minority Senator, Senator Magnuson asked me to be the member of the Commerce Committee that monitored the Law of the Sea negotiations. I did that for a considerable period of time.

I would ask that my full statement appear in the record as so read and let me just take a few minutes of your time of my history on this.

Senator INHOFE. Without objection.

Senator STEVENS. I really gained a great perspective from those trips, traveling with many members of the Senate, including Senator Claiborne Pell and so many others that were involved in that Law of the Sea negotiation as the majority at that time. I really was focused on fisheries and mining because of my State having

half the coastline of the United States and such a tremendous potential from the point of view of mineral resources.

I in the past have opposed this treaty because of the limitations it put on both fishing and other resources of the sea. I think that has been modified now and as pointed out in my statement, what has been done during the period of time that has passed since 1969 to modify this treaty so it does protect American interests in both fishing and mining, in my opinion. I am pleased with the declarations that have been worked out with the Foreign Relations Committee and with the Administration that go along with this treaty. I think these confirm the right and sovereignty of the United States to manage their natural resources, and they certainly do in view of the things I have elaborated on in my statement, protect the fishery resources off our shores that are so vital to the interests of my State.

I urge that you go along with the concept and help us get this treaty ratified. I feel that with the passage of time, we might lose some of these agreements we have not, and I think the agreements do protect our interests in resources and in fisheries, in particular.

If you would, I would appreciate it if you would put into the record following my statement, the statement I made at the international fisheries, the Law of the Sea Convention, at the time when I was opposed to it. So you will see where the opposition that I articulated then and why I and my State now support the ratification of this treaty.

Senator INHOFE. Without objection, that will be included in the record following your remarks.

Senator STEVENS. If you have any questions for me, I would be pleased to respond.

Senator INHOFE. I do not have any questions. Do you have any questions?

Senator JEFFORDS. I have no questions.

Senator STEVENS. Thank you for your courtesy.

Senator INHOFE. Thank you very much for your statement. We appreciate that.

We have been joined by Senator Chafee. Senator Chafee, do you have an opening statement you would like to share?

Senator Chafee. Yes, Mr. Chairman.

Senator INHOFE. You are recognized.

OPENING STATEMENT OF HON. LINCOLN CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. I would like to just say as a member of the Foreign Relations Committee, we did hold hearings on this treaty and approved it in committee 19 to nothing. It is not often these days where we get a 19 to nothing unanimous vote, but we did do that on the Foreign Relations Committee in favor of this treaty.

I would like to also just quote from Secretary Turner on behalf of the Administration in his submitted testimony in which he says,

"As of today, 145 parties including almost all of our major allies have joined the Convention."

He goes on to say,

"It is in the interest of the United States to become a party to the Convention because of military, economic and environmental benefits to the United States, and

because U.S. adherence will promote the stability of the legal regime for the oceans which is vital to the U.S. national security, and because U.S. accession will demonstrate to the international community that when it modifies the regime to address our concerns, we will join that regime."

So I support the treaty and welcome the witnesses.

Senator INHOFE. Thank you, Senator Chafee.

Mr. Turner, would you take the table up here? We have two panels today. The first will be the Administration, Mr. Turner, and then that will be followed by four individuals who are divided equally, both supporting and opposing the treaty.

So Mr. Turner, thank you very much for being here. You are recognized for whatever time you want to take, although your entire statement will be made a part of the record. We never encourage people to talk for a long time.

STATEMENT OF JOHN F. TURNER, ASSISTANT SECRETARY, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEPARTMENT OF STATE ACCOMPANIED BY: WILLIAM H. TAFT IV, CHIEF LEGAL COUNSEL, U.S. DEPARTMENT OF STATE

Mr. TURNER. Chairman Inhofe, Senator Jeffords and Senator Chafee, it is a pleasure for me to appear before you today to testify on Law of the Sea.

Indeed, last October, I was able to join four other Administration witnesses who testified before the Senate Foreign Relations Committee in strong support of the Law of the Sea Convention. I am pleased to say again today that the Administration continues to believe that there are compelling reasons for the United States to become a party to this Convention. A wide variety of ocean-related business groups and associations of environmental organizations have endorsed the Administration's position.

Mr. Chairman, I want to briefly emphasize three things in my initial statement: No. 1, the historical U.S. support for a comprehensive Law of the Sea Convention; No. 2, some of the benefits the United States will receive in joining this Convention; and No. 3, offer clarification of one critical misunderstanding about the Convention that has surfaced recently.

The United States has historically had a very strong interest in codification of the international law of the sea. We are already party to four Law of the Sea Conventions established in 1958, but we have long felt these treaties left some unfinished business. Thus, beginning with President Nixon, the United States played a prominent role in development of the comprehensive 1982 Convention. In 1983, President Reagan announced that the United States would abide by all, all of the Law of the Sea Convention's provisions except Part XI dealing with deep seabed mining.

Thus, the United States has acted in accordance with this treaty for more than 20 years. Part XI has been fundamentally reworked in a legally binding manner to address the mining concerns. The 1994 agreement provides for reasonable access by U.S. industry to deep seabed minerals, overhauls the decisionmaking rules, restructures the regime to embrace free market principles, and includes the elimination of mandatory technology transfers.

As the world's leading maritime power with the longest coastline and largest exclusive economic zone in the world, the United States will benefit more than any other Nation from this Convention. Far from taking away our sovereignty, the Convention affirms and extends U.S. sovereignty over vast resources. It gives the U.S. sovereign rights over living marine resources in our EEZ, including our fisheries out to 200 nautical miles.

The Convention also gives the United States sovereign rights over mineral resources, including oil and gas found in the seabed and subsoil of the continental shelf, both within and beyond 200 miles. As a party, the United States would be able to establish with legal certainty the outer limits of our very extensive shelf, including off Alaska, off the Atlantic Coast and the Gulf of Mexico.

The Convention also protects the freedom of U.S. entities to lay submarine cables, fiber optic networks and pipelines, of increasing importance to global communications, whether they be military or commercial.

Part XII of the Convention establishes the legal framework for the protection and preservation of the marine environment that supports vital economic activities for this country. As a party, the United States would be able to implement Part XII through a variety of existing U.S. laws, regulations and practices that are fully consistent with the Convention and would not need to be changed in any way.

Mr. Chairman, there is another benefit of U.S. accession that I feel very strongly about. The United States must be at the table of the Convention's institutions that are already up and running in order to influence and shape future outcomes that will affect our vital economic and security interests such as the delineation of continental shelves.

Turning to misunderstandings about the Convention, my written testimony responds to many of these incorrect assertions. I want to highlight one: the false assertion that the U.S. accession to the Convention would adversely impact the Proliferation Security Initiative, the PSI, launched by President Bush last May in Krakow. The 14 nations participating in PSI are committed to combating trafficking involving weapons of mass destruction, their delivery systems and related materials. Far from impeding PSI, joining the Convention would actually strengthen the United States' PSI efforts. PSI operating rules specify that activities are undertaken consistent with relevant international law and frameworks, including the Law of the Sea Convention.

The Convention provides a solid legal basis for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction. All our PSI partners are parties to the Convention and observe its provisions. The Navy believes that U.S. accession would greatly strengthen its ability to support PSI objectives by reinforcing and codifying freedom of navigation rights on which the Navy depends for operational mobility.

Mr. Chairman, in summary, as of today 145 parties, including almost all our major allies, have joined this Convention. It is in the interests of the United States to become a party now, to take full advantage of its military, economic and environmental benefits; to promote the stability of a legal regime for the oceans, and to dem-

onstrate to the international community that when it modifies the regime to address concerns of the United States, that we will join that regime.

The Administration strongly recommends that the Senate give its advice and consent on the basis of the proposed resolution before you.

Thank you very much, Mr. Chairman. I am pleased to have accompanying me here today William Taft, Chief Legal Counsel for the State Department and Secretary Powell, who with your permission is available to join to answer any questions you or the committee may have.

Senator INHOFE. All right, Mr. Taft, why don't you just join Mr. Turner at the table.

Mr. Taft. Thank you, Mr. Chairman.

Senator INHOFE. We will go ahead and maybe do 5 minutes of questions, and go longer if you want to.

I notice, Mr. Turner, in the *Wall Street Journal* and in the *New York Times*, and I am going to read this. It says,

> "The Bush Administration retreats from effort to win ratification of the U.N. Convention on the Law of the Sea under pressure from conservatives who contend it gives too much power to the United Nations, but proponents say approval of the treaty is key to winning allied support for Bush's Proliferation Security Initiative and interdicting shipments of weapons of mass destruction."

Could you explain that? Is that a change of position? Could you explain the accuracy of that statement?

Mr. TURNER. Mr. Chairman, I can certainly say that I would not be here today testifying before you if there were any retreat or changed position of the Administration. I appear before you today with the full support of the President, the Vice President, Secretary Powell, and key Agencies within this Administration that have to deal with the important security and intelligence, military and commercial concerns of this country.

There are just many compelling reasons for us to become a member. I might relate one story to you, Mr. Chairman. A year ago, the Russian Federation filed a claim on a great deal of the Arctic as a part of their continental shelf. I find it inconceivable that the United States would not be a member of the Continental Shelf Commission, not even in the room. The Nation with the most at stake in oil and gas, that has the most geological information, not even in the room as the Russian Federation and other countries start staking out claims to their continental shelf. Indeed, the United States will want to file their claim and will want to be a member.

Senator INHOFE. You made the statement in your opening statement that the United States will benefit more than any other nation.

Mr. TURNER. The Law of the Sea Treaty is becoming an arena for the world community to meet on several issues vital to the United States, certainly access to oil and gas; the laying of communication cables; the rights of commercial navigation; access the military; how we are going to address the depletion of our fisheries; addressing the issues of global pollution. These are vital interests of the United States and we ought to be at the table in charting those.

I might say, Mr. Chairman, that many old-time diplomats question whether today we could negotiate a treaty this favorable, this balanced to meet the interests of the United States. In November, the treaty will be open for amendments and there are certainly pressures that might want to change this balance. It would seem to me that the United States should join now.

Senator INHOFE. OK, well, Mr. Turner, you heard me say that one of the concerns, and one of the reasons I wanted to have this hearing was to look at national security ramifications. You are contending that this actually enhances our ability to protect those interests. As a non-party to the Convention, we are allowed to search any ship that enters this 200-nautical-mile area to determine if it could harm the United States or pollute the maritime environment and so forth. But under the Convention, the U.S. Coast Guard or others would not be able to search any ship until the United Nations notifies and approves the right to search a ship. Is that accurate or is that inaccurate?

Mr. TURNER. I am going to ask Mr. Taft to respond to that.

Senator INHOFE. OK.

Mr. Taft. I will have to look at that specific provision, Mr. Chairman. I am not familiar with that, I am afraid to say, but I think we ought to look at that.

Senator INHOFE. I think we should. Here we are in the middle of a war and a very important function would be our ability to search vessels. It seems rather strange to me that you do not have a real good, fast, pat answer about that. I am going to ask the second panel to maybe address that.

Senator Jeffords.

Senator JEFFORDS. Mr. Turner, if the United States becomes a party to the Convention, will there be any need for new environmental laws or regulations to meet our obligations under the Convention?

Mr. TURNER. Senator Jeffords, after a very careful analysis, the treaty is in full accord and supportive of all the comprehensive laws and regulations and programs that the United States now has to protect the environment. In fact, it is my contention that because of the leadership of the United States to address coastal pollution, to manage its fisheries and so forth, that our experience with our domestic law into the international arena will benefit, but there is no need for any accompanying legislative changes in our becoming a member of Law of the Sea.

Senator JEFFORDS. Thank you.

Is the Law of the Sea consistent with the President's Proliferation Security Initiative? Is there any basis for the assertion that full U.S. participation in the Law of the Sea will undermine this important initiative in any way?

Mr. TURNER. Senator, the nations that have now joined us in the President's important PSI are all members of this treaty, PSI. None of its activities are prohibited by Law of the Sea. As Admiral Mullen, Vice Chief of Naval Operations, testified before Senator Lugar's committee, he said, "The LOS would greatly strengthen the Navy's ability to support the objectives of PSI." The rules are completely compatible with the LOS and as we look with our partners to maybe strengthen the regime of boarding and intercepting ves-

sels, that will be done more easily and be facilitated if in fact we are all working within the dialog and the platform of the Law of the Sea Convention.

Senator JEFFORDS. Thank you.

Would full U.S. participation in the Law of the Sea require any changes in current United States practices regarding enforcement of our environmental laws?

Mr. TURNER. It would require no changes in the enforcement of our current law.

Senator JEFFORDS. Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Jeffords.

We have been joined by Senator Thomas. Senator Thomas, do you have an opening statement you would like to share with us?

Senator Thomas. No, sir, fortunately I do not.

Senator INHOFE. All right.

Senator Thomas. But I do want to say hello to my friend John Turner, who comes from Wyoming, as I do. We have the oceans there, you know, so we need to be concerned. John, welcome.

Mr. TURNER. Senator, good to see you. Thank you for coming.

Senator Thomas. Thank you, sir.

Senator INHOFE. Senator Chafee.

Senator CHAFEE. As you know, Mr. Chairman, I do support the treaty. I am in coordination with the Secretary's remarks.

Senator INHOFE. Any questions?

Senator CHAFEE. No, I do not.

Senator INHOFE. All right.

Let me just get back to something that Senator Jeffords brought up when he was talking about the enforcement, any changes. Article 212 of the Convention requires States to adopt laws and regulations for pollution from the atmosphere. I guess the question would be, what laws that we have on the books right now might have to be changed if we were to become a party to the Convention?

Mr. TURNER. As I understand those provisions, and maybe Mr. Taft would like to speak, it encourages all the members, and I think these were provisions helped negotiated by the United States, that we all be better caretakers of these common properties, marine resources and oceans; that we all work to prevent coastal pollution; do a better job of watershed management; of controlling our fisheries; of protecting coral reefs.

I think the United States does have good comprehensive law enforcement. In fact, other parties to the Convention can look to the United States and their leadership. So there is nothing in this particular treaty that would compel the Congress of the United States or resource agencies, the Administration, to change policy or put forth new proposals.

Senator INHOFE. Would it mean, though, that other countries could use a provision maybe to force us to change a policy, that is to maybe regulate CO_2? I do not want to get Senator Jeffords too excited here, but would that be a possibility?

Mr. TURNER. Mr. Chairman, I do not see anything in here that would address people dictating to us, especially in the arena of climate change.

Senator INHOFE. All right.

Mr. TURNER. We would hope that other nations would be better stewards and follow the U.S. leader in trying to protect its important ocean resources.

Senator INHOFE. Senator Thomas, I am sure you have questions.

Senator Thomas. No, sir, I do not.

Senator JEFFORDS. I have one additional one.

Senator INHOFE. Yes, of course.

Senator JEFFORDS. Isn't it true that Part XII provides only some of the many provisions on protection of the marine environment and protection of marine natural resources? For example, the treaty supports the right of a port State to impose environmental conditions as a condition of coming to a U.S. port. Is that correct?

Mr. TURNER. There are several povisions which would encourage all parties to be better stewards of resources, and specifically in answer to your question, the United States now exercises its authority on ballast water coming into port. Any ships coming to U.S. ports must exchange their ballast water at least 200 miles out. The United States will look at increased standards on invasive species and perhaps new standards for ship ballast and ocean dumping. This is within the full rights of the United States and it is in accord and embraced by the treaty.

Senator JEFFORDS. Thank you.

Senator Thomas. Mr. Chairman, I would say to the Secretary that I was in Jackson over the weekend and interestingly enough I had not thought or talked much about this, but ran into a number of people who raised the issue. I guess they were people that were concerned about the U.N.-type of arrangement where we enter into something and other people then can make the decision for us. So it kind of takes away some of our autonomy, and you have probably commented on that, but would you briefly tell me how you would answer those folks?

Mr. TURNER. Senator, the nice thing about this particular treaty, we feel it embraces our sovereignty. It embraces U.S. control over our natural resources, our continental shelf, our right to regulate our fisheries, embark on oil and gas, and the right of our military to have maximum flexibility out and around the globe. So it protects and embraces U.S. sovereignty in every category I can think of.

Mr. TAFT. If I could just add, I think there was a concern in the original treaty that certain activities regulating the international seabed would have had a possibility of having the United States be subject to laws that it did not agree with, so we refused to join it. That has been fixed, as the Secretary said in his statement. So it was the case, and that may have been what these people were thinking about. The 1994 work that was done changed the Convention and solved that problem.

Senator INHOFE. Senator Thomas, I brought this up earlier, that the argument that we better do this because everyone else is doing it always scares me a little bit. In so many of these agreements, we have had lengthy discussion in this committee and on the floor. On the Kyoto Treaty, the argument was used there. Then you really examine it and find out that there would be terrible economic consequences were we to have to comply with that.

So I would like to look at these things independently. One reason I wanted to have this hearing is because there was no one at the two hearings before the Senate Foreign Relations Committee who was opposed to it. I think that there are, anytime you are dealing with something like this, I still want to look and see if there are any laws that we have on the books that could be changed. I am concerned about this being able to board and search ships. That is something that would be, particularly right now when we are in the middle of a war. So these things we do want to pursue, and I appreciate it.

Are there any other questions of Mr. Turner? Mr. Turner, I appreciate very much your being here and articulating your position. We would ask you to retire the table, and our four witnesses for panel two come forward.

Mr. TURNER. Mr. Chairman?

Senator INHOFE. Yes, of course.

Mr. TURNER. Thank you for allowing us this time. I would concur with you that the last reason to join a treaty is because others are members. I submit that joining this treaty is in the best interests of the United States.

Thank you very much.

Mr. TAFT. Thank you, Mr. Chairman. I will get an answer for that question.

Senator INHOFE. OK, thank you so much.

The second panel consists of Mr. Frank Gaffney, president and CEO of the Center for Security Policy; Mr. Paul Kelly, senior vice president of Rowan Companies, Incorporated, a member of the U.S. Commission on Ocean Policy; Mr. Peter Leitner, author, Reforming the Law of the Sea Treaty; and Mr. Oxman, professor at law, director, Ocean and Coastal Law Program at the University of Miami School of Law.

We will go ahead and start in the order that I just introduced you, starting with Mr. Gaffney.

Mr. Gaffney.

STATEMENT OF FRANK GAFFNEY, JR., PRESIDENT AND CEO, THE CENTER FOR SECURITY POLICY

Mr. GAFFNEY. Mr. Chairman, members of the committee, thank you very much.

Senator INHOFE. I would say the same things to you folks. Since there are four of you, try to confine your opening remarks to about 5 minutes, but your entire statement will be made a part of the record.

Mr. GAFFNEY. I appreciate that, Mr. Chairman. Mostly, I appreciate having an opportunity to testify on this treaty. As you have pointed out several times, that opportunity was not afforded us, those of us who are critical of the treaty, concerned about its provisions, during the deliberations of the Foreign Relations Committee.

I think given what is at stake here, which I would respectfully submit are infringements upon the sovereignty and the freedom of action on the seas and in some cases elsewhere of this treaty, imposing on the United States. It is a travesty not to have a much more rigorous, much more fulsome, much more informed debate than has been possible to this point.

So I appreciate your accommodating us and I look forward very much to expressing some of the concerns that I and my colleagues have and answering your questions about them.

One fundamental question which the committee needs to think about, and the Senate needs to deliberate about, is this question of what did the 1994 agreement do to the underlying treaty? It is my understanding that that treaty, that agreement has not been formally ratified, certainly not in the way that the underlying treaty has been; that it therefore cannot modify in the way that you are being told it has modified; the concerns that we have had going back to President Reagan's day about both the seabed mining provisions contained in Part XI, but more generally the sort of edifice of a new supra-national organization called the International Seabed Authority, which is really at the core of many of our concerns about sovereignty and relinquishing sovereignty and submitting this country and its maritime interests, both military and otherwise, to some new international control.

Related thereto, of course, is the International Tribunal, which is also spawned under the International Seabed Authority. The kinds of questions that you pose today it seems to me may be true at this moment, but what I think we need to do, what the Senate most especially needs to do, is to look down the road as this institution with American membership, with our fealty, if you will, to the treaty begins to kick in and begins to have both decisions made by this International Seabed Authority and by this Tribunal impinge, as I frankly submit they will inevitably on the decisionmaking and the kinds of standards and the policies even of the U.S. Government and certainly Members of the Congress.

I have to tell you that even before the recent reports about what has been going on with the Iraqi Oil for Food Program, I was concerned about this supra-national agency and the authority that would be conferred upon it to determine in no small measure what would be done with the resources of some seven-tenths of the world's surfaces.

When you now have evidence accruing that vast kleptocratic behavior was taking place in the United Nations under this international-mandated activity, it has to raise additional questions, I believe, as to whether this is an activity that we wish to entrust to what are at the end of the day unaccountable, unelected bureaucrats in the United Nations, that will nonetheless be able to make far-reaching and commercially very important decisions.

A question here about the rule of law. Judge Robert Bork has written recently expressing concern about the extent to which international judges and rulings are being increasingly cited in our domestic jurisprudence. That raises questions going to I think a point that you addressed, Mr. Chairman, earlier about how does this thing evolve over time. Are we like to see greater and greater infringement on the way we have traditionally done business, whereby judges will on the basis of laws you and your colleagues enact and the President signs? Or do they do it on the basis of something else that somebody unelected, unaccountable, and perhaps corrupt dictates?

I am frankly very troubled by what you have been told today about this Proliferation Security Initiative, and the ability that we

will have to exercise the kind of authority that we have to this point with respect to vessels on the high seas, to say nothing of in our exclusive economic zone or territorial waters, and whether we can stop them, whether we can search them, whether we can seize them. It is not clear from the reading of the treaty that what you have just been told, that the PSI will be absolutely consistent with this treaty; that it will be strengthened by this treaty. It is not clear that that is true. It certainly seems to me, while this is not strictly speaking in the jurisdiction of this committee, certainly the probability that we will in the future, as we now see increasing evidence of tankers passing through places like the South China Sea being hijacked, that you could see us concerned not only about what is happening on ships plying the world's oceans that might be moving weapons of mass destruction-related material, which is of course the focus of the PSI, but that are in effect environmental terrorist instruments of mass destruction, and whether we will be able, in fact, to stop them.

If they are not pirates; if they are not flying no flag at all; if they are not engaged in radio broadcasting, which as I read it are the three conditions under which the treaty allows you to do these kinds of seizures.

Senator INHOFE. Mr. Gaffney, you have gone over your time.

Mr. GAFFNEY. I know I have, Mr. Chairman. May I just wrap up with one final point, because I know it is a particular concern to this committee, the question of research on global warming. I am advised that this is being interfered with by the Russians as we speak in their Arctic areas. One of the previous witnesses spoke to this. I believe this is a matter of, if we are interested in finding out whether there is anything to this, clearly monitoring what is going on in the Arctic areas, including in the Russian areas, is something that we will want to be able to do. It is not clear that you can do it under this treaty. In fact, I think the treaty is going to give the Russians excuses not to do it and encumber our ability to pursue it.

So Mr. Chairman, finally, thank you very much for taking the time this afternoon to give these sorts of concerns and a great many more that time will not permit us to talk about today, perhaps, some illumination. I hope that other colleagues of yours and other committees that also have equities in this treaty will also take the time to look into it before the Senate is asked to consider it and give it its advice and consent.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Mr. Gaffney.

Mr. Kelly, feel free to go over a little bit.

STATEMENT OF PAUL L. KELLY, SENIOR VICE PRESIDENT, ROWAN COMPANIES, INCORPORATED; MEMBER, U.S. COMMISSION ON OCEAN POLICY

Mr. KELLY. Thank you, Mr. Chairman. I appreciate your inviting me to testify before the committee today on this important topic. I am here representing the U.S. Commission on Ocean Policy.

This Commission 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 with 12 coming

from a list of nominees submitted by the leadership of Congress in both parties. We represent a broad spectrum of ocean interests. My background is actually in the field of off-shore oil and natural gas production. I know the Chairman has some questions on this topic which I would be glad to get into later.

The Oceans Act of 2000 specifically charged our Commission with developing recommendations on a wide 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 our second meeting held in November 2001, 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 Law of the Sea Convention.

After reviewing these statements and related information, our Commissioners unanimously passed a resolution in support of United States accession to the Convention. The fact that this resolution was our Commission's first policy pronouncement speaks to the real sense of urgency and importance attached to this issue by my colleagues on the Commission.

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

The responses we received have been very positive. Secretary of State Colin Powell wrote that he "shared our views on the importance of the Convention." Admiral Vern Clark, Chief of Naval Operations, stated that he "strongly believed that acceding to the 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 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. First, the Law of the Sea 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 re-shaping the seabed mining provisions in the early 1990's. As a consequence, the Convention contains many provisions favorable to U.S. interests. The oceans provide vital food and energy supplies, facilitate waterborne commerce, and create valuable recreational opportunities. It is in America's interest to work with the international community to preserve the productivity and health of the oceans and to secure cooperation among nations everywhere in managing marine assets wisely.

There are a series of issues currently being considered by parties to the Convention which could have tremendous economic implica-

tions for the United States. Of particular interest is the work of the Convention's Commission on the Limits of the Outer Continental Shelf, which is charged with reviewing claims and making recommendations on the outer limits of the 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 participation in this process would be beneficial. Namely, first, the LOS Convention sets up 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 a broad continental margin, so we have a lot of potential acreage for development to be gained from this provision.

The continental margins beyond the U.S. exclusive economic zone 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 in the future.

The work of the Continental Shelf Commission is now at a critical stage. The Russians have submitted a claim in the Arctic and have received comments on their claim from the Commission. Other States are preparing their submissions which are due in 2009 or within 10 years of a State becoming a party, whichever is later. Considering the technical work to be done in order to delineate our own shelf, 10 years is a short time horizon.

Here in the United States, the University of New Hampshire Center for Coastal and Ocean Mapping Joint Hydrographics Center, in conjunction with NOAA and the USGS, has already identified regions in U.S. waters where the continental shelf is likely to extend beyond 200 nautical miles and is developing strategies for surveying these areas. Bathymetric and seismic data will be required to establish and meet a range of other environmental, geological, engineering and resource needs.

The Minerals Management Service has estimated that there could be just under 300,000 square miles that could be added to the sea floor for potential resource development by the United States once this delineation is done. I might add that we are the leaders in technology in terms of knowing how to make these determinations with our advanced sonar and computer and computer graphics technology.

I also want to make the point which would be of particular interest to this committee that the 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 off-shore activities.

The principles, rights and obligations outlined in this framework are the foundation on which more specific international agreements is based.

Senator INHOFE. We are going to have to wind up here.

Mr. KELLY. Let me just make the point in wrapping up that the Ocean Commission as I indicated has been directed by our enabling legislation to make recommendations to preserve the role of the United States as a leader in ocean activities. But in our opinion, we cannot remain a leader without playing a role in the process. For this reason, we renew our Commission's unanimous call for United States accession to the treaty.

Senator INHOFE. Thank you, Mr. Kelly.

Mr. Leitner, feel free to go ahead and take 7 minutes or so if you need.

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

Mr. LEITNER. Thank you, sir.

Mr. Chairman, Mr. Jeffords, I really appreciate the opportunity to be here today. I think you are giving a chance to air some concerns which have been basically excluded from the Senate Foreign Relations Committee hearings, and from what I hear, also from the National Ocean Policy Commission hearings, where it is hard to believe that if an extensive job was done of finding diverse opinion, that opponents of the treaty would not have been surfaced in the Commission hearings as well.

The Convention is a seriously flawed document. It was rightly rejected by President Reagan because it represents and embodies a wide range of precedents, obligations and restrictions that are deleterious to American national and economic security interests.

The treaty has many precedent-setting provisions that are a direct assault on the sovereignty of the United States and the supremacy of the nation-state as the primary actor in world affairs. None of these things have changed with the spurious 1994 agreement notwithstanding. The treaty is based upon a couple of fundamental principles which through to today. One is the common heritage of mankind principle, which asserts that the oceans or the areas beyond national jurisdiction are the common heritage of mankind, meaning they cannot be appropriated by a particular country and must be shared by the global commons. That philosophy, which was the clarion call of the new international economic order back in the 1970's and the early 1980's, is still embodied in and is still a basic subtext of this agreement.

In addition, the treaty and the organizations that it brings forth are based upon the one-nation-one-vote principle, which means that the United States will have the same voting power in the assembly of the International Seabed Authority as Guinea-Bissau. It does not represent American economic interests at all and it gives a disproportionate weight to small irresponsible states who have very little stake in the oceans or in the world economic system at large.

I was first hired to get involved in the Law of the Sea Treaty back in 1976 by the General Accounting Office. Then I was assigned as an observer to the U.S. delegation for several of the negotiating sessions, including the final session of the Conference. My mission was to provide an alternative delegation report to the Congress, to several congressional committees, including House Mer-

chant Marine and Fisheries, the International Relations Committee and others, because they felt that the delegation reports being given by the State Department were inaccurate, misleading and presented an overly rosy picture of the status of negotiations. After hearing the prior speaker on the first panel from the State Department, I think they are still suffering from the same affliction.

The treaty has a range of ramifications that are not wholly related within the context of the treaty itself. It does have collateral damage. In my position in the Defense Department for many years, I have been dealing with high-tech transfers to Third World countries, potential adversaries and trying to control such trade in high-tech to terrorist sponsors as well. Several years ago, the Chinese, came in asking for the most advanced side-scan sonars, deep-sea bathymetric equipment, remotely operated vehicles, cameras, sleds and other equipment that they asserted they were going to use to help survey their mine site in the mid-Pacific. They were using their status as a pioneer investor under the Law of the Sea Treaty to acquire a level of technology which is a direct threat to U.S. national security.

The technology that they wound up eventually getting approved was exactly what they asked for. It basically provided the PRC with the ability to engage in the deepest ocean areas to find, locate, disrupt, salvage or destroy U.S. sensor webs and other types of equipment that we put on the ocean floor in order to be able to monitor hostile traffic. We gave the Chinese the ability to find, locate and destroy these systems.

The Chinese were using their status as a pioneer investor in order to acquire technology they could not justify any other way. When we fought this in the interagency process, we immediately had lines drawn between treaty supporters and treaty opponents where the argument was made in the State Department, NOAA and some other Agencies that we need to provide this technology to the Chinese as a sign of good faith in the Law of the Sea Treaty and the development of international law. It will have a consequence that will outlive us all, unfortunately.

Much of the data that Mr. Kelly described in terms of the surveys, the high-end computer simulations, the graphics, and the high-resolution sonar images that will be required in order to make claims under the Law of the Sea Treaty to areas of the outer continental shelf, currently beyond 200 nautical miles, would be the same type of data that an adversary can use in order to get critical information about the physiography of our coastline, in order to develop submarine routing schemes, find underwater bastions or hiding places where a potential hostile can implant sensors, and use a cruise missile launching submarine in order to menace our coast. Unfortunately, the resolution of the images acquired in the year 2004 is a whole heck of a lot better than was able to be acquired in 1980, when the treaty was negotiated. It puts that data in an entirely different class of threat to the United States.

The treaty and its environmental provisions I believe are a relic of an earlier era, an era where environmental damage was presumed to be accidental or incidental to economic activity. In the post-9/11 era, however, the world is defined by the nonconventional use of all tools available to a non-state or state-sponsored terrorist

or proxy warrior to create a weapon of mass destruction. The very environment that we cherish and that this committee seeks to protect and preserve is a likely battleground in this new era. The presumptions that underlie the environmental provisions of the Law of the Sea Treaty and other key elements of the document are woefully inadequate to handle the post-9/11 threats.

We have ample evidence of terrorists targeting maritime commerce as a means of waging their worldwide attacks. A critical aspect of their planning is to cause as much environmental degradation as is possible. The method of fighting turns western war-fighting doctrine based upon limiting collateral damage as much as possible on its head. Terrorists and their State sponsors have high regard for the environment, but unfortunately they see it as a force multiplier, not as a treasure to be preserved.

You can recall very well the oil well fires in Kuwait set by Saddam's retreating troops and the use of the environment as a weapon; also the attack on the French tanker Limberg, carrying 158,000 tons of crude oil where the object was to create as large an oil spill as possible and cause as much collateral damage as possible.

As Mr. Gaffney was describing earlier, using a supertanker, an LNG tanker as an environmental weapon is not beyond the pale. It is also something that is actively being considered by counterterrorism officials, by the Department of Homeland Security, by the Coast Guard and others. It is a reality. If a supertanker, for instance, was scuttled along our coast, possibly near a nuclear powerplant, the ability of the powerplant to operate would be shut down or cause catastrophic damage to the powerplant because its water intake, critical for its cooling system, would be fouled and would probably be fouled for decades. The plant would either have to be shut down or suffer direct damage.

Senator INHOFE. OK, Mr. Leitner, your time has expired. Do you want to wrap up here?

Mr. LEITNER. Yes. I want to very quickly summarize that it is absolutely critical for the Senate to focus all of its oversight power on this treaty for very close scrutiny under the various jurisdictions of the different committees. The treaty has taxation; it has miliary; it has intelligence; it has judicial and other impacts beyond simply foreign policy and environmental issues. It is absolutely critical for the Senate to take a good look at this in all of its respects and look at the full flower of the treaty, and hopefully do what has not been done, and that is do an overall assessment of the treaty against all of these equities. At the present moment what we have seen is a constellation of narrow interest groups, single interest groups for the most part, advocating on behalf of the treaty, without a collective judgment and overall impact assessment, an overall cost and benefit assessment for the United States really being done. That sorely needs to be done.

Thank you.

Senator INHOFE. Thank you, Mr. Leitner.

Mr. Oxman.

STATEMENT OF BERNARD H. OXMAN, PROFESSOR OF LAW; DIRECTOR, OCEAN AND COASTAL LAW PROGRAM, UNIVERSITY OF MIAMI SCHOOL OF LAW

Mr. OXMAN. Thank you, Mr. Chairman.

Mr. Chairman, members of the committee, it is an honor to appear before you today to urge you and your colleagues to support the resolution of advice and consent. The unanimous recommendation of the Foreign Relations Committee reflects the fact that the Law of the Sea negotiations were a long-term, successful, bipartisan effort to further American interests that engaged successive Administrations and I might add distinguished members of both houses of Congress, including the distinguished Ranking Member of this committee.

Mr. Chairman, President Bush has emphasized that we cannot wait for the terrorists and their weapons to reach us. We need to reach the sources of the threats. For that, we need reliable navigation and overflight freedoms throughout the world.

Mr. Chairman, in my opinion, we have ample sources of legal and moral authority at our disposal to do what we need to do when our forces reach their operational destinations, including the boarding and inspection of foreign vessels. The crucial contribution of the Convention is that it facilitates our ability to deploy and move our forces around the world in the first place.

It is all but impossible to carry out most operational missions without traversing and using the 200-mile exclusive economic zones of many other countries, but Coastal States are tempted to think of their exclusive economic zones as belonging only to them. We face a significant threat to our global mobility and operations in the coming decades from the gradual erosion of high seas freedoms of navigation and overflight and related military uses of the exclusive economic zone.

To deal with that threat, we need the greatest possible influence over the perception of foreign governments regarding the source, legitimacy and content of their obligations to respect high seas freedoms in their exclusive economic zones. We achieve that best in my opinion with a widely ratified Law of the Sea Convention to which the United States is party, and with respect to which the voice and practice of the United States are prominent authoritative evidence of what the Convention means. The alternatives are likely to be less effective and more costly.

Mr. Chairman, a significant part of my career has been devoted to negotiating, drafting and writing on the Law of the Sea. I had the privilege of representing the United States in the Nixon, Ford, Carter and Reagan administrations in the Law of the Sea negotiations. The criticisms that we have heard today and have read recently are in my opinion misplaced and many of them are out of date. They bear little resemblance to the Law of the Sea Convention text as I understand it, as modified by the 1994 agreement for the specific purpose of resolving the problems identified by President Reagan. I should note that the 1994 agreement is a binding agreement that modifies the Convention. From the first day it met, the International Seabed Authority has acted in accordance with and under the 1994 agreement.

In the text with which I am familiar, Mr. Chairman, there is unlikely to be much if any oil in the international seabed area beyond the continental shelf. There is no all-powerful supranational Seabed Authority and no transfer of sovereignty or wealth to the Seabed Authority.

We will have control over the funds and other major decisions of the Seabed Authority with our decisive vetoes on both the Council of the Authority and in its Finance Committee. The implementing agreement expressly discourages bureaucracy. There is no mandatory transfer of technology. On top of that, the Convention expressly states, "No party to the Convention is required to disclose information contrary to the essential interests of its national security. There are no production limitations." There is more, not less, environmental protection in the sea and on the seabed.

The Convention gives us greater rights to board and inspect foreign vessels off our coast than we have under the Law of the Sea treaties to which we are party today.

President Reagan did not reject the entire Convention. Quite to the contrary, he embraced all of it except for the deep seabed mining provisions, instructed the U.S. Government to act in accordance with it, and made it quite clear that he was prepared to use force against foreign governments that did not respect the Convention.

Today, every neighbor of the United States, every other permanent member of the U.N. Security Council and every other major industrial State in the world is among the 145 parties to the Convention. The issue is no longer whether there will be a Seabed Authority. That exists. The issue is whether the United States should and will assume the privileged seat expressly reserved for it in the text.

Mr. Chairman, I think this has three important implications. No. 1, the system is regarded as workable by other industrial states that share many of our interests as consumers and potential seabed producers of hard minerals. No. 2, it is unlikely that major sources of private capital would be particularly comfortable making substantial new investments in deep seabed mining carried out in defiance of the Convention. No. 3, we need to assume our guaranteed seat on the Governing Council of the Seabed Authority and the Finance Committee, and the decisive voting power that goes with it, as soon as possible to ensure that the system evolves in ways satisfactory to the United States. This includes protection of our environmental and economic interests as a Coastal States whose continental shelf abuts the international seabed area in three oceans.

Mr. Chairman, my prepared remarks address some of the matters to which you referred in your opening statement. I would be happy to comment on some of the other questions that you posed and any other questions that you and your colleagues may have.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Mr. Oxman.

We have been joined by Senator Murkowski. Senator Murkowski, would you have an opening statement you would like to share?

OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM THE STATE OF ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman. I appreciate your scheduling this hearing this afternoon. I am sorry that I was not able to attend for most of the testimony, but since this is an issue that strikes so close to my home State, I would like to take the opportunity this afternoon to enter my comments into the record.

Some of my colleagues might not be aware, but over half of the United States coastline is in Alaska. Likewise, the Arctic Ocean covers only 3 percent of the area surface, yet it accounts for over 25 percent of the world's continental shelf area. So when we are considering a treaty that governs the planet's oceans and the ocean floor, we in Alaska have a very strong, a very keen interest.

There are some who do not see the point in joining the rest of the world in ratifying the Convention on the Law of the Sea. They say that the United States already enjoys the benefits of the treaty, even though we are not a member. They suggest that by not becoming a party to the treaty, we can pick and choose which sections of the treaty we abide by, while not subjecting our actions to international review.

I would point out that while the situation may be favorable now, it may not always be the case. The treaty is open to amendment later this year and the question is, "Do we want a seat at the table to ensure that our voice is heard, or do we place our interests in the hands of other nations?"

There are several topics I would like to comment on relating to the treaty and its potential impact on Alaska, the first being claims over the continental shelf. In the 1958 Convention on the Continental Shelf, to which the United States is a party, the issue of limitations on the continental shelf was not resolved due to lack of information about the continental shelf. With, technological advances and greater knowledge, the Law of the Sea provides that a Coastal State's continental shelf can extend for 200 nautical miles, with a potential to extend that claim even further.

I understand that Russia submitted a claim in 2002 to the Commission on the limits of the continental shelf that would grant them 45 percent of the Arctic Ocean's bottom resources. I also understand that the Commission has so far withheld its approval of the Russian claims.

According to the U.S. Arctic Research Commission, if we were to become a party to the treaty, the United States stands to lay claim to an area in the Arctic of about 450,000 square kilometers, approximately the size of California. But if we do not become a party to the treaty, our opportunity to make this claim and have the international community respect it diminishes considerably, as does our ability to prevent claims like Russia's from coming to fruition. Not only is this a negligent forfeiture of valuable oil, gas and mineral deposits, but also the ability to perform critical scientific research.

The Arctic Ocean is probably the most poorly understood ocean on the planet. There are reports about the thinning of the polar cap and open waters during the summer months. If the polar cap is in-

deed changing, now is the time to be studying it to determine its impact on the global climate, as well as our fisheries.

Also in relation to the Arctic Ocean and the potential thinning of the polar cap is the opening of the polar routes for maritime commerce. There are predictions that the Arctic Ocean will be ice-free for 90 days or more in the summer by the year 2050, which in turn translates to greater access and greater utilization. By utilizing a polar route, the distance between Asia and Europe is 40 percent shorter than current routes via the Suez or Panama Canals, and is in a much more stable part of the world.

But with greater usage comes greater responsibility. A number of nations have Arctic research programs. Alaska's coastline on the Arctic Ocean is over 1,000 nautical miles. The United States can either exercise sea control and protection in this area of the world, or cede that role to whichever Nation is willing to assume it. As a party to the Law of the Sea, the United States' ability to enforce our territorial waters and our EEZ in the Arctic Ocean is strengthened even further.

Mr. Chairman, the Convention on the Law of the Sea also provides a basis for several international treaties with great relevance to our Nation's most productive fisheries, which occur off the coast of Alaska and are of significant value to the economies of Alaska and the other Pacific Northwest states.

The Convention on Straddling and Highly Migratory Stocks provides both access to and protections for fish stocks which migrate through the high seas and the jurisdictions of other countries. Among the stocks for which this agreement is of paramount significance is the Bering Sea stock of Alaska pollock, which is the basis for this country's largest single fishery.

The Convention on Fisheries in the Central Bering Sea is another critical piece, which allows us an unprecedented degree of control over the activities of other fishing nations in the central portion of the Bering Sea beyond both the United States and the Russian exclusive economic zones. Without the influence of the Law of the Sea, neither of these important fishing agreements would likely have come into being.

I would also like to note the importance and the somewhat fragile status of our maritime boundary agreement with Russia. As you may know, this agreement delineates a specific boundary between our two countries. It is necessary because the agreement under which the United States acquired what is now the State of Alaska was interpreted differently by the two parties. Both the boundary agreement and the fisheries enforcement mechanisms that stem from it are critical to the conduct of fisheries policies in the United States and Russian EEZs in the Bering Sea.

Although the United States ratified the Maritime Boundary Agreement shortly after it was presented to the Senate, the Russian government has yet to do so, under pressure both from nationalist political interests and Russian Far-East economic interests.

While observing the provisions of the boundary treaty, the Russian government also has attempted to persuade the United States to make a number of significant concessions regarding Russian access to U.S. fishery resources, suggesting that such concessions would improve the atmosphere for Russian ratification. The terms

of the boundary treaty are widely regarded as highly favorable to the United States and are themselves consistent with the Law of the Sea. However, rejection of the latter by the United States could trigger similar rejection by the Russian Duma of the boundary treaty.

Senator INHOFE. Senator Murkowski, could you try to wrap up pretty quickly?

Senator MURKOWSKI. I have one more paragraph, Mr. Chairman, if you would allow me.

Senator INHOFE. All right, thank you.

Senator MURKOWSKI. If that were to occur, it would be extremely difficult to renegotiate the boundary treaty with similar positive results for the United States. The United States and Alaska have tremendous interests in the Arctic Ocean. Our technological capabilities in calculating the extent of the continental shelf are welcomed by other nations. As a party to the Law of the Sea Treaty, we have the opportunity to stake our claim to a significant chunk of real estate that has the potential for impact on our economy and our national security.

Mr. Chairman, I appreciate the opportunity to make these comments, place them in the record, and again, as I mentioned at the outset, Alaska has a keen interest in what goes on with this treaty and I appreciate the opportunity to speak to the gentlemen that are here today and to listen to their perspectives.

Thank you.

Senator INHOFE. Thank you, Senator Murkowski. Senator Stevens was here and made some similar comments.

First of all, let's do 5-minute rounds and see what happens here.

Mr. Kelly, would you go into this thing. You had stated something about that area between 200 nautical miles and 350 nautical miles, that this treaty could offer exploration or some production in that area. Explain that to me, would you please?

Mr. KELLY. Yes, sir. Under the treaty, a Nation has a right to claim sub-sea territory beyond the traditional 200-mile limit by making a case to the Continental Shelf Commission of the United Nations that our continental shelf actually extends beyond 200 miles. This is done by judging various elements of physical oceanography. If the claim is approved by the Continental Shelf Commission, the Coastal State, in this case the United States, could actually hold a lease-sale beyond 200 miles. The quid pro quo when that was negotiated was that there would be a royalty paid to the International Seabed Authority by the Coastal State for any minerals produced.

Senator INHOFE. By the government?

Mr. KELLY. Yes, it would be paid by the government. It is a royalty that only commences 5 years after initial production and it begins at 1 percent.

Senator INHOFE. OK, but the question I had is, in the absence of becoming a party to this treaty, how could you get at that particular exploration? Can you do it now without this?

Mr. KELLY. Not really, without violating the Convention.

Senator INHOFE. No, forget about the Convention, if we are not a party to it. Can you do it anyway?

Mr. KELLY. I do not believe so.

Senator INHOFE. So this would open up exploration, in your opinion, in areas we cannot explore right now.

Mr. KELLY. That is correct. You can ask, well, are we there yet in terms of technology?

Senator INHOFE. No, I do not care about that.

Mr. KELLY. I just wanted to tell you that there are wells that have been drilled recently in the Gulf of Mexico that are within 2.5 miles of the edge of the exclusive economic zone, so technology has gotten us out to that distance. Whereas in 1994, it was not, but today the technology is available to go beyond 200 miles. It has not happened yet, but we are just about there in terms of the potential.

Senator INHOFE. All right.

Mr. Oxman, you heard me ask Mr. Turner when he was in here the question in terms of being able to board vessels in our national security's interest. Twice in your testimony, you emphasized that you can do that under this treaty. I would like to have you explain that because Mr. Turner was not aware of that.

Mr. OXMAN. Thank you, Mr. Chairman. I will do my best.

Senator INHOFE. After that, I am going to ask Mr. Leitner and Mr. Gaffney if you agree with his explanation here.

Mr. OXMAN. First, let me emphasize that we are already in everybody's opinion bound by the rules of high seas law that are in question. The Law of the Sea Convention copies virtually verbatim the rules of high seas law that are contained in the 1958 Convention on the High Seas to which we are a party, having received the advice and consent of the Senate.

So those rules are the same. They are also the rules that President Reagan specifically announced that we would respect and that we expected everybody else to respect, and every subsequent Administration has applied President Reagan's declaration of 1983.

Now, those rules lay out specific circumstances under which a ship can be boarded on the high seas in general. Under the Convention, we gain additional opportunities to board ships off our own coast, not for security reasons, but for economic reasons, but nevertheless those can relate to security concerns. Thus for example, while Senator Murkowski and I would agree, and would be interested in our power to board fishing vessels off Alaska to inspect for fishing purposes, nevertheless our right to do so will carry with it a right to make sure that we have nobody on board who is interfering with our security or might attack one of our fishing boats.

Similarly, we are going to have extensive boarding rights for anti-pollution purposes. Once again, I am not suggesting pretext here, but if we were to board a foreign vessel to make sure and check under our pollution laws as to whether there has been a violation, it would be a dereliction of duty for the people on board not to notice that there might be someone there who might be trying to commit an act of terrorism either on one of our cities or the kind of ecoterrorism to which there has been a reference.

In addition, we are party to other treaties that deal with terrorism. Finally, most important, Mr. Chairman, this Convention does not affect our right of self-defense. It does not deal with the rules of international law regarding armed conflict.

Senator INHOFE. All right. Thank you, Mr. Oxman.

Now, I would like to ask if there are any other members, the other three here, that would like to express a position or challenge anything that Mr. Oxman said.

Mr. LEITNER. First of all, terrorism is not really directly applicable to the rules of armed conflict. It is a totally different way of fighting. It is a totally different creature. It is also basically a peacetime engagement. What we normally consider as peacetime is when terrorism actually flourishes. You do not have states to blame. You do not have cities to attack. You do not have areas to retaliate against.

The Proliferation Security Initiative is an attempt to go off-shore to interdict what will otherwise be considered legal movement on the high seas. Ships engaged in transit passage, not stopping, not loitering, not polluting, would not be subject to boarding under The Treaty if they are not engaged in certain restricted activities that are enumerated in the Law of the Sea Treaty; if they are not engaged in the slave trade and if they are not engaged in broadcasting; if they are not flying a false flag; if they fail to fly any flag.

The Chinese have already come out very forcefully and asserted that the Proliferation Security Initiative is illegal under the Law of the Sea Treaty. They cited the various provisions and the various strictures that determine the particular events and particular circumstances where boarding or interdiction is allowed. So the Chinese are making it a matter of State policy now to use the Law of the Sea Treaty to try to nullify the Proliferation Security Initiative.

They are trying to also, sub-rosa, intimidate allies like Singapore and some other countries, Thailand and others who are part of PSI from supporting it as well.

Senator INHOFE. All right. Thank you very much.

Mr. Gaffney, did you want to make any comment concerning that issue?

Mr. GAFFNEY. Mr. Chairman, I would just encourage the committee to probe further on this, to investigate the treaty. A number of things that are being said here today by some of its supporters, I have not found in the treaty. Maybe it is just a poor reading on my part, but I do not know where it says we have a guaranteed place at the table, let alone a veto. That point has been made here several times.

Senator INHOFE. OK. I am going to start with you.

Mr. GAFFNEY. I am trying to make sure that as promises are made here, that we will be secure in whatever surrender of sovereignty or whatever adjustments we are making, the kind that Peter has talked about or otherwise, that the Senate is dealing with the treaty as it stands, first and foremost, and is very clear on the extent to which if at all it has been formally modified with the consent of all of the parties through an agreement negotiated and signed in 1994.

Senator INHOFE. All right. Mr. Gaffney, my time has expired. We have been joined by Senator Warner. Would it be all right if we deferred to Senator Warner?

Senator JEFFORDS. No problem whatsoever.

Senator WARNER. Yes, in a moment.

Senator INHOFE. All right, that is fine.

Senator Jeffords, for your questions.

Senator JEFFORDS. To followup, Mr. Gaffney, in your opening statement you said that you were "troubled" by the testimony given by the Administration's witness. You also said that part of the testimony was simply, "not true." Are you insinuating that Mr. Turner and Mr. Taft misled this committee?

Mr. GAFFNEY. I hope the committee will sort this out, Mr. Chairman, because it is not consistent with the reading of the treaty that I have done; the studying of the treaty that I have done. It is not clear to me how you square the circle. I am not suggesting that they are deliberately misleading the Senate. I just want the Senate not to be misled. If I am wrong, I hope that will be pointed out and corrected here and I am sure it will, but I do not think I am.

If I am not, it raises the question as to whether the treaty that you are being asked to ratify is really the 1982 treaty with I think acknowledged defects and warts, or whether it is something different; and if it is something different, Senator, whether it is something different in the eyes of all of the parties to the treaty; or whether it is only different in the eyes of the U.S. Government and you will be asked to ratify it on that understanding and basis, and lo and behold it turns out as the treaty is implemented by all those other countries as well as ourselves, especially if I am right, that we are not in fact guaranteed a seat at the table, let alone a veto, but these understandings, these interpretations, this expectation proves wrong.

If I may, specifically on this question, you have been told repeatedly that this is going to work out OK because we will be at the table. The problem with the 1982 agreement was it did not work out OK because we were at the table and we were consistently outvoted. Maybe it will work out better this time because we are now the world's only superpower, or because we will be more assertive or we will have better, smarter negotiators than we did in 1982. I do not know.

But I submit to you, sir, this is one of those questions that the Senate ought to weigh very carefully if you are being asked to think about a permanent commitment here. This is not something we will do for a couple of years and see how it works out. This is forever and sets a model for I suggest not only the Law of the Sea, but probably for space and perhaps, who knows, for supranational agencies that will do other things.

It bears emphasis there will be no Security Council to intervene if it turns out the votes go against us as they typically do in places like the General Assembly, and I think they would in the Seabed Authority.

Senator JEFFORDS. Mr. Oxman, could you explain the purpose and function of the International Seabed Authority? If the United States became a party to the Convention, what would be the nature of our participation in ISA? Does ISA have unconstrained enforcement potential as claimed by Dr. Leitner?

Mr. OXMAN. Thank you, Senator. I will try.

First, let me say that most of the answer is dependent upon the 1994 agreement. Were any Senator to assert that the Convention can only be understood as modified by the 1994 agreement, that as-

sertion would be completely consistent with the declarations of the U.N. General Assembly, with the practice of all other industrial states, and with the practice of the Seabed Authority from the very first day it met. There is no doubt whatsoever that the 1994 agreement has already modified the Convention. If you felt, Senator, there was any need to clarify this, there would be no quarrel with such an assertion.

Under the implementing agreement, the United States is automatically guaranteed a seat on the Executive Council. That seat goes to a State which was identified as of the data of entry into force of the Convention and everyone knows that is the United States and can be only the United States.

Second, most important regulatory decisions, including how you collect money, how you spend money, is made by regulations of a limited Council of the Seabed Authority by consensus. We cannot be outvoted. If we vote no, there is no regulation. That power is reposed in the Council of the Authority.

On top of that, we will have a guaranteed seat on the Finance Committee so long as the United States is making contributions. That committee functions by consensus and once again any budgetary decisions would have to be based on the decisions of the Finance Committee.

Finally, I want to note that Senator Warner was among those when he was in the executive branch that insisted on this position, the Seabed Authority has a role only with respect to mining; not with respect to military activities; not with respect to scientific research; not with respect to fisheries. It is a very, very limited role indeed. Once minerals are extracted under a permit that is achieved under specified conditions from the Seabed Authority, title to the minerals passes to the miner.

Senator JEFFORDS. Mr. Chairman, I see my time is up. I have another question prepared for later on.

Senator INHOFE. All right, that is fine.

Senator JEFFORDS. Mr. Oxman, are there any mandatory technology transfer provisions in this treaty? How would you respond to the claims that the treaty somehow provides cover for hostile foreign powers to acquire sophisticated technology that cannot otherwise be justified?

Mr. OXMAN. There were, Senator, mandatory technology transfer provisions in the Convention as adopted in 1982. That was one of the reasons President Reagan objected to the deep seabed mining provisions. They have been removed. The specific language is in the implementing agreement that they shall not apply. All that is left are very general statements that we will cooperate in attempting to facilitate transfer of technology. They do not affect any rights with respect to intellectual property. We already cooperate in our foreign aid and other cooperative efforts all over the world today.

Senator JEFFORDS. Thank you, Mr. Chairman.

Senator INHOFE. Senator Warner.

Mr. GAFFNEY. Senator, might I respond on that?

Senator INHOFE. Certainly.

Mr. GAFFNEY. Again, this goes to the heart of this question of does the 1994 agreement eviscerate parts of the Law of the Sea Treaty. You have heard testimony from Peter Leitner about the ap-

plication of the modified Law of the Sea Treaty in a specific export control proceeding by the U.S. Government. The interpretation or the practice, more to the point, was of course, under the Law of the Sea Treaty either as modified by the 1994 agreement or under its initial incarnation, it is our duty to provide the Communist Chinese advanced technology of a directly military character.

Some of this requires, I guess, reflection. Knowing that this is the world's greatest deliberative body, my hope is that it will in fact reflect not narrowly on what is on the paper in front of you, though I think in some cases, as in this issue, of did the 1994 agreement modify the treaty, the paper is not all that clear itself. It should be. I would offer as a constructive suggestion, if you wish to ensure there is no problem, explicitly condition your resolution of ratification if you choose to advise and consent to this treaty, on the changes that that 1994 agreement makes to the underlying document.

I would be willing to bet you will find there is more opposition to that than you think or than you have been told, partly because there are no rights of changing this treaty, no reservations may be added to the resolutions of ratification of its parties.

But more to the point, sir, I would again respectfully suggest that the process that is being adopted here is one that opens the door to new commitments, new responsibilities, that we have had some hard experience with in the past. The President of the United States just a couple of months ago talked about the loophole in the nonproliferation treaty, which as you know was called the Atoms for Peace provision whereby we gave countries atomic technology if they promised not to make bombs with it, only to discover in case after case after case, they did.

The technologies that we will, even under the 1994 agreement, have an obligation to be as forthcoming with as possible, I suspect will wind up being injurious to our national interest; national security perhaps; perhaps commercial; to say nothing of what happens if we wind up being either dragooned or voluntarily going as we did in this previous exercise down the road of feeling obliged to give anybody anything they wanted. Because just as we have some very eminent spokesmen here for certain interests, you can bet, you know yourself, Senator, there are certain interests that will want to sell any comer some of the site-scanning sonars or some of the bathymetric technologies or some of the other deep-sea sensors and mining and other equipment that may be used to our detriment.

What I just hope you will do, as a body, is look past the immediate assurance; apply some common sense to where the inexorable logic of this treaty takes you, and on the balance, as Peter said, on balance evaluate whether, yes, there are some things that we like about this treaty, but it nets out in our overall interest. I suggest to you it does not.

Senator INHOFE. Thank you.

Mr. GAFFNEY. Thank you, sir.

Senator INHOFE. Senator Warner.

Senator Warner. Mr. Chairman, thank you.

Mr. Oxman, I appreciate your reference to the fact that I think we were associated together when I was the Under Secretary and then Secretary of the Navy. I was that Navy Secretary for 5 years,

4 months and 3 days. Secretary Laird appointed me as his personal representative at the Law of the Sea talks in Geneva. In my recollection, we were associated in those days. I worked extensively with Mr. Stevenson, who was then the Chief Counsel to the Secretary of State. So I think you and I have a little bit of a track record in this, do we not?

Mr. OXMAN. Indeed, Senator, and it was a great honor to work for you, sir.

Senator WARNER. I don't know that you worked for me, but anyway, we did work on it.

The years 1969 to 1974, where were you, Mr. Gaffney?

Mr. GAFFNEY. I was in knickers, Mr. Chairman.

Senator WARNER. That is right. I think you were in knickers when you wrote this statement in your opening paragraph to the effect that after all, but for Senator Inhofe's initiative, the Senate may well have taken no testimony at all from critics of the Law of the Sea Treaty.

You know that I had scheduled a hearing of the Armed Services Committee, do you not? You were invited to testify.

Mr. GAFFNEY. Mr. Chairman, in my prepared remarks, which were submitted and are more fulsome——

Senator WARNER. I am talking about this, which is here before the members.

Mr. GAFFNEY. I believe in my prepared remarks, it makes reference to the fact that you and your staff had contacted me about a hearing.

Senator WARNER. That is correct.

Mr. GAFFNEY. I think it is referred to there, sir.

Senator WARNER. You were invited to attend.

Mr. GAFFNEY. I explained that I could not do so, sir.

Senator WARNER. That is correct.

Mr. GAFFNEY. Yes, sir.

Senator WARNER. It seems to me statements like this taint your whole statement.

Mr. GAFFNEY. I beg your pardon, Senator, but I do not have the prepared remarks in front of me, but my recollection is I said your committee has undertaken to schedule a hearing, and I commend you for that. I said, there are several other committees that have not and my hope is that they will before this is done. I regret that I will not be able to testify, but I am delighted that you are going to hold a hearing.

Senator WARNER. You have been associated a long time. You just got to control sometimes the extremism of some of these attacks.

Mr. GAFFNEY. Senator, with respect, I do not know what extremism you are referring to.

Senator WARNER. When you say here that only this distinguished Member of my committee and Chairman of this committee is the one holding hearings, that is a misrepresentation.

Mr. GAFFNEY. I do not think that is the full paragraph, Senator, if you will read the whole paragraph.

Senator WARNER. After all, but for Senator Inhofe's initiative, the Senate may well have taken no testimony from critics of the Law of the Sea.

Mr. GAFFNEY. If you would continue reading, Senator, with respect, I think the rest of it makes clear my point.

Senator WARNER. Where do I continue to read?

Mr. GAFFNEY. I believe the rest of that testimony. Again, you have the benefit of me. You have it in front of you. I do not.

Senator WARNER. Somebody just passed this down.

Mr. GAFFNEY. I would be happy to make the point. In the submitted version of this, Senator, I said very clearly I understood you were preparing to hold one; you have not held one yet. That was my only point.

Senator WARNER. It has been scheduled and you were invited to testify.

Mr. GAFFNEY. I appreciate that, sir.

Senator WARNER. We are having a panel on those who hold views different than that of the Administration.

Mr. Leitner, there was some discussion about your being included in that panel, but I understand you are an employee of the Department of Defense. Is that correct?

Mr. LEITNER. Yes, sir, I am.

Senator WARNER. You are free to express your views, but we have a policy in our committee that unless it is an extraordinary circumstance, which I do not view this one as being, the Administration, you are in the employ of the Administration. I cannot understand in what capacity you are here.

Mr. LEITNER. I will clarify that. I am here as an author, private citizen, and former observer to the delegation to the Law of the Sea Conference; basically as an outside expert. I have testified probably seven times before the House and Senate over the last 6 or 7 years on various issues relating to export controls, the COCOM export control regimes.

Senator WARNER. I do not question your expertise or your professionalism, it is just that it is unusual that you are drawing a salary at taxpayer expense and the Department of Defense and the Secretary of Defense is on record as supporting this treaty. Am I not correct?

Mr. LEITNER. Absolutely, sir. That is the beauty of this country in that we still have freedom of speech even though you are a government employee as long as we are not representing the Department.

Senator WARNER. Mr. Gaffney, when he offered you as a substitute for himself, I felt that it was inappropriate at that time.

So Mr. Chairman, I hope you will join in my hearings.

Mr. GAFFNEY. Mr. Chairman, may I have your indulgence just to read the relevant section toward the end. You actually highlighted it as well, Mr. Chairman.

While staff of the Senate Armed Services Committee have indicated that Chairman Warner intends to hold a hearing on this subject next week, the Intelligence, Commerce, Energy, Governmental Affairs and Finance Committee have yet to evidence any interest in following suit.

I want to make sure, Mr. Chairman, that you know of my strong support for your having this hearing. I commend you for it. I just wish that you would enable what I consider to be one of the most

knowledgeable experts on the subject to participate in it, and I regret that I cannot do so myself due to family business.

Senator WARNER. I have no further comment.

Senator INHOFE. All right, thank you, Senator Warner.

Senator WARNER. I would say, at that hearing, we will take testimony from a series of witnesses who will address those aspects of the relationship between the treaty and our national security policy. These are individuals who, like myself, who have had a long experience in this area.

Senator INHOFE. Senator Warner, I look forward to participating in those hearings. I know they will concentrate on the national security ramifications. This committee is concerned about those, but also the environmental concerns that I think are the purview of this committee and things that we should be addressing. Prior to your coming, I did in my opening statement mention that I had the opportunity to look at the format of the two Foreign Relations hearings. There were no witnesses at that time who were opposed to it. I thought this would be a good balance to have, in this case a panel where two are opposed and two are supporting.

Senator Murkowski, you are recognized for questions.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Mr. Gaffney, in your testimony you had suggested that the International Seabed Authority could issue permits for deep sea oil and gas exploration or exploitation without regard to our environmental concerns. This is despite the fact that the Council adoption of rules concerning seabed mining must be done by consensus of the Council. Doesn't it make sense that if the Council were to issue permits that the United States opposes when we hold a seat on the Council, that they would even be more likely to do so if we are not a party to the Convention?

Mr. GAFFNEY. That is a possibility, Senator. I want again to raise a concern that if you buy into the treaty, things may not turn out to be as they are being represented to be. There is no question that if you are not in the treaty, there are some downsides. What basically I think Dr. Leitner and I are suggesting is, those need to be evaluated by members of this body in their totality.

I think in this case, frankly Senator, one of my insights from government service was finding that objecting to consensus is often harder to do than it would seem; that there is a certain desire, whether log-rolling is a term that I am sure you are accustomed to and is used up here. But there is also a certain sense that, well, it is better than the alternative; indeed, that is pretty much the argument that you hear from some less-than-enthusiastic proponents of this treaty, is that it is better than the alternative.

I am just suggesting to you that it is not necessarily the same thing as a veto. It does not necessarily work the same way. It does not operate in terms of our own government councils the same way. But even vetoes, look at our practice in the United Nations where we actually do have a U.N. Security Council veto. We are very reluctant to exercise it.

Senator MURKOWSKI. Let me ask you one more. You express concern that the United States would not be able to continue its activities under the PSI to stop and search vessels suspected of transporting illegal weapons. Yet many of the United States's partners

in this effort are already partners to the Law of the Sea. How is it that these nations are not in violation of the Convention then?

Mr. GAFFNEY. It is a very good question. You have heard, or perhaps you did not hear because I think you may have been out of the room when this was addressed a moment ago, there seem to be some differences as to whether or not this will be an impediment to these sorts of inspections. Dr. Leitner pointed out, and this is something I hope the Chairman will focus on in the Armed Services Committee hearing, the Communist Chinese government is saying that PSI is impermissible under this treaty. Some of those that are in its area of influence, if you will, notably some whose interests in the South China Sea are being affected by the citation of the Law of the Sea by the Chinese government to extend its sway through the use of artificial islands over more and more of its waters. Some of these governments seem to be now uneasy, shall we say, about participating in the Proliferation Security Initiative.

So again, you need the facts and hopefully they will be expressed as well in the Armed Services Committee. There is clearly a formal U.S. Government position that this is not a problem. My concern is that in I think a number of these cases, we are going to find out it is a problem. I would just assume have the Senate know that it might be or even is before it signs off on this treaty.

Senator MURKOWSKI. Mr. Oxman, both Mr. Gaffney and Mr. Leitner have suggested that the United States will not have discretion in regards to certain articles. Can you give me your view or your opinion on that?

Mr. OXMAN. Senator, I am not entirely sure. I can comment on a few of the things that may be relevant to the question. Taking the last comment first, Senator, I am reading from the text, artificial islands installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone, or the continental shelf. It is true that the Chinese are attempting to extend their claims based on land territory. They claim islands, but that is of course a different question.

In terms of the Proliferation Security Initiative, in my view the success of that initiative is entirely dependent upon our capacity to move our forces around the world without interference by the states past whose coasts they move. Once we get there, I think we have more than ample bases for legal authority to board. Those would be a variety of different bases depending on the particular circumstances. With Liberian ships, we now have a new agreement pursuant to which we will be able to board. I detailed some of these, Senator, a few minutes ago when I believe you were busy with some other matters.

I hope that is responsive, Senator.

Senator MURKOWSKI. I see that my time has expired, Mr. Chairman. I appreciate that. I might have some other questions if we have another round here.

Senator INHOFE. We will give you another round here in a minute.

Senator MURKOWSKI. OK, thank you.

Senator INHOFE. Senator Warner.

Senator WARNER. Thank you, Mr. Chairman.

Senator INHOFE. All right. I would like to ask a question of Mr. Oxman and then ask Mr. Leitner to respond to it also.

Do the environmental provisions of the Convention protect or expose the high seas and the U.S. coastline to environmental threats? Which way is it?

Mr. OXMAN. I think that they increase the protection of the environment.

Senator INHOFE. Of the environment.

Mr. OXMAN. Of the environment in general and the U.S. coast in particular. The question of ecoterrorism is of course a completely separate question from the provisions on environmental protection. I entirely agree that we have to deal with it, and once again, I think that the Convention will facilitate our capacity to deal with it. I want to make clear, Mr. Chairman, that I share Mr. Leitner's concern, but we have the capability to deal with it.

Senator INHOFE. Mr. Leitner?

Mr. LEITNER. I disagree. I think we are more deeply exposed than we would be otherwise than we would be outside the treaty than we would be inside the treaty.

You have to think of the treaty in a number of ways. In every article on the treaty, it is a double-edged sword. It all depends upon interpretation. Our interpretation, and I think we have seen a lot of that today and we certainly saw that in the Senate Foreign Relations Committee, there is a great deal of group-think that seems to be afflicting the United States team, the technical team, the policy team, as it pertains to the Law of the Sea Treaty. We are seeing it from one side as if there is one vector that we are all going to walking on and it has some inexorable momentum and everybody is going to agree with us as we go down this path.

I think that is wrong. I think that there are 140-something countries who are party to this, so you are going to get at least 140 separate views on a particular issue at a particular time in a particular place. This is not a treaty that is going to solve all problems. The Chinese in the South China Sea, for instance, are erecting, we call them artificial islands; the Chinese do not consider them artificial. They consider them real islands. They are using coral reefs; they are using semi-submerged lands as footings in order to build islands above the water line. At some times of the day, the islands are actually above the water line, at least portions of them. They are building military platforms. These are like little aircraft carriers all throughout the South China Sea that are being erected.

It is a very serious threat. There is a great potential for a flashpoint in the South China Sea between the Philippines, between Malaysia, Vietnam, Taiwan and China in terms of potential conflicts. There is a tremendous amount of oil at stake in the South China Sea, as well as the shipping routes that are absolutely vital to the United States, as well as Japan and some other allies.

So these are issues that are all there that have to be dealt with. We cannot deal with these issues. We cannot prognosticate. We cannot do a real overall assessment if we are simply thinking the same way and wishful thinking that the way we interpret the treaty is the way other people are going to interpret it. It is not true.

In terms of Frank Gaffney's comment on consensus being a very difficult thing to work with as opposed to an up and down vote, I share that opinion very closely because I spent many years in COCOM in Paris, back and forth as a COCOM negotiator on behalf of DOD. That was a consensus-driven organization. It was a consensus-driven organization and it was almost impossible to get consensus on anything. You had individual nations acting in the final account in their national interest, as a matter of national discretion. That is what we will have here. National power will trump the agreement, where it is in the interest of the particular State party to trump the agreement.

We have a very serious issue of the Freedom of Navigation Program. That is a program where the United States maintains constant challenges by the Navy and the Air Force to excessive claims of Coastal States, whether a Coastal State is claiming a particular body of water to be a historic bay, such as the Gulf of Taranto or the Gulf of Sidra in Libya or Italy, respectively, or whether a Coastal State is claiming straight baselines in terms of measuring their territorial sea that do not comport with the Law of the Sea Treaty, such as China. They are trying to enclose huge areas of their coastal zone as territorial sea.

What do we do with this? Well, we send ships in. A ship will deviate from its path going from point A to point B in order to enter that area and see whether it provokes a challenge, or at least document that we do not accept that claim.

The Chinese have also promulgated, even though they are a party to the Law of the Sea Treaty, even though they are not allowed to do this under the treaty, a demand for prior notification by warships entering their territorial sea. That is not allowed under the treaty, yet the Chinese are doing it and so are other states, many other states.

When the treaty first began in 1973 in earnest in terms of the Third U.N. Conference on the Law of the Sea, one of the issues of the day, and I am sure Senator Warner will remember this, was the seizure of U.S. tuna boats by Chile, Ecuador and Peru. It was a constant problem. As we have an extensive continental shelf, we claimed 200 miles under the Truman Doctrine.

The countries on the west coast of Latin America claimed a patrimonial sea going out to 200 miles, saying that they did not have the resources, the continental shelf, because they have a big trench off the west coast of Latin America, that they were geographically disinherited from the shelf, therefore they claimed that the region's anchovy and tuna fishing was essential for their economies. So they were seizing our boats because we did not recognize their 200-mile territorial sea.

Senator INHOFE. Did you have something to say, Mr. Kelly, on this?

Mr. KELLY. Yes, a brief comment. With respect to, would we be better off in terms of environmental conservation with this treaty or without? I think it is well to think about the Law of the Sea Treaty in a sense as a large umbrella instrument. It encourages cooperation among nations on a world and on a regional basis in environmental protection. As a result of that, a number of agreements have been spawned. As Senator Murkowski indicated, the

Straddling Stocks Agreement is a good example of the kinds of agreements with respect to fisheries that have come out of the Law of the Sea Treaty.

Likewise, if you take issues like the question of invasive species from ballast water; if you look at various other agreements that have been reached under the umbrella of the Law of the Sea Treaty, often through the International Maritime Organization, IMO, in London, we have been able to achieve real progress on a number of these issues.

There have been standards dealing with safety and environmental protection on ships and mobile offshore drilling rigs that have come out of this whole process that would not be there today if it were not for the Law of the Sea Treaty.

So we have to look at it in a larger sense. The U.S. Coast Guard has done an excellent job representing us at IMO and with respect to other international meetings, but they told our Commission that they certainly felt like their hand would be considerably strengthened if we were a party to the treaty.

Senator INHOFE. All right. Thank you, Mr. Kelly.

Senator WARNER. Could I make one note?

Senator INHOFE. Certainly.

Senator WARNER. Thank you, Mr. Chairman.

I would like to say that Admiral James Watkins, former Chief of Naval Operations, is the chairman of your group. He, together with you and others have performed a very valuable service for the country. I thank you.

Mr. KELLY. Thank you, Senator. I will pass that along to the other Commissioners.

Senator INHOFE. Thank you.

Senator Murkowski?

Senator MURKOWSKI. One final question, Mr. Chairman.

Mr. Leitner, this is directed to you. Your written testimony suggests that the United States resume the practice of authorizing private vessels to arm themselves and sail as privateers. I am told that this has not been practiced since the War of 1812. Are you suggesting that this would be a legal and acceptable act if we are not a party to the Law of the Sea?

Mr. LEITNER. I think it would be an acceptable act regardless of whether we are a member of the Law of the Sea Treaty or not. From the perspective of using the oceans and using privateers as an instrument of foreign policy, I see them being directly an instrument of the courts. One of the things that I do as well, outside of my government employ, is that I work on a great many terrorism lawsuits that have come up in the course of the years, including the 9/11 case, Khobar Towers, the *USS Cole* case, and a variety of other lawsuits where American courts have awarded judgments to American citizens because they were victimized by terrorist actions, and very often state-sponsored terrorism. Usually, Iran is behind it and legal court orders in the United States are awarded, allowing a judgment to be collected, both compensatory and punitive damages.

I see that it would be a great service to the families who are victims of terrorism, as well as the victims of terrorism themselves, if we would enable private collection activities to take place on the

high seas or elsewhere to satisfy judgments and raise the costs of engaging in international terrorism directly to the State party who sponsored the terrorist act.

So this is a novel form of collection, because right now people are really inhibited from collecting. They have judgments that cannot be enforced. They are meaningless judgments and the State sponsors of terrorism pay nothing.

Senator MURKOWSKI. Mr. Chairman, I have no further questions. Thank you.

Senator INHOFE. Thank you, Senator Murkowski.

Mr. GAFFNEY. Mr. Chairman, if you are about to wrap up, I just wanted to make one other point.

Senator INHOFE. I am not about to wrap up.

Mr. GAFFNEY. Excellent.

Senator INHOFE. I hear Senator Warner and Mr. Oxman and others talk about having been exposed to this all the way back to the Nixon administration. This is all new to me, so I may be looking at this from a little different perspective than some of the others are.

You all four heard me ask Mr. Turner about the understanding I have that Article 212 of the Convention requires states to adopt laws and regulations for pollution from the atmosphere. Now, do any of you have in your mind now any specific domestic policies that would need to be changed, or domestic laws that we would have to change should we become a party to this? Anyone? Yes, Mr. Leitner.

Mr. LEITNER. I was surprised when the State Department representative said "no, there were none," because off-hand I think of the Deep Seabed Hard Mineral Resources Act. That law was enacted after the United States rejected the treaty so as to enable ocean mining to take place with a reciprocal state's regime. Basically it brings in other countries, like-minded countries to recognize claims to deep ocean areas so we would not have claim-jumping and any sort of conflict at sea in the absence of a treaty.

That is a law that I would think would have to change, at a minimum that will have to change or it would be disbanded if we become a party to the treaty. That is a pretty major effort.

Senator INHOFE. One of the things I had in mind, and I think I may not have specifically said it, but we have been going around this CO_2 thing for a long time. Is there any way that this could be used to force the United States to regulate CO_2? Any comments on that? Yes, Mr. Oxman.

Mr. OXMAN. Mr. Chairman, no. All it does is require that we have air pollution regulations in effect with respect to our territory and with respect to our vessels and aircraft. It does not specify what those measures must be. That is quite important. It simply requires that we do things. There is legislation, I would like to do a little research on how much, but clearly the Clean Air Act and other legislation that we have satisfies this obligation.

Similarly, the Deep Seabed Hard Minerals Act which was enacted by Congress while we were negotiating the Convention, in an attempt to induce a dose of realism in the negotiators, specifically contemplated the possibility that we would become party to a treaty.

Thank you, sir.

Senator INHOFE. Yes.

Mr. GAFFNEY. Mr. Chairman?

Senator INHOFE. Yes?

Mr. GAFFNEY. I just again want to encourage some second-order thinking about this. When Mr. Oxman says we are undertaking to do certain things, but they are not specified, that plays into what I consider to be one of the really worrying things about this treaty, when it is pointed out that the International Seabed Authority has very circumscribed responsibilities at the moment. For the purposes of discussion, let's just say that is true.

The second-order problem is, these things take on a life of their own. Now, I think Peter would agree with me, there is a certain, call it cynical belief on my part, at least, that people have behaved with greater circumspection and constraints on what they ultimately would like to see this supranational agency do, so as to not to queer the deal on getting the Senate to go along with the ratification of this treaty.

I submit to you, if this treaty is ratified, I hope you will have us back in 5 years time to reevaluate this, but I would be willing to wager that what will happen will be vastly greater duties and responsibilities imputed to this institution; greater authority exercised in its own right and through its tribunal, and the promised veto not protecting our equities the way we thought they would.

Senator INHOFE. OK. That is something I would like to ask all four of you about, because I am not familiar with that.

Let's say that we were to become a part of this and we would be the 146th country to do it. Do we have one vote? How is it set up in terms of our participation as a country?

Mr. GAFFNEY. At best, we have one vote.

Mr. OXMAN. Senator, we have one vote, but the power in the Seabed Authority is held by the Council of the Seabed Authority. The Council of the Seabed Authority and its regulatory decisions must function by consensus. Our one vote therefore constitutes a veto, as does the one vote of every other member of the Council. On certain other kinds of decisions, consensus is not required, but there is a complex chamber system pursuant to which any three industrial States could block a decision. Again, we have only one vote, but if we are joined by two of our friends, the decision is blocked.

Furthermore, Mr. Gaffney is correct that consensus decision-making processes, as I am sure any Senator is aware, involve not only negative power, but affirmative power. President Reagan demanded both. I am quite confident that the United States would use its veto on the Council in order to further our own affirmative agenda, for example with respect to the environment.

In effect, our vote is the same as any other country's, but its effect is quite different.

Senator INHOFE. Mr. Leitner?

Mr. LEITNER. I would just like to add, there is a certain element of wishful thinking that is embodied in what our assumptions are in terms of what the U.S. role is going to be; what will it be if we accede; what will it be over time. The United States is not called out anywhere, not anywhere does it say the United States shall be a member of this body, period. Instead, it is done by other terms;

the country with the highest and the greatest GNP at a certain date; the country with the largest consuming of a certain type of mineral; that sort of thing. So it is all measured indirectly and it is all assumed that the United States will be that party. Under current rules, perhaps it is, but there is no "United States shall have a seat on this particular body." It is not written anywhere.

In addition, there are other things that are really quite disturbing. In the Tribunal, for instance, of which Mr. Oxman, by the way, was a visiting judge in the Tribunal at Hamburg; it is a pretty distinguished position, the way the judgeships are awarded in the Tribunal, which is the dispute settlement mechanism in the treaty, Africa has five judges; Asia has five judges; Eastern Europe, we still call it Eastern Europe, even though it is post-cold war, three judges; Latin America and the Caribbean, four judges; Western Europe and Others, four judges.

Basically, if we were to assume, if you just look at this, I added up this morning the percentage of world GDP represented by that small group called Western Europe and Others, the four seats, and the percentage of GDP for the world is 50 percent of the world's GDP is made up of this Western Europe and Others group, but we only have four votes.

Basically, it gives the equivalent of 19 percent of the votes. We represent 50 percent of the world's GDP, but we only get 19 percent of the voting power in the Tribunal.

This same pattern is evident elsewhere in the International Seabed Authority in terms of the economic interests of the United States not really being adequately represented. Our power in the world, the fact that the United States will contribute according to the United Nations share of contributions, that same formula, about 25 percent at least of the operating budget, that is what we are obligated to pay as a subscription.

It is totally disproportionate to our actual influence and our status in the world. We have a negative disproportionate share of the votes compared to our economic influence and the importance of the United States in the world. The single superpower on the planet does not anywhere in this treaty have a direct called-out seat on any body, on any of the judicial or administrative bodies in this treaty. It is just not there. It is all indirect.

Senator INHOFE. Mr. Kelly.

Mr. KELLY. Mr. Chairman, while we are discussing all the possible things that could go wrong, let me add a little more optimistic note to this whole scenario. During the past 2 years, I have attended at least two meetings where there were officials from the Seabed Authority, United Nations representatives and representatives of other countries who were gathered together to talk about these issues and about U.S. participation in the treaty. This is all outside of my Ocean Commission responsibilities.

I want to tell you that we are being asked for help. In the developing nations of the world, they need food sources from fish. They want to protect their environment. They want energy resources and they want to learn how to do it right; to do it with good stewardship practices and good environmental sensitivity. As an American attending these meetings, the communications I get through these meetings has been, please get on board; join the Law of the Sea

Treaty. We know you have 50 universities who specialize in ocean science. We want them over here teaching us how to do it right.

So I would close my comments with the note that we have a wonderful opportunity to establish some leadership here in all these fields and we are being asked to do it.

Senator INHOFE. Thank you, Mr. Kelly. I think that is an excellent statement.

Let me just share with you my concern that I have when these things come along. I am not likening this to other treaties, but if you take the Kyoto Treaty, the train is going so fast and everyone is saying, yes, all these good things are going to happen, only to find out from the Wharton Econometrics that ratification would end up costing us 1.4 million jobs. It would cost us a doubling the cost of energy. It would add 65 cents to a gallon of fuel. Each family of four would have to pay $2,710 more. Then we find out that since 1999, the science has been on the other side. In fact, anthropogenic gases are not causing climate change.

So I see this treaty coming up and I am thinking this is pretty far-reaching. I just want to be sure within the purview of the committee that I chair that there are not problems that we are going to have to adhere with. I have been deeply concerned about the sovereignty of this Nation. I know that sounds perhaps a little prosaic, but I really believe when we get into these multinational things that we need to be first and foremost looking out after the interests of our country and making sure that any treaty in which we engage does the same thing.

Let me just ask any of you to take whatever time you want, because this is a very significant thing, a very important thing. This is covered by a lot of media and I do not want anyone to walk out of here feeling that they did not have ample opportunity to thoroughly express their concerns and their interest in this treaty.

Let's go ahead and start with you, Mr. Oxman.

Mr. OXMAN. Thank you, Senator.

Lawyers, as you know, Senator, are paid to worry about what happens if things go wrong. That explains a lot of the verbiage in legal documents.

Senator INHOFE. They normally hope they will go wrong.

[Laughter.]

Mr. OXMAN. Things could go wrong, Senator. I cannot preclude that. We foresaw that. Unlike the 1958 Conventions on the Law of the Sea to which we are already a party; we are party to all four; this convention contains a denunciation clause. It contains a denunciation clause because we insisted on it. It was my job to negotiate it. My colleagues were not happy about it, but we got it. If we find that something goes wrong and seriously, adversely affects our interests, we have a legal right to pull out.

Moreover, the resolution of advice and consent rightly in my view, worrying about that possibility, contains some provisions regarding review that are designed to protect the United States and protect the prerogatives of the Senate.

My second point is a positive note, and I will end on that one, which I addressed in my prepared remarks. It is directly related to some of the concerns you have expressed, Senator. For many years in the Law of the Sea negotiations and in other negotiations,

the United States has tried to make clear that environmental treaties must be carefully framed to produce a reasonable accommodation of diverse interests. Some people have characterized this as opposition to environmental protection. Some of the extreme rhetoric used abroad has been particularly damaging to our reputation in important allied countries.

The Senate now has a signal opportunity to set the record straight. Its approval of the Convention and the implementing agreement together, would suggest that there is every reason to ensure that the multilateral 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 to the world that when that is done, America will be on board.

Thank you, Senator.

Senator INHOFE. Thank you, Mr. Oxman. You have been an excellent witness.

Mr. Leitner.

Mr. LEITNER. Thank you, sir.

I would like to begin by saying that there are tradeoffs with a treaty like this. The assertion that we are going to enhance our sovereignty by becoming part of the Law of the Sea Treaty I think turns reality on its head. I think it is an absurd statement and if anything we are going to be trading off an awful lot of sovereignty, an awful lot of freedom of action, an awful lot of discretion on the part of the United States to act in its national interest by getting away from a traditional system of traditional rights and freedoms, to a system of statutory regulation.

One of the things we have seen time and time again is that once you go to a statutory system, a rule-bound system, your own lawyers, State Department lawyers, DOD lawyers and others, are going to hamstring, are going to constrain, and are going to strangle the ability of the United States to act in a unilateral way. It simply their nature; it is the nature of the game. It is something that gets repeated consistently.

The issue of creeping jurisdiction is one that really we need to look at in great detail. What I mean by this is allowing this international organization to get its nose under the tent, so to speak, and further erode sovereignty by intruding into areas that it really does not have direct jurisdiction.

I found it interesting that there was a case before the Law of the Sea Tribunal back in November of 2001 called the MOX case, for mixed oxide fuels. It was a case where the British were building a mixed oxide fuel plant to use in control rods and nuclear reactors, radiological material. It was on their national territory within Great Britain. Ireland objected to it and Ireland was trying to stop it and trying to get environmental impact statements and other things. They went to the Law of the Sea Tribunal in order to try to bring a case to enjoin the British from not operating this plant.

The British Government argued that the Tribunal does not have any jurisdiction in this area. It is a terrestrial system. It is not on the ocean. It is not on the high seas. It is not adjoining any high seas. It is right in the land territory of Britain. But the court ruled anyway; the Tribunal took the case even though it had nothing to

do with the high seas other than possible incidental pollution from runoff.

Like Frank Gaffney has stated, we think that these bodies are on their best behavior right now while trying to woo the United States into joining the treaty, basically trying to sucker us into the treaty, and then the real excesses will start coming out later. Do we know this for a fact? No. There is no way of knowing what the future is going to hold, but we do see trends now. The creeping jurisdiction in the MOX case I think is a good example of the type of power-grab that will be later on. It will be even more intrusive and we will have to live with it if we are part of it.

In terms of denunciation clauses, it is nice to have a denunciation clause. A country can always act in its national interest anyway. It can always walk out of a treaty whether there is a denunciation clause or not. We all see the result of North Korea trying to use its denunciation clause under the Nonproliferation Treaty, where the whole world is jumping all over their neck trying to keep them inside the treaty, even though they have a right to walk away from that treaty, as any Nation would. I am not saying they should. I am just saying they can and we will be in a similar position.

Also, the comments about PSI, Proliferation Security Initiative. Based upon my reading of the treaty, my understanding of the naval policy, my understanding of the Freedom of Navigation programs, my understanding of how the Defense Department works, the Chinese are right. The PSI would be illegal if we acceded to the Law of the Sea Treaty because the motivations, the pretext, and the jurisdictional areas that we would exercise our rights, or supposed rights, of interdiction, interception and boarding simply do not apply in the context of the Law of the Sea Treaty. It does not allow it.

In fact, the Law of the Sea Treaty specifically states that traffic in weapons is a normal commercial activity engaged in by states. So a country like North Korea shipping missile parts to Venezuela, let's say, that might eventually be used against us, or shipping them to Cuba, we would have no right to interdict it on the high seas. There could be radiological material. It could be CBW. It could be almost any sort of weapon of mass destruction. We have no right under the treaty to interdict it because it does not fall within any of those categories that the treaty allows.

We can always do it as a matter of national power. That is without question and that is what we would do. But what is the point of acceding to a treaty that we know we are going to have to violate on a regular basis in order to protect our citizens? This treaty puts us in that position. We do not need to be put in this position. I do not think it is beneficial at all.

I think many of the benefits that accrue from our potential membership in the treaty fall into the "nice to have" category. They are nice to have, the environmental provisions, some of the issues that Mr. Kelly raised, they are all nice to have. Are they essential to this nation? No. Can we achieve every one of those goals outside of the treaty? Yes.

But what do we have to tradeoff in order to get those "nice to have" things which are not essential? We have to tradeoff sov-

ereignty. We have to create this international body, basically help provide the wherewithal for an international body to be created that has taxation powers; that has the ability to regulate seven-tenths of the earth's surface; has all kinds of supranational implications of world government, which even though we act in a very sophisticated way, at root those are the issues that are still there; that have been there from day one; that are still there today. We called it something different. We added a lot of ambiguity with the 1994 agreement, but we have not gotten away from these basic facts.

I would really like to express my appreciation for being invited to speak today. I think you have done a great service by allowing some of these issues to be aired that were not allowed to be aired in the Senate Foreign Relations Committee.

Thank you.

Senator INHOFE. I thank you, Mr. Leitner. You have been a very excellent professional witness and I appreciate your time.

Mr. Kelly.

Mr. KELLY. Before closing, I would like to address one comment that was made by one of my colleagues here at the table that some of the interests that were characterized as supporting the treaty were characterized as having a narrow interest. I would like to make the point that when we talk about adding a potential 450,000 square kilometers that Senator Murkowski mentioned to our potential resource base, that that is not a narrow interest, that is a national interest.

I do not have to tell you as an Oklahoman, that you never know whether there is a resource there until you drill a well. That is certainly the case here. No one knows what is out there at those distances and depths, but we have been surprised recently with a well being drilled in 10,000 feet of water in the Gulf of Mexico. We have been surprised at the resources that appear to be far off shore in the ultra-deep water, so we shall see.

The other comment I wanted to make is that on April 20, the U.S. Commission on Ocean Policy will issue its first draft report; 2½ years in the making. Under the Oceans Act of 2000, we are required to deliver a draft to the Governors for their comments before we deliver it to the President and Congress. So we are about there. When we issue the Governors draft on the 20th, it will be the first time that our complete report is available to the public for reading.

Our responsibility was to look at the potential of the ocean and coastal areas of the United States in terms of both need for stewardship and economic development potential. We will be addressing a lot of those issues; on the stewardship side, the need for better watershed management in this country; the need to look at watersheds in terms of ecosystems; the need to look at non-point source pollution in the watersheds and elsewhere; and a range of stewardship issues dealing with the land, the water and living marine resources.

In addition, we will be pointing out how fast world commerce on ships is growing and the pressure that puts on our ports and waterways. That also makes the point that as we have more and more ships plying the world waters, these issues of freedom of navigation become more important.

Indeed, 45 percent of the total tonnage coming into the United States is in the form of petroleum products. We know how rapidly our imports are growing. We are going from the 50 percents up to the 60 percents very shortly. So we are somewhat vulnerable there, and I think one of the reasons that the downstream sector of the petroleum industry supports the treaty is that they would like to have the security of freedom of navigation on the high seas and through the straits and archipelagos because the whole world is going to be getting more dependent on the security of the shipment of energy. We have liquefied natural gas ships coming on as well, which will add another dimension to shipping.

Then there is all the new potential products that are being developed from ocean resources; aquaculture, a very interesting and rapidly growing industry that could serve to take some of the pressure off of the fish stocks that are depleted. We have interesting new pharmaceutical products including cancer cures that are being discovered in marine organisms.

So we live in an extremely interesting time in terms of ocean resources and our Commission hopes to issue a wake-up call on all these issues. I would just like to say to you that part of our mission is to bring knowledge on these issues and show leadership with respect to them on a global basis.

In concluding, I would just say that we think we can do a better job of that if the United States accedes to the treaty.

Senator INHOFE. Thank you very much, Mr. Kelly. I can certainly identify with you in the concern about the energy problem that we have in this country and the frustration that I, from an oil State, feel in not having been able to partially resolve it when there are some very obvious solutions to the problem.

As you well know, we are quite a marginal well State, and people do not realize the vast reserves that are there, the potential that is there in some of the shallow production that I worked on some 50 years ago. So hopefully, we will do a better job. Thank you for your participation.

Mr. Gaffney?

Mr. GAFFNEY. Mr. Chairman, I particularly appreciate the opportunity to summarize some of my thoughts at this point, as I will not have a chance to speak to the Armed Services Committee or perhaps other committees.

As I think Dr. Leitner said, I want to stipulate that people want us in the treaty at the moment. I do not think there is any disputing that, whether they want us in there for the best of reasons or for some of the more sinister ones that we can, I think, reasonably anticipate. This is not just a question of could things go wrong, but like you, I think, Mr. Chairman, I have been very concerned to see the growing insistence, for example in Iraq, that the United Nations be the organization that supplants the United States in trying to bring about the liberation and consolidate it. That is not something going wrong. That is sort of a trend that we have seen, and lots of our allies, many of your colleagues for that matter, want that to go forward.

Similarly, as I mentioned in my opening remarks, we have seen in the Oil for Food scandal things going wrong, where the U.N. bureaucracy, or at least parts of it, relatives in some cases of senior

officials apparently enriching themselves through a process that has far smaller amounts, still significant to be sure, but far smaller amounts at stake than this treaty could possibly result in over time, particularly if Mr. Kelly is right that we wind up seeing whole new industries that are currently gleams in the eye or in their infancy developing in the world's oceans.

As to this question of whether or not we will enjoy this new sort of gold rush, if you will, bonanza off the coast of Alaska, if I understood him right, and I think I did, that is entirely possible if we get the permission of one of these commissions associated with the treaty. Maybe we will. Maybe we will get it under certain conditions and restrictions. Maybe we will get a piece of it. Maybe they can have a piece of it. Because again going back to something Dr. Leitner said at the beginning based on his experience, which I gather is almost as lengthy as Mr. Oxman's, the genesis of this treaty, at least in the minds of many of its proponents decades ago, was how do we distribute the wealth from the industrialized world to the not industrialized world? Again, that is part of the concern that goes to your question about multilateralism versus sovereignty.

On this matter, we keep touching on it, of the freedom of the seas. I believe we are less likely to be assured of all of the good things that are presented here, of free passage transit through straits and so on, if we rely predominantly on international law rather than the power and the credibility of the United States Navy. Maybe Senator Warner would call that an extreme remark. I do not know.

I happen to believe it, and I think given his history in the United States Navy, maybe he would, too, but that is one of those questions that the Senate ought to deliberate long and hard about. I believe the two are incompatible here. It pains me to say that because, of course, we have had a number of admirals cited as supporters of this treaty, including the current Chief of Naval Operations. In the committee, I gather you will hear from him over on the Armed Services side.

I am concerned that what the Navy has bought into here is a notion that on the face of it seems consistent with their interests and will over time be counterproductive to those interests. That is a sort of second-order problem, but I will be interested to see several years down the road how this sorts out.

In regard to that, Mr. Chairman, there are two provisions that I think Peter and I both alluded to that this committee, other committees, the Senate as a whole needs to address. Are there impacts as a result of provisions of this treaty on the collection of intelligence and submerged transit in territorial waters? The proponents assure us rather blithely, I am afraid, that there are no such problems. I think a straightforward reading of it suggests that there will be problems. Particularly, going back to something Peter said, since this treaty was drafted, decades before 9/11, the Senate has an obligation to evaluate it in light of a post-9/11 world. I suggest to you that is a world in which we need as much intelligence and we need to be operate submarines that among other things do the collection of intelligence, as you know, in territorial waters. We would not want there to be new inhibitions, and by the way, some

of those may be self-imposed inhibitions, once there is a treaty to which we are party.

Finally, Mr. Chairman, if nothing else, I hope today's hearing has illuminated that there are real questions. With all due respect and I worked for Secretary Taft in his biggest incarnation in the Defense Department. I do not know Mr. Turner, but I find it troubling that when you asked the direct question, what happens if we have to stop a ship, they do not have a ready answer. They will have a ready answer I am sure in due course, but this should not be something about which there is any uncertainty at all. Neither should there be uncertainty about the numerous other points that we have raised. Is the 1994 agreement something that supersedes in effect, because if it is correct, it fundamentally alters this treaty. I do not know, but I think you need to.

I think, Mr. Chairman, just going back to my opening point, you deserve great credit for having convened this hearing. I must tell you that I am not sure Senator Warner would have convened this hearing but for the fact that you indicated that you were going to. My initial feedback from his staff, who I mentioned in this testimony, was that they did not think a hearing was necessary in the Armed Services Committee. That continues, as best I can tell, to be the case in the Commerce Committee, in the Intelligence Committee, in the Finance Committee, in the Governmental Affairs Committee, the Energy Committee and the Judiciary Committee. Each of whom, I suggest to you, have an interest or will have interests affected by this treaty.

So again, I commend you, Mr. Chairman, for taking the time to do this; for bringing it before your panel; for giving us who are skeptical about the all this a chance to testify. Since what is in my estimation at stake here is nothing less than the sovereignty of the United States, this kind of attention is the least that the American people can expect from their elected representatives in this body.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Mr. Gaffney. That was an excellent statement.

I thank all of you for your patience. I am not known for long hearings. I prefer short hearings, but in this case I thought it was necessary to get a real education and I think I have accomplished that. Hopefully, others did, too.

Thank you very much for your time.

We are adjourned.

[Whereupon, at 4:45 p.m. the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM THE STATE OF ALASKA

Chairman Inhofe, thanks for inviting me to testify at this hearing today on ratification of 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. I gained valuable perspectives on the need for international cooperation on the management of the world's oceans at meetings held in Caracas, Paris, London, Geneva, and at the United Nations in New York. I traveled with John ("Jack") Stevenson the Legal Adviser for the State Department

from 1969 to 1973 to many of these places and worked with former Senator Claiborne Pell during the 1990's on the Law of the Sea.

My objections to the Law of the Sea Treaty during those times focused largely on fisheries concerns, and namely protecting U.S. interests in living marine resources off our coastline.

It was these concerns that led to the work on the Magnuson-Stevens Act and extending coastal State jurisdiction to 200 miles. Before passage of the Magnuson-Stevens 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 moves on to another fishery and decimates those stocks. This practice was devastating for our fisheries, and until the 200mile exclusive economic zones were established there was very little international cooperation to manage or to protect shared fisheries.

Now, 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. In addition, the current resolution of advice and consent that Chairman Lugar of the Foreign Relations Committee has developed for ratification includes understandings and report language that further protect U.S. interests in abundant and sustainable fisheries. This is critical for fisheries off the coast of Alaska in the North Pacific where there are extremely conservative harvest caps in place that have allowed for increased abundance of fisheries resources.

These understandings provide the exclusive right for coastal States 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—such determinations are not subject to binding dispute resolution under the Convention.

Other protections for our Nation's fisheries have also been included in the Convention on the Law of the Sea, some of particular interest to me in my career in the Senate are:

1. *The Moratorium on High Seas Drift Nets.*—In 1987, the Driftnet Impact Monitoring, Assessment, and Control 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 United Nations adopt our suggestion for a global moratorium on large-scale driftnet fishing on the high seas.

2. *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 know 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 United States did the right thing by ratifying it in August 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. The agreements have proven to be critical first steps toward cooperative international management of transboundary stocks.

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.

I am pleased with the declarations for U.S. accession to the treaty that the Administration worked out with the Foreign Relations Committee. Specifically, these declarations confirm the right and sovereignty of the United States to manage our natural resources, both living and nonliving, in our exclusive economic zone. 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. Thank you.

INTERNATIONAL FISHERIES AND THE LAW OF THE SEA CONVENTION

TED STEVENS*

I am delighted to have an opportunity to be here with you and extend my thanks to the University of Virginia School of Law and particularly to Professor John Norton Moore, Director of the Center for Oceans Law and Policy. If I have been successful, John, it is because I have been blessed with a long string of able Alaskans, including Earl Comstock of my staff who is here tonight.

This seminar serves as a tribute to John R. ("Jack") Stevenson, and I have a special spot in my heart for Jack. As you know, Jack was the Legal Adviser for the State Department from 1969 to 1973, and I met with him often in those days. That was my first real year in the Senate, in 1969, and I remember so well when Senator Warren Magnuson, with whom I had contact during the Eisenhower days, asked me whether I would like to monitor the Law of the Sea negotiations. Of course I did, so he assigned me as a freshman minority member to attend all of those negotiations, and working with Jack Stevenson was one of the rewards of that assignment. We met often in New York, Geneva, and Caracas. I hope you will carry to him my best wishes. We do have great admiration and fondness for Jack Stevenson in my office.

It may seem like an exaggeration to some people to describe to you the Senate movement as "towards" consideration, much less ratification, of the Law of the Sea Convention. I have talked to Senator Helms, Chairman of the Senate Foreign Relations Committee, about it. He has a pretty clear expression so far about his concerns with the Convention. They are not new issues. I do not think they have scheduled any hearings yet and I seriously doubt that we will get any soon. I know that you know I have some reservations about some aspects of the Convention and I appreciate your inviting me to be here. I do want to tell you that in my judgment the Senate is not simply ignoring the advantages of having the United States formally adopt the Law of the Sea. We have listened to presentations by Ambassador David Colson and others in support of ratification, and are reviewing the contents. And Senator Claiborne Pell has had a series of meetings, as have others, with those who are involved in negotiations to try to generate more interest in moving the Convention in the Senate. Also, we are now aware fully, of course, of the military's position in support of ratification.

Tonight, I ask you to allow me to set aside the concerns that many have concerning the deep seabed mining provisions, and address, the area that is of great concern to me and important to my home state of Alaska—the portion of the Convention that deals with fisheries. I know that two people are here tonight who have done a great deal in this area—Maggie Hayes of NOAA [National Oceanic and Atmospheric Administration] and David Balton of the Department of State. These two have worked with us on these international issues and they deserve a great deal of credit for the success that I am going to speak to you about. First, I will review briefly for you the history of the 200-mile exclusive economic zone and then the recent international fishery agreements, which I believe must be fully protected in the Convention if we are to ratify the Convention. I worked with Howard Baker for 8 years as the assistant [Republican] leader when he was leader and he used to say to me, "Teddy, if you don't toot your own horn no one will toot it for you." If I am tooting here, a little bit, I hope you remember that there are many other people, including the two I just mentioned, who did a lot of the work that I am talking about.

I have taken the time to mentally review things along with my assistant, Earl Comstock, and I think this goes back literally to that first year, 1969, when I first took the role that Senator Magnuson asked me to take on. It was then that I was fortunate enough to meet Jack Stevenson. Fisheries around the world, including the fisheries off Alaska, were very much over-fished primarily by distant water fleets. There was very little international cooperation to manage or to protect those fisheries. We were a new state. We had only been a state for 10 years in 1969 and we knew we had to have more protection for our fisheries. After all, fisheries then and now are the No. 1 area of employment for Alaskans. I remember debating on the Senate floor in 1969 and in the early 1970's whether we should extend coastal State jurisdiction to 200 miles. I was not certain that we could implement that south enough to protect our fisheries.

It was not until 1971 that I introduced the first 200-mile bill, S. 46, although we had discussed it many times before. S–46 really was a unilateral offer by the United States to extend jurisdiction to 200 miles. At that time my thoughts were very ex-

*U.S. Senator, Alaska

treme. By 1975, I had enlisted Senator Magnuson's help, and he sponsored the bill in that Congress and said he would work with me to get it done. There were others urging that we should not move forward to the 200-mile bill until we had ratified the product of the Law of the Sea negotiations. Those of us who supported passing that bill by then had named it the Fishery Conservation and Management Act. Later I was the one who offered the motion to name it in honor of Senator Warren Magnuson. I believe now we were ahead of the game by at least 20 years.

The Magnuson Act passed in 1976, yet we are still in the position where we have not ratified the Law of the Sea Convention for many other reasons. In fairness I think we would all agree that we do abide by most of the principles that have been the result of the negotiations we have all watched over these years. In my judgment, the fisheries off the United States received a significant increase in protection when we did extend our national jurisdiction Fisheries in other parts of the world also have received increased protection as they have extended their jurisdiction similarly. And now, 90 percent of the fisheries that are harvested off the United States are within the fishery conservation zone, which we call the "exclusive economic zone."

We have tried now to move beyond that 200-mile limitation, as you know, to stop fishing on the high seas. Ambassador Satya Nandan and I were talking about that and his efforts as chairman the U.N. Conference on Straddling Fish Stocks and Highly Migratory. Fish Stocks. As you know the salmon fishery is very important to us. We fought hard to stop the high seas interception salmon by the Japanese, Koreans, and Taiwanese. At first we had an international agreement on high seas fishing for salmon in North Pacific—an agreement entered into by the United States, Japan, and Canada in 1954. In 1978 and 1985 it was renegotiated and strengthened in an attempt to stop over-fishing.

In the early 1980's, a young fisherman from Alaska took an airplane to Seattle and flew here to Washington, bringing with him a large box which he put in the middle of my desk. I had met him just once before, and that was my first introduction to a piece of a driftnet. He had lost his complete propeller unit because he had run into a driftnet that had been cut loose in our Alaska waters. After that we received increasing information about the significant impact that the large-scale driftnets were having on our fisheries.

I was Chairman, at that time, of the Ocean Subcommittee in the Senate, and we had hearings on the high seas driftnets. We received some opposition from the State Department spokesmen because they thought that the actions that we sought to take would violate the general rights of fishing vessels to fish on the high seas, embodied in article 116 of the Convention. We did back up a little bit and then passed another bill. I introduced the Driftnet Impact Monitoring, Assessment, and Control Act 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. At that time I viewed the Driftnet Act as consistent with article 118 of the Convention,' which says that "States shall cooperate with each other in the conservation and management of living resources" on the high seas. That action by the United States is still considered extreme by many nations who continue to oppose any high seas fishing restrictions, and they have often argued that the Convention did not allow any restrictions on high seas fishing.

Once the Driftnet Act, was passed, we began to learn more about the impact of driftnets, particularly on other sea life—sea birds and many other species—and we enlisted the aid of many organizations. I went to the United Nations to see if we could completely ban the use of driftnets worldwide. Other nations were concerned, too, particularly about the unrestricted use of such fishing gear, and they began to support the ban. We have this fraternity of people who go to various negotiations. They have made fast friendships with many people, as I have with Tom Pickering, who is now in Moscow. In 1989, he was at the United Nations as our Ambassador and he led a successful fight to stop driftnets. Ten other Senators had joined with me in approaching Ambassador Pickering to request such action by the United Nations. I think that was a significant action—one for which Tom Pickering deserves a lot of credit and so does Earl Comstock. He wrote the resolution on which the United Nations took action.

In 1989, the U.N. General Assembly adopted a resolution to establish a global moratorium on large-scale driftnet fishing on the high seas. Since then they have adopted two more resolutions and have made three decisions to strengthen that moratorium. The driftnet ban and extension of the exclusive economic zone (EEZ) to 200 miles were the two most important initiatives, in my opinion, in the past quarter-century to conserve the fishery resources of the' world: the 200-mile limit because it gives the adjacent nation, which has the most direct stake, authority to conserve the fisheries close to its shore; and the driftnet ban because it sets the

precedent that, even on the high seas, destructive fishing practices will not be tolerated by the world. . The 200-mile limit was explicitly adopted by the Convention; however, the U.N. action imposed by the moratorium on driftnets could be challenged sunder the Convention's mandatory dispute settlement procedures. As, I understand it, under Part XV of the Convention, any dispute concerning the interpretation or application of the invention is required, at the request of any signatory, to be submitted to compulsory dispute settlement proceedings. A dispute can be heard by an international tribunal under Annex VI, a general arbitration panel under Annex VII, or a special arbitration panel under Annex VIII. As most of you probably know, the decisions made under the tribunal or two panels cannot be appealed If challenges are made and dispute panels favor unrestricted high seas fishing, precedents such as the U.N. resolutions banning driftnets could be weakened or overturned by such challenges. That kind of vulnerability is, what worries me and what brings me before you tonight.

In the past 5 years, we have witnessed the development and maturity of a new kind of regional high seas fishery agreement. These agreements also may be vulnerable under the Convention. Regional internationals agreements are to me the key to improved fishery conservation in the next 25 years. Like the 200-mile limit, regional agreements provide nearby nations, working together and driven by an immediate interest, to form a forum in which to strive for sound conservation and management measures. Some of you, as Ambassador Satya Nandan and I discussed, are familiar with the treaty in the Central Bering Sea, the Doughnut Hole as it is commonly known, which is the patch of international waters between the 200-mile limit off the coast of Russia and 200-limit off of our state of Alaska. Negotiations began in 1998 when the Senate adopted a resolution that I offered to call for a moratorium on fishing in the international waters in the Central Bering Sea. Foreign fishing vessels were using the Doughnut Hole as a staging area for illegal fishing. These vessels would fish on the periphery of the United States or Soviet 200-mile zone and when the enforcement vessels were not looking would dart into our waters and use these large trawl nets with staggering impact on the stocks of Aleutian Basin pollock which were then collapsing. The Senate resolution did lead to initiation of the negotiation between six nations that had' fished in the Doughnut Hole: the United States, Russia, Japan, China, Korea, and Poland.

In 1992, Congress went further, passing another bill that I crafted that would deny U.S. port privileges to any foreign vessel that fished in the Doughnut Hole unless the fishing was done under an agreement to which both the United States and Russia were parties. This law, called the Central Bering Sea Fisheries Enforcement Act, also prohibited U.S. vessels from fishing in the Doughnut Hole in the absence of an international regime. We closed it to everyone. That .was passage of a tough law with enforceable sanctions and, like the passage of the Driftnet Enforcement Act before it, it got the attention of fishing nations. They agreed to a 2-year moratorium on fishing in the Doughnut Hole, and during that time the parties entered intense negotiations.

Even then many observers did not believe an agreement between these different nations was possible or that other nations would respect it. At the end of the 2-year moratorium—in June 1994—the six nations signed a new treaty to conserve and manage pollock within the Central Bering Sea. The Doughnut Hole Treaty set the precedent of authorizing the United States and Russia, as the coastal States nearest the Central Bering Sea, to establish harvest levels for the area if harvest levels could not be agreed to by all six countries. That treaty also set the precedent of allowing officials from Russia and the United States to board vessels suspected of violating the Doughnut Hole agreement. Aleutian basin pollock stocks in the Doughnut Hole are now recovering, and fishing is expected to commence again under a new regional agreement in just a year or two. These stocks could not have recovered without the type of cooperation or the potential sanction that was involved in the action by the U.S. Congress.

We believe the Doughnut Hole Treaty is consistent with the Convention, in particular article 63, dealing with fish stocks that occur both within and beyond a nation's EEZ (which are known, as you know, as "straddling" stocks). Article 63 says that the coastal State and any State whose vessels fish for the straddling stock should seek, either directly "or through appropriate subregional or regional organizations," to conserve the stock. However, the Doughnut Hole Treaty provisions which allow the United States and Russia to set the harvest levels and to board vessels are not specifically addressed by the Convention. If weakened or overturned by the Law of the Sea dispute panel, we would have no recourse for appeal. It would be a major, major setback for the nations of the North Pacific if agreements such as the U.N. driftnet moratorium and the Doughnut Hole Treaty were to be overturned by procedures contained within the Law of the Sea Convention.

Despite these concerns, which I hope you understand, I have always been open to debate on whether the Senate should commence ratification procedures for the Convention. Some argue the United States could be more effective in protecting fishery agreements, which I have addressed tonight, by adopting the Convention. I am willing to listen and willing to be shown that it is true. I am also considering arguments made by those who believe we would be better off by involving ourselves in the initial administrative decisions under the Convention rather than being outside of that process. They mention, for instance, selection of judges for dispute settlement panels. As you know, having been around for more than a quarter century, it does not seem to me that we should ever base a judgment on a convention, treaty, or an act of Congress that derives a temporary security from the participation of particular individuals in the initial administrative decisions. Agreements like the Convention must be clear enough to prevent misinterpretation by succeeding officials. We cannot rely entirely on the decisions and precedents set by the initial participants.

My personal feeling is that, notwithstanding continued reservations, members of the Senate may be and, I believe are, gradually warming up to the idea of ratifying the Convention. Though my focus is on fisheries, the primary reason I think the United States has not joined the Convention still lies in the same place it did in President Carter's days—our concerns about the Convention's deep seabed mining provisions. Proponents, including the present Administration, tell us that the now agreement reached last year on seabed mining addresses these past concerns; the key to Senate ratification is simply to convince those who believe otherwise. The United States was heavily involved in the development of many basic concepts included in the Convention, and, for the most part, I think we all support the Law of the Sea principles. As I said, we have not interfered with the assumption that we should live under those principles as a general agreement with the world.

As you know, there is a negotiation currently underway at the United Nations in New York to address the straddling stock and the highly migratory species issues. I understand that tomorrow morning's panel will address that specifically. It is the position of the United States, and of the Chairman's draft of the proposed treaty, that this new agreement would be consistent with all of the provisions in the Convention. I certainly hope that the final agreement clearly and unequivocally states the position that statement reflects. If the negotiation in New York on the straddling stocks issue is successful in incorporating the advances that have been made through the U.N. moratorium on driftnets and the Doughnut Hole Treaty in a new agreement that is broadly supported, then I think the concerns I have tried to articulate here will have been answered. And hopefully we will obtain similar clarification with respect to the seabed mining issues, which others continually raise as I have indicated. I have not raised, those concerns, but I do believe we should get the clarification so that the Senate of the United States should give its full consent to this Convention that we have all lived with over these past almost 30 years. It is nice to be with you and I appreciate your interest. Thank you very much.

REFERENCE LETTERS TO SENATOR JEFFORDS' OPENING STATEMENT

U.S. COMMISSION ON OCEAN POLICY,
Washington, DC, March 19, 2004.

Hon. JAMES M. JEFFORDS, *Ranking Member,*
Committee on Environment and Public Works,
U.S. Senate,
Washington, DC.

DEAR SENATOR JEFFORDS: Thank you for inviting Commissioner Paul L. Kelly of the U.S. Commission on Ocean Policy to testify before your Committee on the important subject of United States accession to the Unite Nations Law of the Sea Convention.

On October 14, 2003, I appeared before the Senate Committee on Foreign Relations concerning United States accession to the Law of the Sea Convention. I am forwarding herewith a copy of my testimony on that occasion together with associated documents I submitted for the record as additional information which I hope will be helpful to your Committee. Commissioner Kelly and I share the unanimous and strongly held position of all 16 Presidentially appointed members of the U.S. Commission on Ocean Policy in favor of United States accession to the United Nations Law of the Sea Convention.

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

Sincerely,

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

ATTACHMENT

STATEMENT BY ADMIRAL JAMES D. WATKINS, USN (RETIRED), CHAIRMAN, U.S. COMMISSION ON OCEAN POLICY, OCTOBER 14, 2003

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

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

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

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

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

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

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

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

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

Of particular importance is the work of the Convention's Commission on the Limits of the Continental Shelf, which is charged with reviewing claims and making recommendations on the outer limits of the Continental Shelf. This determination will in turn be used to establish the extent of coastal state jurisdiction over Continental

Shelf resources. There are several reasons why direct U.S. participation in this process would be beneficial, namely:

• The LOS Convention sets up the ground rules by which coastal nations may assert jurisdiction over exploration and exploitation of natural resources beyond 200 miles to the outer edge of the continental margin. This is particularly important to the United States, which is one of only a few nations in the world with broad continental margins.

• The continental margins beyond the United States' Exclusive Economic Zone (EEZ) are rich not only in oil and natural gas, but also appear to contain large concentrations of gas hydrates, which may represent an important potential energy source for the future.

• The work of the Continental Shelf Commission in establishing clear jurisdictional limits creates a degree of certainty crucial to capital-intensive deepwater oil and natural gas development projects. Industry representatives stressed to us the importance of this certainty not only for potential investment in energy resource development beyond our own EEZ, but in U.S. industry participation in approved development projects undertaken on other nation's Continental Shelves.

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

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

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

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

The United States is party to many international agreements—including conventions pertaining to vessel safety, environmental protection and fisheries management—which are based directly on the LOS framework. Those United States representatives who participate in the negotiation of these agreements are among the strongest advocates for accession to the LOS Convention.

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

From a security perspective, the LOS Convention provides a balance of interests that protect freedom of navigation and overflight in support of United States' national security objectives. The provisions were carefully crafted during negotiation of the LOS Convention, and reflect the substantial input that the United States had in their development. In particular, the Convention provides core navigational rights through foreign territorial seas, international straits and archipelagic waters, and preserves critical high seas freedoms of navigation and overflight seaward of the ter-

ritorial sea, including in the EEZ. The navigational freedoms guaranteed by the Convention allow timely movement by sea of U.S. forces throughout the world, and provide recognized navigational routes which can be used to expeditiously transport U.S. military cargo—95 percent of which moves by ship.

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

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

There are many other examples of benefits that would be derived from U.S. accession to the LOS Convention. For example, the U.S. research fleet frequently suffers costly delays in ship scheduling when other nations fail to respond in a timely manner to our research requests. Currently, we are not in a position to rely on articles in the Convention that address this issue, such as the "Implied Consent" article (Article 252) that allows research to proceed within 6 months if no reply to the request has been received, and other provisions that outline acceptable reasons for refusal of a research request. Also, as a party to the Convention, the U.S. could participate in the member selection process, including nominating our own representatives, for the International Law of the Sea Tribunal, as well as the Continental Shelf Commission and the various organs of the International Seabed Authority that I have previously mentioned. U.S. accession to the LOS Convention has received bipartisan support from past and current Administrations. On November 27, 2001, Ambassador Sichan Siv, U.S. Representative on the United Nations Economic and Social Council, in his statement in the General Assembly on Oceans and Law of the Sea, said: "Because the rules of the Convention meet U.S. national security, economic, and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the [LOS] Convention." More recently the G–8 Summit held in June, 2003, produced a G–8 Action Plan for Marine Environment and Tanker Safety which stated: "Specifically, we commit to: [1.1] The ratification or acceding to and implementation of the United Nations Convention on the Law of the Sea, which provides the overall legal framework for oceans."

Mr. Chairman, the input received by the U.S. Commission on Ocean Policy reflects a broad consensus among many diverse groups in favor of ratification of the LOS Convention. Over 140 nations are party to the Convention. As I have described, there are many important decisions being made right now within the framework of the Convention which will impact the future of the public order of the oceans and directly impact U.S. interests. Until we are a party to the Convention, we cannot participate directly in the many bodies established under the Convention that are making decisions critical to our interests.

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

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

ATTACHMENTS TO STATEMENT BY ADMIRAL JAMES D. WATKINS, USN (RET.), OCTOBER 14, 2003

COMMISSION ON OCEAN POLICY,
November 28, 2001.

The President,
The White House,
Washington, DC.

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

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

Respectfully,

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

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, DC.

COMMISSION ON OCEAN POLICY,
November 26, 2001.

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

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

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

At the second meeting of the Commission in Washington, DC 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 nonparty status and the benefits of the Convention to the United States.

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 United States in the community of coastal states. The LOS Convention provides that framework for a whole host of jurisdictional issues including the 12-mile territorial sea, the 200-mile Exclusive Economic Zone, and the continental shelf through its full prolongation including those areas where it extends beyond 200 miles.

Although there are many more matters addressed by the Convention that are in the economic and environmental interest of the United States, there are some issues of immediate concern that call for the expeditious consideration of the Convention by your Committee. Specifically, the Continental Shelf Commission established by the Convention has the responsibility to review submissions from coastal states that have continental shelves extending beyond 200 miles to establish the outer limits of their shelves.

The U.S. has one of the broadest continental margins in the world and our oil and gas industry operates not only on our shelf but on the continental shelves of other nations. Thus, a place on the Commission is critical to the protection of our jurisdictional, resource management, and economic interests. Elections to the 21 member Continental Shelf body are scheduled in April of next year. To be in a position to nominate someone to the Continental Shelf Commission, we must be a party to the Convention by February 2002.

This situation also applies to the primary dispute settlement institution of the Commission, the Law of the Sea Tribunal. Seven of the Tribunal's judges will be elected in April and the U.S. must be a party to the Convention if we want to nominate a candidate.

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

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

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

Sincerely,

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

COMMISSION ON OCEAN POLICY,
November 26, 2001.

Hon. JESSE HELM, *Ranking Minority Member,*
Committee on Foreign Relations,
U.S. Senate,
Washington, DC.

DEAR SENATOR HELMS: 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, DC. 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 United States.

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

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

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

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

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

Sincerely,

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

THE SECRETARY OF STATE,
Washington, December 12, 2001.

Admiral JAMES D. WATKINS, USN (Retired), *Chairman,*
Commission on Ocean Policy,
Washington, DC.

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, 2 weeks later, announced at the U.N. 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.

CHIEF OF NAVAL OPERATIONS,
December 5, 2001.

Admiral JAMES D. WATKINS, *USN (Ret),*
Commission on Ocean Policy,
Arlington, VA.

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.

DEPARTMENT OF THE NAVY,
Washington, DC, March 18, 2004.

Hon. JAMES M. JEFFORDS, *Chairman,*
U.S. Senate,
Washington, DC.

DEAR SENATOR JEFFORDS: I write to express my strong support for United States accession to the Law of the Sea Convention. It has been the consistent, longstanding position of the Navy that accession to the Convention will benefit the United States by advancing our national security interests and ensuring continued U.S. leadership in the development and interpretation of the law of the sea.

The Law of the Sea Convention helps assure access to the largest maneuver space on the planet—the sea—under authority of widely recognized and accepted law and not the threat of force. The Convention protects military mobility by codifying favorable transit rights that support our ability to operate around the globe, anytime, anywhere, allowing the Navy to project power where and when needed. The Convention also provides important safeguards for protecting the marine environment while preserving operational freedoms.

Although the Convention was drafted over 20 years ago, the Convention supports U.S. efforts in the war on terrorism by providing important stability and codifying navigational and overflight freedoms, while leaving unaffected intelligence collection activities. Future threats will likely emerge in places and in ways that are not yet known. For these and other as yet unknown operational challenges, we must be able to take maximum advantage of the established navigational rights codified in the Law of the Sea Convention to get us to the fight rapidly. The diversity of challenges to our national security combined with a more dynamic force structure makes strategic mobility more important than ever. The oceans are fundamental to that ma-

neuverability and, by joining the Convention, we further ensure the freedom to get to the fight, twenty-four hours a day and 7 days a week, without a permission slip.

I appreciate your continued strong support of the Law of the Sea Convention and the Navy.

Sincerely,

VERN CLARK,
ADMIRAL, U.S. NAVY.

STATEMENT OF 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"), which, with the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the 1994 Agreement"), was reported favorably by the Senate Foreign Relations Committee on March 11, 2004.

OVERVIEW

Last October five Administration witnesses testified before the Senate Foreign Relations Committee in strong support of the Law of the Sea Convention. I said then, and I reiterate: This Administration has concluded that there are important reasons for the United States to become a party to this Convention and we urge Senate action on it.

The achievement of a widely accepted and comprehensive law of the sea convention to which the United States can become a party has been a consistent objective of successive U.S. administrations for the last thirty years. The United States is already a party to four 1958 conventions regarding various aspects of the law of the sea. While a step forward at the time as a partial codification of the law of the sea, those conventions left some unfinished business; for example, they did not set forth the outer limit of the territorial sea, and they did not contain a dispute settlement mechanism that the United States could use to push back illegal maritime claims of other countries. The United States played a prominent role in the negotiating sessions that culminated in the 1982 Convention, which sets forth a comprehensive framework governing uses of the oceans that is strongly in the U.S. national security, economic, and environmental interest and is supported by affected industries, associations, and environmental groups.

When the Convention was adopted in 1982, the United States recognized that its provisions were favorable to U.S. interests, except for Part XI on deep seabed mining, which I will discuss later on. In 1983 President Reagan announced in his Oceans Policy Statement that the United States accepted, and would act in accordance with, the Convention's balance of interests relating to traditional uses of the oceans. He instructed the Government to abide by all the provisions other than those in Part XI.

Part XI has now been fixed, in a legally binding manner, to address the concerns raised by President Reagan or successive Administrations. We urge the Senate to give its advice and consent to this Convention, to allow us to take full advantage of the many benefits it offers. As noted in the March 1, 2004, letters from State Department Legal Adviser William H. Taft IV to the Chairman and the Ranking Member of the Senate Foreign Relations Committee:

> U.S. law and practice are already generally compatible with the Convention. Except [with respect to the enforcement of certain deep seabed mining decisions, which would be necessary at some point after U.S. accession], 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 .[t]he 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.

JURISDICTION AND NAVIGATION

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 any other Nation from the provisions of the Convention, which 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. U.S. Armed Forces rely on these navigation and overflight rights daily, and their protection is of paramount importance to U.S. national security.

ENVIRONMENTAL INTERESTS

The United States' coastal waters and EEZ 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.

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, in a manner that effectively balances interests of States in protecting the environment and natural resources with their interests in freedom of navigation and communication. The provisions contain a variety of obligations and authorizations relating to coastal States, flag States, and/or all States. As a party, the United States would be able to implement Part XII through a variety of existing U.S. laws, regulations, and practices (including enforcement practices) that are consistent with the Convention and that would not need to change in order for the United States to meet its Convention obligations. For example, because our laws already provide for the protection of rare and fragile ecosystems and the habitat of depleted, threatened, or endangered species, no amendment to the Endangered Species Act or the Marine Mammal Act would be required. Nor would the Convention impose any restrictions or requirements on U.S. citizens in addition to what is already required by statute.

With respect to protection of the U.S. coastal marine environment in particular, I would note that the executive branch, through the Department of Justice, the Department of Homeland Security, 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, including its allocation of enforcement responsibilities among coastal States, flag States, and port States in various situations.

In order to ensure that the relationship between U.S. law and the Convention's enforcement provisions is a seamless one, the Administration recommended, and the proposed resolution of advice and consent contains, a number of understandings that, among other things, harmonize certain domestic terminology with the Conven-

tion and confirm the longstanding right of a State to impose and enforce conditions for entry of foreign vessels into its ports. The Convention's support of a State's ability to exercise its domestic authority to regulate the introduction of invasive species into the marine environment and to regulate marine pollution from industrial operations on board foreign vessels is also highlighted.

LIVING MARINE RESOURCES

As noted, a coastal State has sovereign rights over living marine resources in its exclusive economic zone, i.e., out to 200 nautical miles from shore. The Convention's provisions on fisheries are entirely consistent with U.S. domestic fisheries laws as 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.

CONTINENTAL SHELF

The Convention also 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. It lays down specific criteria and procedures for determining the outer limit of the continental shelf. The Convention improves on the 1958 Continental Shelf Convention by giving all coastal States a continental shelf out to 200 nautical miles, regardless of geology; by allowing for extension of the shelf beyond 200 nautical miles if it meets certain geological criteria; and by providing more precise standards (favorable to the United States) to replace the 1958 "exploitability" standard.

By becoming party to the Convention, the United States would be better able to protect its interests in several ways, including by nominating a U.S. citizen to serve on the Commission on the Limits of the Continental Shelf, and by submitting data on our very extensive continental shelf beyond 200 miles to establish the outer limits as final and binding in accordance with article 76(8).

The Convention also protects the freedom to lay submarine cables and pipelines, of increasing importance to global communications, whether military, commercial, or research. Its provisions are favorable to U.S. security and economic interests. The United States would retain the right under the Convention to set conditions for cables and pipelines entering our territorial sea, as well as for those used in connection with oil and gas activities on our continental shelf.

DEEP SEABED MINING

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. Informal negotiations were launched in 1990 during the first Bush Administration, under the auspices of the United Nations Secretary General, and continued into 1994. The Agreement, signed by the United States on July 28, 1994, contains legally binding changes to that part of the Convention dealing with mining of the deep seabed beyond the limits of national jurisdiction. It is to be applied and interpreted together with the Convention as a single instrument.

The changes set forth in the 1994 Agreement meet our goal of guaranteed access by U.S. industry to deep seabed minerals on the basis of reasonable terms and conditions. The Agreement overhauls the decisionmaking 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 United States is guaranteed a seat on the critical decisionmaking body; no substantive obligation can be imposed on the United States, and no amendment can be adopted, without its consent.

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. The International Seabed Authority has no regulatory role other than administering the mining regime, and no ability to levy taxes.

A future decision, which the United States and other investors 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. Of particular importance, 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 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.

DISPUTE SETTLEMENT

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, providing options 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 is pleased that its recommendation that the United States elect arbitration under Annex VII and special arbitration under Annex VIII is included in the proposed Resolution of Advice and Consent. I would note that, while the Administration previously raised a concern regarding dispute resolution, that concern has been satisfactorily addressed by the proposed Resolution.

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 is similarly pleased that the proposed Resolution of Advice and Consent follows its recommendation that the United States elect to exclude all three of these categories of disputes from dispute settlement mechanisms.

The ability of a party to exclude disputes concerning military activities from dispute settlement has long been of importance to the United States. The U.S. negotiators of the Convention sought and achieved language that creates a very broad exception, successfully defeating attempts by certain other countries to narrow its scope. The United States has consistently viewed this exception as a key element of the dispute settlement package, which carefully balances comprehensiveness with protection of vital national interests.

The Administration recommended, and the proposed Resolution includes, a statement that our consent to accession to the Convention is conditioned on the understanding that each State Party has the exclusive right to determine whether its activities are or were "military activities," and that such determinations are not subject to review. Disputes concerning military activities, including intelligence activities, would not be subject to dispute settlement under the Convention.

REASON TO JOIN

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

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

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

• While we have been able to rely on diplomatic and operational challenges to excessive maritime claims, it is desirable to establish additional methods of resolving conflict.

• The Convention is being implemented in various forums, both those established by the Convention and certain others (such as the International Maritime Organization). While the Convention's institutions were not particularly active during the past decade since the Convention entered into force, they are now entering an operational phase and are elaborating and interpreting various provisions. The United States would be in a stronger position to defend 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.

• As a party, the United States could get the legal certainty with respect to its continental shelf claim beyond 200 miles that will facilitate activities in those areas by the U.S. oil and gas industry.

• 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. It is worth noting that the Convention will be open to amendments beginning next November. 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 20 years largely due to the Convention's stable, widely accepted legal framework. It would be risky to assume that it is possible to preserve indefinitely the stable situation that the United States currently enjoys. Customary international law may be changed by the practice of States over time and therefore does not offer the future stability that comes with being a party to the Convention.

RESPONSES TO ARGUMENTS AGAINST

Certain arguments have recently been put forward suggesting that it would not be in the U.S. interest to join the Convention. I would like to address these arguments in turn.

President Reagan thought the treaty was irremediably defective

• President Reagan expressed concerns only about Part XI's deep seabed mining regime.

• In fact, he believed that Part XI could be fixed and specifically identified the elements in need of revision.

• The regime has been fixed in a legally binding manner that addresses each of the U.S. objections to the earlier regime.

• The rest of the treaty was considered so favorable to U.S. interests that, in his 1983 Ocean Policy Statement, President Reagan ordered the Government to abide by the non-deep seabed provisions of the Convention.

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

• The 1994 Agreement contains legally binding changes to the Convention.

• The Convention could only have been "amended" if it had already entered into force.

• It would not have been in our interest to wait until the Convention entered into force before fixing it, as it would have been more cumbersome to effectuate the changes that we sought.

• The Agreement unambiguously changes Part XI in a legally binding manner.

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

• Each objection has been addressed.

• Among other things, the 1994 Agreement:

  • provides for access by U.S. industry to deep seabed minerals on the basis of non-discriminatory and reasonable terms and conditions;

  • overhauls the decisionmaking rules to accord the United States critical influence, including veto power in some cases, over future decisions;

  • restructures the regime to comport with free-market principles, including the elimination of the earlier mandatory technology transfer provisions and all production controls.

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

• It is not true that our navigational freedoms are not threatened. There are more than one hundred illegal, excessive claims affecting vital navigational and overflight rights and freedoms.

• The United States has utilized diplomatic and operational challenges to resist the excessive maritime claims of other countries that interfere with U.S. navigational rights under customary international law as reflected in the Convention. But these operations entail a certain amount of risk e.g., the Black Sea bumping incident with the former Soviet Union.

• Being a party to the Convention would significantly enhance our efforts to roll back these claims by, among other things, putting the United States in a far stronger position to assert our rights and affording us additional methods of resolving conflict.

The Convention gives the U.N. its first opportunity to levy taxes

• The Convention does not provide for or authorize taxation of individuals or corporations. There are revenue sharing provisions for oil/gas activities on the continental shelf beyond 200 miles and administrative fees for deep seabed mining operations. The amounts involved are modest in relation to the total economic benefits, and none of the revenues would go to the United Nations or be subject to its control. U.S. consent would be required for any expenditure of such revenues.

The Convention mandates another tribunal to adjudicate disputes

• The Convention established the International Tribunal for the Law of the Sea. However, Parties are free to choose other methods of dispute settlement. The United States would elect two forms of arbitration rather than the Tribunal.

• The United States would be subject to the Sea-bed Disputes Chamber, should deep seabed mining take place under the regime established by the Convention. The proposed Resolution of Advice and Consent, however, makes clear that the Sea-bed Disputes Chamber's decisions "shall be enforceable in the territory of the United States only in accordance with procedures established by implementing legislation and that such procedures shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States."

Other Parties will reject the U.S. "military activities" declaration as a reservation

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

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

• Under the Convention as amended by the 1994 Agreement there is no transfer of wealth and no surrender of sovereignty.

• In fact, the Convention supports the sovereignty and sovereign rights of the United States over extensive maritime territory and natural resources off its coast, including a broad continental shelf that in many areas extends well beyond the 200-nautical mile limit.

• The mandatory technology transfer provisions of the original Convention, an element of the Convention that the United States objected to, were eliminated in the 1994 Agreement.

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

• The Convention addresses seven-tenths of the earth's surface. However, the International Seabed Authority (ISA) does not.

• The authority of the ISA is limited to administering mining of minerals in areas of the deep seabed beyond national jurisdiction, generally more than 200 miles from the shore of any country. At present, and in the foreseeable future, such deep seabed mining is economically unfeasible. The ISA has no other role and has no general regulatory authority over the uses of the oceans, including freedom of navigation and overflight.

• The ISA has no authority or ability to levy taxes.

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

• It is true that the Convention was drafted before the war on terror. However, the Convention does not prevent the United States from waging a successful war on terror.

• On the contrary, maximum maritime naval and air mobility that is currently assured by the Convention is essential for our military forces to operate effectively. The Convention provides the necessary stability and framework for our forces, weapons, and materiel to get to the fight without hindrance and is the best guarantee that our forces will not be hindered in the future.

• Thus, the Convention supports our war on terrorism by providing important stability for navigational freedoms and overflight. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements. It is essential that key sea and air lanes remain open as an international legal right and not be contingent upon approval from nations along the routes. A stable legal regime for the world's oceans will help guarantee global mobility for our Armed Forces.

The Convention adversely affects activities to be undertaken pursuant to the Proliferation Security Initiative

• On the contrary, joining the Convention would strengthen PSI efforts.

• PSI's own rules require that PSI activities be consistent with relevant international law and frameworks, which include the Convention's navigation provisions.

• The Statement of Interdiction Principles pursuant to which the PSI operates explicitly specifies that interdiction activities under PSI will be undertaken "consistent with national legal authorities and relevant international law and frameworks." The relevant international law framework for PSI includes customary international law that is codified in the Law of the Sea Convention.

• The Convention provides solid legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of WMD, e.g., exclusive port and coastal State jurisdiction in internal waters and national airspace; coastal State jurisdiction in the territorial sea and contiguous zone; exclusive flag State jurisdiction over vessels on the high seas (which the flag State may, by agreement, waive in favor of other States); and universal jurisdiction over stateless vessels.

• All of the United States' partners in the PSI are parties to the Convention and accordingly observe its provisions.

• As Admiral Michael Mullen, Vice Chief of Naval Operations, testified before the Foreign Relations Committee, being party to the Convention "would greatly strengthen [the Navy's] ability to support the objectives" of PSI by reinforcing and codifying freedom of navigation rights on which the Navy depends for operational mobility.

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

• No technology transfers are required by the Convention. Mandatory technology transfers were eliminated by Section 5 of the Annex to the Agreement amending Part XI of the Convention.

• Article 302 of the Convention provides that nothing in the Convention requires a party to disclose information the disclosure of which is contrary to the essential interests of its security.

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

• We are not aware of any claims by China to a 200-mile economic zone around its artificial islands.

• Any claim that artificial islands generate a territorial sea or EEZ has no basis in the Convention.

• The Convention specifically provides that artificial islands do not have the status of islands and have no territorial sea or EEZ of their own. Sovereignty over certain Spratly Islands (which do legitimately generate a territorial sea and EEZ) is disputed among Brunei, China, Malaysia, the Philippines, and Vietnam. China has consistently maintained that it respects the high seas freedoms of navigation through the waters of the South China Sea.

The Convention, specifically articles 19 and 20, prohibit two functions vital to American security: collecting intelligence in, and submerged transit of, territorial waters

• This assertion is not correct.

• The Convention does not prohibit U.S. intelligence activities, nor would it have any negative effect on those activities.

• In the 1958 Convention, Article 14 provides that passage is innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State" and that "submarines are required to navigate on the surface and to show their flag."
• The United States is already a party to the 1958 Territorial Sea Convention, which contains provisions very similar to articles 19 and 20 of the 1982 Convention.
• The 1982 Convention's specification of activities that are considered to be "prejudicial to the peace, good order, or security of the coastal State" are more favorable than the provisions of the 1958 Convention both because the list of activities is exhaustive and because it generally uses objective, rather than subjective, criteria in the listing of activities.
• Since President Reagan's 1983 Oceans Policy Statement, the United States has conducted its activities consistent with the non-deep seabed provisions of the 1982 Convention.
• U.S. accession to the Convention supports ongoing U.S. military operations, including the continued prosecution of the war on terrorism.

CONCLUSION

As of today, 145 parties, including almost all of our major allies, have joined the Convention. It is in the interest of the United States to become a party to the Convention, because of the military, economic, and environmental 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. The Administration recommends that the Senate give its advice and consent to accession to the Convention and ratification of the Agreement, on the basis of the proposed Resolution of Advice and Consent.

Thank you very much.

RESPONSES BY JOHN F. TURNER TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1a. Article 2(3) of the Treaty states "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."

What is your interpretation of this provision?

Response. This provision, which is the same as article 1(2) of the 1958 Convention on the Territorial Sea and Contiguous Zone, to which the United States is already a party, means that a coastal State's sovereignty over the territorial sea is qualified in two ways: by other provisions of the Convention and by other rules of international law.

Question 1b. Do you think all parties of this Treaty will interpret this provision the same?

Response. We have no reason to believe that this interpretation would not be shared by all Parties. The other provisions of the Convention provide for rights of passage—innocent passage, transit passage through straits, and archipelagic sea lanes passage—that are critical to U.S. global mobility, national security, and economic interests.

Question 1c. How could this Treaty interfere with the United States' sovereign exercise of freedom of the seas and in what ways will that have an adverse effect on national security and the environment?

Response. Article 2(3) would not have an adverse effect on national security and the environment. On the contrary, the rights of passage to which it refers advance the interests of the United States. And the Convention advances U.S. military and commercial interests in freedom of navigation and U.S. interests in protecting the marine environment both off our own coastline and globally.

Question 2. Do you believe it is in the best interest of the United States to vest control of seabed mining operations in countries which lack the necessary technology and capital to conduct such operations themselves?

Response. Part of the objection of President Reagan and subsequent Administrations to the original Part XI of the Convention was in fact to the decisionmaking structure. However, the Convention as modified by the 1994 Agreement, which the United States would be joining, fundamentally changes the decisionmaking structure to give the United States and other industrialized countries influence commensurate with their political and economic situations.

Question 3. Do you believe the Treaty's structure of decisionmaking is in the best political and economical interests of the United States? Please explain in detail.

Response. It is assumed that you are referring to the Convention's deep seabed mining institutions, because decisionmaking is not a factor regarding the bulk of the Convention's provisions. The decisionmaking structure applicable to Part XI of the Convention has been fundamentally overhauled by the legally binding 1994 Agreement to accord the United States, and others with major economic interests at stake, decisive influence over decisions regarding deep seabed mining. The United States would be guaranteed a seat on the critical executive body, so that any deep seabed mining regulations or amendment to the regime would require U.S. agreement. The United States has a guaranteed seat for the foreseeable future on the Finance Committee, in which a consensus of major contributors is required for decisions with financial or budgetary implications. Joining the Convention and Agreement, far from hurting our deep seabed mining interests, will facilitate them.

It is important to note that the alternative to the modified deep seabed mining regime reflected in the Convention and Agreement is not that U.S. companies can engage in deep seabed mining without going through the Convention's institutions; rather, to get the legal certainty they need, U.S. companies would have to go through the Seabed Authority—but under the auspices of another country that is a party. It is also important to note that, while some seem to be asserting that the deep seabed mining institutions will somehow encroach on U.S. sovereignty, the United States has never asserted sovereignty or sovereign rights with respect to seabed areas beyond national jurisdiction or to mineral activities thereon.

Question 4. Do you believe that by acceding to the Treaty the United States would gain an adequately effective bargaining position to protect its current and future national policies and interests relating to national defense, seabed mining and environmental protection? Please explain in detail.

Response. The United States would in fact maximize its "bargaining position" in those areas by joining the Convention. Regarding national defense, while we have been able to enjoy certain navigational benefits of the Convention through customary international law, the United States would be in a stronger position to promote and defend its navigational rights by putting them on firm treaty footing and by strengthening the authority of our views concerning the application and interpretation of the Convention provisions reflecting the rights upon which our mobility depends.

Regarding exploitation of resources of the continental shelf beyond 200 miles, the Convention would promote U.S. energy and other economic interests by providing for coastal States to be able to establish an outer limit that gives legal certainty to investors; as a party, we would also be in a position to nominate an American expert for the Commission that plays a significant role in that process.

Regarding deep seabed mining, the United States, as a party, would certainly enhance its bargaining power through, among other things, a permanent seat on the Council, the key decisionmaking body. Concerning environmental protection, the United States has a strong interest in maintaining the Convention's balance between effective environmental protection and other uses of the oceans, including navigational freedoms; as a party, we would be in a stronger position to promote and maintain this balance.

Question 5. Despite the clear requirements in Articles 208 and 210 of the Treaty which specify that related national laws must be "no less effective" than international rules, standards and recommended practices and procedures, the Committee received testimony to the effect that the United States would not be required to change any of its environmental laws to be in compliance with the Treaty. Are you certain that the Treaty could not be used to impose restrictions or requirements on the United States to limit or expand current or future U.S. laws and policies?

Response. There are currently no applicable international standards regarding the subject matter covered by article 208, namely pollution from sea-bed activities subject to national jurisdiction. With respect to ocean dumping under article 210, the United States is a party to, and implements, the 1972 London Convention, which reflects the long-established global regime addressing pollution of the marine environment by dumping. Internationally agreed rules in the case of sea-bed activities or international acceptance of new global rules in the case of ocean dumping would not be achievable without the endorsement of the United States, the State with the largest EEZ and the world's dominant maritime power.

Question 6. Article 212 of the Treaty requires States to adopt laws and regulations for pollution from the atmosphere. How would the United States' domestic policy need to be changed or altered to comply with the international laws, regulations, and recommended practices to address these concerns? And does this mean that other countries can use this provision to force the United States to regulate $C0_2$?

Response. Article 212 does not require States to "comply" with international laws, regulations, or recommended practices, does not require any particular domestic standards, and would not require any change in U.S. domestic law or policy concerning pollution from or through the atmosphere, including with respect to carbon dioxide. There would be no legal basis under the Convention to force the regulation of carbon dioxide, including because the atmospheric pollution obligation under article 212 is not subject to dispute settlement under article 297(1)(c) of the Convention.

Question 7a. In your written testimony submitted to the Committee, you state that "our laws already provide for the protection of rare and fragile ecosystems and the habitat of depleted, threatened, or endangered species." However, the protections of the Endangered Species Act only affect those species listed as "threatened" or "endangered" and does not describe or include "depleted" species as mentioned in the Treaty under Article 194. What U.S. environmental law were you referring to in your written testimony that already protects depleted species?

Response. The Marine Mammal Protection Act (MMPA) of 1972, 16 U.S.C. 1361 et seq., provides statutory authority for protecting "depleted" marine mammals. The terms "depleted" and "depletion" are defined in 16 U.S.C. 1362(1) to apply to species or populations determined to be below their optimum sustainable population, or to species listed as "endangered" or "threatened" under the Endangered Species Act (ESA). Some depleted marine mammal species are listed under the ESA; some are not. For those that are not, the relevant Federal agency must prepare a conservation plan, under 16 U.S.C. 1383b(b), that is modeled on recovery plans required under the ESA, 16 U.S.C. 1533(f). The conservation plan may include measures to protect the habitat of marine mammal species.

Question 7b. The Federal Government is already constantly involved in the litigation-driven designation of critical habitat for species listed under the Endangered Species Act. Does the inconsistency between the Treaty and current U.S. law have any potential for mandating the current or future expansion of U.S. species protection? If so, how are we to know what species fall under this new, undefined category of "depleted" species?

Response. The MMPA also provides authority to implement conservation or management measures to alleviate impacts on rookeries, mating grounds, or other areas of similar ecological significance to marine mammals. 16 U.S.C. 1382(e). There is no inconsistency between the treaty and current U.S. law. Depleted species are listed at 50 CFR 216.15.

Question 8a. The Treaty would impede marine scientific research in that a costal State could object to granting a ship access in its territorial sea unless the ship is just passing through. For example, as Mr. Gaffney pointed out in his testimony, Russia has denied access to its territorial sea for ships conducing marine scientific research.

How would this Treaty ensure that research could be conducted if there is a difference of interpretation or opinion by another Nation and that Nation can object to a ship's access to its territorial sea?

Response. Coastal States have sovereignty over the territorial sea, subject to certain qualifications (such as the rights of innocent passage, transit passage, and archipelagic sea lanes passage). This sovereignty includes the exclusive right to regulate, authorize, and conduct marine scientific research, which is exercised by the United States as a coastal State with respect to its territorial sea. While the extent to which foreign flag vessels can conduct marine scientific research in the territorial sea is up to the coastal State, coastal States do not have the right to object to "access" per se, i.e., passage that comports with the requirements for innocent, transit, or archipelagic sea lanes passage, as the case may be.

Question 8b. What are the implications for military and intelligence research?

Response. Marine scientific research does not include military/intelligence research, and the marine scientific research provisions of the Convention do not apply. At the same time, if a foreign vessel wanted to take advantage of the right of innocent passage, research or survey activities would be considered activities prejudicial to the peace, good order, or security of the coastal State under article 19.

RESPONSES BY JOHN F. TURNER TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. What is the meaning and legal effect of Article 2, section 3 of the Convention, which states that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law"? If the United States

accedes to the 1982 Convention and ratified the 1994 Agreement, could this provision be used in any way to limit the sovereignty of the United States?

Response. This provision, which is the same as article 1(2) of the 1958 Convention on the Territorial Sea and Contiguous Zone, to which the United States is already a party, means that a coastal State's sovereignty over the territorial sea is qualified in two ways: by other provisions of the Convention and by other rules of international law. The other provisions of the Convention provide for rights of passage—innocent passage, transit passage through straits, and archipelagic sea lanes passage—that are critical to U.S. global mobility, national security, and economic interests. Article 2(3) of the Convention will not limit the sovereignty of the United States if we join the Convention; the United States is already bound by the provision under the 1958 Convention, and it also reflects customary international law.

Question 2. If the United States accedes to the Convention and ratifies the 1994 Agreement, what will be the legal effect of any declarations and understandings contained within a Senate resolution of advice and consent?

Response. The declaration under article 287 will establish the means chosen by the United States (arbitration and special arbitration) for the settlement of various disputes under the Convention. The declaration under article 298 will establish that the United States does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to specified categories of disputes and will condition its consent to accession to the Convention 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.

With respect to the understandings and declarations under article 310, the understandings are designed to clarify, or harmonize U.S. law with, certain provisions of the Convention; the declarations are statements of purpose, policy, or position. Neither the understandings nor the declarations purport to exclude or modify the legal effect of the provisions of the Convention.

Question 3. Could you clarify the scope attending the imposition of corporal punishment and imprisonment under Article 230, section 2? My understanding is that this provision, as clarified by understanding 11 in section three of the resolution of advice and consent passed out of the Senate Foreign Relations Committee, would require the United States to show gross negligence and a "serious" act of pollution before seeking imprisonment under the criminal penalties provisions of the Clean Water Act for acts of pollution committed by an operator or crew member of a foreign vessel in the U.S. territorial sea in cases where the vessel is not traveling to a U.S. port. Is this consistent with current U.S. enforcement practices under the Clean Water Act? Are there any circumstances in which the provision could be used to restrict statutory authority regarding the imposition of criminal penalties under the Clean Water Act or any other relevant statute?

Response. The executive branch, through the Department of Justice, the Coast Guard, and EPA, 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 the provision you refer to. The United States has been able to maintain an effective marine pollution enforcement program consistent with the Convention's provisions.

There are a variety of U.S. environmental statutes that regulate pollution 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 proposed understanding, we interpret the references to "monetary penalties only" to exclude only imprisonment [and corporal punishment] and not the range of other administrative, civil, and criminal penalties, sanctions, and other remedies available under domestic statutes. The "wilful and serious" standard 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; U.S. interpretations of key terms (as reflected in the proposed understandings) will harmonize the terminology; and, as noted above, U.S. enforcement practices have been consistent with the Convention's provisions.

Question 4. You stated in your prepared statement that "[a]s a party, the United States would be able to implement Part XII through a variety of existing U.S. laws, regulations, and practices (including enforcement practices) that are consistent with the Convention and that would not need to change in order for the United States to meet its Convention obligations." This statement could be read to suggest that if there are U.S. laws, regulations, and practices that are not consistent with the Convention, such laws, regulations, or practices might need to change. Could you clarify for the record whether any existing U.S. laws, regulations, or practices would need to change in order for the United States to meet its Convention obligations?

Response. The statement was intended to mean that the applicable U.S. laws, regulations, and practices (including enforcement practices) are consistent with the Convention. It was not intended to refer only to a subset of such laws/regulations/practices that are consistent with the Convention. As noted in the answer to Question 3, consistent with policy since 1983 to apply the non-deep seabed provisions of the Convention, U.S. practice has been to enforce U.S. marine pollution laws against foreign flag vessels in a manner consistent with the Convention's provisions.

RESPONSE BY WILLIAM H. TAFT IV TO AN ADDITIONAL QUESTION FROM SENATOR INHOFE

Question. As a non-party to the Convention, we are allowed to search any ship that enters this 200-nautical mile area to determine if it could harm the United States or pollute the marine environment. Under the Convention, the U.S. Coast Guard or others would not be able to search any ship until the U.N. is notified and approves the right to search the ship. Is that accurate?

Response. Our answer to that question is that the description of the Convention's provisions on this question is not correct. The basic rules for boarding and searching foreign ships at sea contained in the 1958 Geneva Conventions on the Law of the Sea, to which the United States is a party, are unchanged in the 1982 Convention on the Law of the Sea. The law of the sea gives no role in the U.N. in deciding when and where a foreign ship at sea may be boarded.

The 1982 Convention provides additional authority for a coastal State to board a foreign ship in its exclusive economic zone if the ship is suspected of violating its laws for the protection of the marine environment.

As stated in the resolution of advice and consent now before the Senate, nothing in the Convention impairs the inherent right of individual or collective self-defense or rights during armed conflict.

STATEMENT OF FRANK GAFFNEY JR., PRESIDENT AND CEO, THE CENTER FOR SECURITY POLICY

Mr. Chairman, Members of the Committee: It is a commonplace for witnesses to express their appreciation for the opportunity to testify before this and other panels of the U.S. Congress. Rarely, I suspect, has such an expression been more heartfelt than is mine today. After all, but for Senator Inhofe's initiative, the Senate may well have taken no testimony at all from critics of the Law of the Sea Treaty (LOST) before this body was asked to debate its merits and consent to its ratification.

Such a situation would be a travesty in terms of Senate procedure and would effectively have precluded what has rightly been called "the World's greatest deliberative body" from being able to deliberate on this immensely significant accord in an informed way. As a former legislative assistant for Senator Henry M. Jackson and professional staff member for the Armed Services Committee during the chairmanship of Senator John Tower, I have enormous respect for the Senate's constitutional responsibility to provide a "sanity-check" on international treaties. That role simply cannot be properly performed if, as the Senate Foreign Relations Committee insisted, only official and other supporters of the treaty are permitted to discuss its attributes.

Therefore, Mr. Chairman, please accept my grateful appreciation for your efforts to ensure that the record will reflect not only the enthusiasm for this treaty expressed by its admirers, but also the considered opinions of Americans who believe the Law of the Sea Treaty to be fatally flawed and inconsistent with our national interest.

I am by training and experience a specialist in national security matters, not the environment. As it happens, some of the concerns I have about LOST's defects with respect to the former could also have adverse repercussions of an environmental nature. In this brief testimony, I will try to highlight the Treaty's deleterious implications for the Nation's military, intelligence and self-defense capabilities while focusing principally on what might be called its negative "environmental impacts."

UNWISELY EMPOWERING THE U.N.

The first such impact will flow from the mandate the Law of the Sea Treaty provides for a supranational agency to regulate seven-tenths of the world's surface. This agency, known as the International Seabed Authority (ISA), has the exclusive right to regulate what is done, by whom, when and under what circumstances in subsurface international waters and on the sea-floor. In addition, it will have considerable say over what goes on upon the oceans' surface, as well. As with all such organizations, it will be staffed by unelected and unaccountable international bureaucrats.

Unlike other, far less powerful U.N. entities, however, the International Seabed Authority will operate without the benefit of what amounts to "adult supervision" provided by the Security Council. The United States will be, at best, one among many countries represented in the ISA. Conceivably, due to membership rotation, there could be times when it might not even have a vote to say nothing of a veto over decisions taken by that body.

OVERRIDING U.S. ENVIRONMENTAL CONCERNS AND PRACTICES?

What might such decisions entail? Thanks to the regulatory powers granted by the Law of the Sea Treaty, the ISA could decide, for example, to issue permits for deep-sea oil or gas exploration and exploitation just beyond our 200-mile Exclusive Economic Zone—without regard for the views of members of this Committee, the Congress more generally or the American people who may consider such activities to be environmentally unsound.

Not only could those concerns be shunted aside as the United States would be, at best, outvoted. An international tribunal created to adjudicate and enforce ISA decisions could levy penalties for any efforts to impede such activities once authorized by the International Seabed Authority even if we had reason to be fearful that such activities posed an environmental hazard to our coastal areas. Worse yet, the ISA and its tribunal are authorized to ask member states to enforce its judgments, possibly leading to conflict.

Environmental implications could be exacerbated by the ISA's authority to apportion drilling and mining rights to other nations who may be less scrupulous than American companies in complying with environmental standards and practices this country holds dear. Such apportioning could occur even in situations where this country's companies provide the research, seed investment and fees the first a U.N. agency has ever been allowed to levy associated with securing the required ISA permits.

AN INVITATION TO WORLD-CLASS GRAFT?

Worries about the sorts of decisions U.N. bureaucrats might make that could harm American environmental and other equities have only been heightened by recent press accounts. According to successive investigative reports in the Wall Street Journal, there is evidence of systemic corruption and malfeasance on the part of senior U.N. personnel—and, in the case of the Secretary General, one of his relatives—in connection with the Iraq Oil-for-Food programs. The House International Relations Committee has announced its intention to investigate this evidence. The Senate would be well-advised to conduct its own inquiry.

At the very least, I would respectfully submit that Senators cannot responsibly act on the Law of the Sea Treaty until they can satisfy their constituents that turning over to a new U.N. bureaucracy the authority to make decisions about and generate revenues from what could be billions of dollars worth of ocean-related commerce will not amount—literally—to a license to steal on an unprecedented scale.

ERODING AMERICA'S RULE OF LAW

Even if LOST could somehow be prevented from enabling a massive new U.N. kleptocracy, it will likely have a corrupting effect on one of our most cherished principles: the rule of law.

The rulings of the tribunal set up by the Law of the Sea in Hamburg, Germany will, after all, have implications for more than our sovereignty and environment.

They could effectively supplant the constitutional arrangements that govern this Nation.

Even without LOST, as Judge Robert Bork has recently noted, U.S. courts have begun to inject the decisions of international judges and judicial bodies into domestic legal proceedings. LOST and its tribunal could accelerate this phenomena, corroding one of our Republic's more fundamental principles namely, that American laws duly fashioned by Congress and signed by the President form the ambit within which U.S. jurisprudence predictably operates.

DISARMED AGAINST ENVIRO-TERRORISM?

Yet another "environmental impact" could arise from limitations the treaty imposes on measures we might take to assure our national security and homeland defense. If, for instance, foreign vessels operating on the high seas do not fit into one of three categories (i.e., they are engaged in piracy, flying no flag or transmitting radio broadcasts), LOST would prohibit U.S. Navy or Coast Guard vessels from intercepting, searching or seizing them.

As you know Mr. Chairman, such constraints would preclude President Bush's most important recent counterproliferation measure—the Proliferation Security Initiative (PSI). The same would be true, however, if the crew of the foreign ship was engaged not in the sort of activity the PSI is meant to interrupt (namely, the covert transfer of weapons of mass destruction and/or related equipment), but in the shipment of heavy crude oil or other toxic materials that could cause an environmental disaster were the vessel to be blown up or scuttled in or near our waters.

IMPEDING RESEARCH ON GLOBAL WARMING?

Finally, I understand that the Russian government is taking the position that U.S. surface vessels may not engage in research concerning global warming—a subject I know to be of considerable interest to you, Mr. Chairman and other members of this Committee—within the Arctic waters they have declared, pursuant to this treaty, to be part of their territorial waters and Exclusive Economic Zone. I am informed that such data collection could be vital to the President's efforts and yours to understand the true nature, extent and implications of global warming.

We could, of course, assign this collection task to submerged submarines. The U.S. Navy (which officially supports this treaty) is understandably reluctant to do this, however, given myriad, competing demands on these vessels' time at sea. There is also the problem that LOST deems submerged transit and collection of intelligence (an activity for which the Russians might consider "global warming research" to be but a cover) inside territorial waters to be inconsistent with the Treaty's requirement that foreign vessels conduct themselves in such waters only with "peaceful intent."

In short, our adherence to the Law of the Sea Treaty would legitimate Russia's objections to our research in important areas of the Arctic and complicate our ability to perform it there.

THE BOTTOM LINE

Unfortunately, considerations like those I have mentioned are only part of what makes the Law of the Sea Treaty incompatible with U.S. national interests. I would ask that I be permitted to provide for the record several articles that I have recently written that amplify on my concerns with respect to LOST's defects from a national security and intelligence perspective.

Suffice it to say, Mr. Chairman, a number of other Senate committees would be very well-advised to emulate your initiative in examining the Law of the Sea Treaty's implications for their respective oversight portfolios. While staff of the Senate Armed Services Committee have indicated that Chairman Warner intends to hold a hearing on this subject next week, the Intelligence, Commerce, Energy, Governmental Affairs and Finance Committees have yet to evidence any interest in following suit.

Given the stakes for the Nation's equities in the areas for which these panels are responsible, a failure to examine the sorts of hard questions I have raised with you today is tantamount to a dereliction of duty. I very much hope, Mr. Chairman, that your leadership in affording an opportunity for such questions to be posed before this important Committee will encourage your counterparts and colleagues also to subject the Law of the Sea Treaty to the critical examination it so clearly requires.

Such reviews will, I am confident, serve further to underscore the points I have made here today about the inadvisability of U.S. ratification of the Law of the Sea Treaty. I recommend that the full Senate not consider this accord until they are completed. I further respectfully suggest that, once the necessary oversight has been

performed, Senators vote to reject this clearly defective treaty on national security, sovereignty and economic, as well as environmental, grounds.

RESPONSES BY FRANK J. GAFFNEY, JR. TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1a. Article 2(3) of the Treaty states "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." What is your interpretation of this provision?

Response. This particular provision seems likely to be interpreted as subjecting even the limited area of supposedly sovereign territorial sea (extending 12 nautical miles offshore) to interference by the Law of the Sea regime. On its face, Article 2 (3) specifically incorporates this area within the jurisdiction of the International Tribunal for the Law of the Sea and its subsidiary arbitral tribunals.

Question 1b. Do you think all parties of this Treaty will interpret this provision the same?

Response. Undoubtedly, states parties to the Treaty who wish to constrain U.S. freedom of action will interpret this provision—among many others—differently than will the United States in the hope of achieving their objective. Non-state actors, moreover, will also likely seek to interpret such provisions in a manner at odds with the U.S. interpretation and inimical to the Nation's interests.

Question 1c. How could this Treaty interfere with the United States' sovereign exercise of freedom of the seas and in what ways will that have an adverse effect on national security and the environment?

Response. The Treaty could be interpreted to place all activities on, under and over the world's oceans—and even those occurring entirely on sovereign territory—under the jurisdiction of mandatory, binding dispute settlement mechanisms (the Tribunal or arbitral tribunals). Were the United States to become a party to this treaty, it would allow sovereign control of such activities to be eroded, if not effectively taken out of American hands altogether.

It is particularly worrisome that these tribunals are certain to be politicized and will likely prove to have majorities hostile to U.S. interests. They will, consequently, lend themselves to being used to curtail activities vital to American security by, for example: prohibiting certain intelligence collection activities in territorial waters; impeding the interdiction of ships carrying WMD to rogue states and terrorists; and compelling the transfer of sensitive, military useful technologies and information. In addition, the Law of the Sea's tribunals and arbitral panels will likely be used to impose long-sought environmental regulations on the United States that could not be gained through normal diplomatic processes.

Question 2. What are your thoughts about developing countries having the capabilities to implement international laws relating to issues of our national security as well as regulating the marine environment?

Response. It is inconsistent with American traditional practice and vital interests and most ill-advised for the United States to enter into a multilateral agreement that could impinge upon its ability to project power and otherwise to safeguard its equities on, under or above the world's oceans. This Treaty, however, was designed by an anti-American majority—one that repeatedly outvoted and outmaneuvered the United States in the drafting of the document, to the detriment of American sovereignty and security. The U.S. should not become party to such an accord.

Question 3. What are the implications for the U.S. of acceding to the Treaty and becoming a member of the International Seabed Authority?

Response. The International Seabed Authority (ISA) provides a vehicle for forcing advanced industrialized states to obtain permission from developing ones before extracting certain resources from seabeds under international waters—resources that, in the absence of the Treaty, industrialized states or their private companies could exploit to the extent permitted by their technology, resources and ingenuity. Put differently, American miners must have the permission of the ISA before they exploit the seabed.

Taken to its logical conclusion, this represents an unprecedented surrender of U.S. flexibility and inherent Executive authority to an international organization. It is a firm break with the Nation's entrepreneurial traditions. It also positions the ISA as the nascent high seas sovereign.

The ISA would also indirectly tax Americans by removing profits from the American business revenue stream for a governmental purpose—namely, to pay its own expenses—and for distribution to developing states. The underlying goal of the Treaty is, of course, to facilitate the transfer of wealth from the industrialized to the developing world. This objective is the antithesis of free enterprise.

Question 4. Can we predict with some degree of certainty whether the International Seabed Authority and its related tribunal will, over time, accrue any more powers than those currently provided to it in the Treaty or which they have already exercised?

Response. This is a point on which supporters and opponents seem to agree—that the Treaty will continue to evolve and assume greater authority over time. As stated by Treaty proponent Admiral James D. Watkins in testimony before the Senate Foreign Relations Committee on 14 October 2003:

"[T]he foundation that the [Treaty] provides is subject to interpretation and will no doubt continue to evolve through time."

This observation appears to animate proponents of speedy ratification, who contend that the U.S. must assume a "seat at the table." At the very least, this appears to be an implicit admission that the majority of states parties is intent on expanding the current terms of the treaty to the detriment of America's interests. Unfortunately, the same anti-American dynamic that was at work in the negotiation of the treaty seems certain to eventuate as the Treaty "evolves" further since the United States would likely be no more able to prevent unsatisfactory outcomes in the future than it was in the past.

Question 5. Do the environmental provisions of the Treaty protect or expose the high seas and U.S. coastline to environmental threats?

Response. While some of the Treaty's provisions are desirable for protection of the marine environment, they are certain to be used to expose America to problematic pressure from radical environmentalists. As Clinton Secretary of State Warren Christopher acknowledged when submitting the Treaty to the Senate in 1994:

"[T]he Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."

That reality could enable foreign powers and non-governmental organizations to impose on America environmental regulations that the United States has otherwise rejected, including, for example, those enshrined in the Kyoto Protocol. The Treaty's courts offer mechanisms for interpreting and enforcing its provisions in ways that may prove far more onerous and intrusive than anything contemplated by Kyoto.

Question 6. Would the Treaty constrain the U.S. from acting unilaterally on the high seas in protecting its national interests?

Response. Were the United States to become a party to the Treaty, it would agree to abide by a number of provisions that could constrain the Nation's ability to act unilaterally on the high seas under circumstances short of war. Exemptions claimed for "military activities" may not be available in practice if, as seems likely, the LOST Tribunal chooses to view such activities through the prism of their environmental rather than military implications.

It is instructive that the Proliferation Security Initiative (PSI)—a multilateral undertaking involving a large number of states that are party to the Law of the Sea Treaty—is already being constrained by this accord. Since LOST identifies only four circumstances under which ships can be stopped on the high seas (piracy, slave-trafficking, drug-trafficking, and unauthorized broadcasting), a pretext must be found which allows PSI operations to claim that one (or more) of those conditions applies. If such a pretext cannot be cited, states party are not allowed to intercept and board ships in international waters—even if there is strong reason to believe they are involved in terror or the transfer of weapons of mass destruction.

Question 7. From a national security perspective, are we better off with or without the Treaty?

Response. From a national security perspective, we are undoubtedly better off not being a party to the Law of the Sea Treaty. Our experience over the past twenty-three years affirms that the United States has been able to observe those of LOST's provisions as it finds beneficial without having to submit to mandatory dispute resolution arrangements and other Treaty institutions that would restrict America's freedom of action or sovereignty.

The United States decision to remain outside LOST has, moreover, seemingly contributed to date to Treaty organizations remaining relatively modest in size and refraining from the sort of overreach at our expense that its principal framers had in mind.

Question 8. Does the 1994 Agreement that President Clinton negotiated fix the problems in the Treaty that caused President Reagan to reject it?

Response. Great confusion surrounds President Clinton's much ballyhooed 1994 effort to "fix" President Reagan's concerns about the Treaty. The Clinton effort has been misrepresented as an "amendment" or "renegotiation" of the Treaty. Neither characterization is correct: The Treaty's text is exactly the same as it was when

President Reagan rejected it. Under the Treaty's own terms, LOST could not be amended until 10 years after it entered into force, i.e., November 2004.

In fact, what the Clinton Administration effort actually produced in 1994 was a second complex treaty, separate and independent of the Treaty, which purports to govern how signatories will implement the seabed mining section of the Treaty. The 1994 Clinton agreement is very narrowly focused. Even if it did modify the underlying treaty, its "fixes" such as they are would not address wider concerns about the Treaty effects on our Navy, our sovereignty and related matters.

Another problem arises from the fact that nearly 20 percent of the parties that ratified the Treaty have not ratified the 1994 Agreement. There is no certainty, for example, as to how the Tribunal would interpret a dispute that might arise between parties and non-parties to the 1994 accord.

Question 9. Is there anything you would like to add?

Response. No.

RESPONSES BY FRANK J. GAFFNEY, JR. TO ADDITIONAL QUESTIONS FROM SENATOR MURKOWSKI

Question 1. 1Mr. Gaffney, you have indicated you don't believe the 1994 agreement is binding, while Mr. Turner says it is. Please explain the legal basis for your opinion.

Response. Great confusion surrounds President Clinton's much ballyhooed 1994 effort to "fix" President Reagan's concerns about the Treaty. The Clinton effort has been misrepresented as an "amendment" or "renegotiation" of the Treaty. Neither characterization is correct: The Treaty's text is exactly the same as it was when President Reagan rejected it. Under the Treaty's own terms, LOST could not be amended until 10 years after it entered into force, i.e., November 2004.

In fact, what the Clinton Administration effort actually produced in 1994 was a second complex treaty, separate and independent of the Treaty, which purports to govern how signatories will implement the seabed mining section of the Treaty. The 1994 Clinton agreement is very narrowly focused. Even if it did modify the underlying treaty, its "fixes" such as they are would not address wider concerns about the Treaty effects on our Navy, our sovereignty and related matters.

Another problem arises from the fact that nearly 20 percent of the parties that ratified the Treaty have not ratified the 1994 Agreement. There is no certainty, for example, as to how the Tribunal would interpret a dispute that might arise between parties and non-parties to the 1994 accord.

Question 2. Mr. Gaffney, you expressed concern that the U.S. would not be able to continue ts activities under the PSI—to stop and search vessels suspected of transporting illegal weapons—if we become a party to the treaty. Yet many of the United States' partners in this effort are already parties to the LOS. How is it that they are not in violation of the Convention? Are you saying they are operating illegally?

Response. Insofar as the text is concerned, it is a simple fact that the Treaty explicitly permits boarding of another vessel on the high seas in only a handful of limited circumstances (piracy, slavery, unlicensed broadcasting, no flag). Proliferation is not among them. In fact, China recently opposed a United Nations Security Council resolution that even mentioned counter-proliferation and shipping in the same document.

Currently, states party to the Law of the Sea Treaty can only board a suspect vessel for counter-proliferation or counter-terrorism purposes if they can do so under the pretext of conducting a boarding for one of the permitted purposes. For example, had the North Korean vessel that delivered Scud missiles to Yemen been flying its flag and declared on its manifest the true nature of its cargo, the Spanish Navy would have been unable to stop it without violating the Convention.

Since the United States is not a party to LOST, it is not subject to such limitations and the prospect that they might be enforced by the Treaty's Tribunal. We should not want to deny ourselves the option to interdict a vessel suspected of dangerous activities not covered by LOST simply because our partners in PSI find themselves unable to do so.

It is moreover entirely possible that PSI has not yet been challenged under LOST because its adversaries hope to first draw the United States into the Treaty.

I believe the following quotes from an article published in the European Journal of International Law, Vol. 7 (1996) No. 3, by Bernard Oxman validate my testimony. Professor Oxman was a U.S. negotiator of the Law of the Sea Treaty and twice testified in support of its ratification before Senate committees.

"[T]hose who wish to realize fully the contributions of the Convention to the rule of law will need to exercise restraint and wisdom in at least the immediate future lest they complicate the ratification process in one or more states. Politically, this suggests caution regarding the organization, composition and budgets of the new institutions established by the Convention. Legally, this suggests restraint in speculating on the meaning of the Convention or on possible differences between the Convention and customary law."

"From the perspective of strengthening the rule of law in international affairs and the peaceful resolution of disputes, our primary goal must be to promote compulsory arbitration or adjudication wherever it appears plausible for states to accept it."

"For those of us for whom strengthening the rule of law is the goal, and global ratification of the Convention is the means, it is essential to measure what we say in terms of its effect on the goal. Experienced international lawyers know where many of the sensitive nerve endings of governments are. Where possible, they should try to avoid irritating them."

"It is therefore ironic that while one of the most significant contributions of the Law of the Sea Convention to the rule of law is its requirement for adjudication or arbitration of disputes, the prospects for global ratification of the Convention may be placed in jeopardy by litigation in this delicate interim period, particularly with or between nonparties, over maritime jurisdictional issues."

"I do not dissent from the view that the development of international law benefits from more cases and decisions by the Court. My view is simply that, because of its compromissory clauses, a globally ratified Convention promises many more cases in the future, and that it would be unfortunate if one or two cases during this delicate interim period, when so many governments are considering ratification, had the effect of prejudicing that promise." (Emphasis added throughout.)

RESPONSES BY FRANK J. GAFFNEY, JR. TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. You stated in your prepared testimony that "[t]he rulings of the tribunal set up by the Law of the Sea . . . . could effectively supplant the constitutional arrangements that govern this Nation." What is your basis for this assertion? Are you aware of any rulings from other international tribunals that have supplanted the United States Constitution?

Response. Increasingly, the rulings of international courts and even documents issued by various international conclaves have begun to influence American jurisprudence. Plenty of examples can be found in recent Supreme Court rulings. In *Atkins* v. *Virginia* (2002), for example, the Court reversed its earlier ruling partly out of concern for "the world community." Similarly, in *Lawrence* v. *Texas* (2003), the court also reversed itself in part because it was concerned about the European Court of Human Rights and the European Convention on Human Rights. And in *Roper* v. *Simmons* (2005), the court reversed itself yet again in part because of treaties the U.S. has never ratified—the U.N. Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. Justice Anthony Kennedy, writing for the majority, declared that ["the Court must take into account international law in interpreting the [Constitution]."

The American military's domestic and foreign adversaries in particular clearly recognize that such judicial activism can be used as an instrument of asymmetric warfare against the generally vastly superior U.S. armed forces. This technique has come to be known as "lawfare." To the extent the United States subjects itself to international agreements that contain mandatory dispute resolution mechanisms and other court systems, it affords its foes new instruments for waging lawfare against us.

I would also point you to testimony by treaty proponent and Legal Advisor to the State Department, William H. Taft, before the Senate Foreign Relations Committee on 21 October 2003, in which he acknowledges that the Treaty might present constitutional complications:

"[T]he Convention includes simplified procedures for the adoption of entry into force of certain Convention amendments and implementation and enforcement measures that raise potential constitutional issues."

Question 2. You stated in your oral testimony that under the 1982 Convention, as modified by the 1994 agreement, "it is our duty to provide the Communist Chinese advanced technology of a directly military character." You also asserted in a recent Washington Times article (2/24/2004) that the Convention mandates the transfer of sensitive technologies. What is your basis for these assertions? Are you aware that the Provisions in the 1982 Convention requiring industrialized nations to transfer deep seabed mining technology to developing countries (Annex III, article

5) were eliminated by the 1994 Agreement restructuring the Convention's deep seabed mining regime? Specifically, have you read Section 5 of the Annex to the 1994 Agreement, which states that "[t]he provisions of Annex III, article 5, of the Convention shall not apply"?

Response. As noted in response to Senator Inhofe's Question 8, the Law of the Sea Treaty could not be amended until November 2004. Consequently, the 1994 Agreement represents a separate and parallel accord that did not change the obligations parties would assume under the original treaty.

Interestingly, even if the 1994 Agreement actually had amended some provisions of the Treaty's seriously defective Part XI, it would have left a number of other, troublesome commitments untouched. These include, for example:

- Article 266 mandates that states "cooperate in accordance with their capabilities to promote actively the development and transfer of marine science and marine technology on fair and reasonable terms and conditions" and "endeavor to foster favourable economic and legal conditions for the transfer of marine technology."
- Article 268 requires states to "promote the acquisition, evaluation and dissemination of marine technological knowledge and facilitate access to such information and data."
- Article 269 calls for states to "establish programmes of technical cooperation for the effective transfer of all kinds of marine technology to States which may need and request technical assistance."

Dispute settlement mechanisms, furthermore, make vulnerable valuable technology and information. Article 6 of Annex VII requires that parties to a dispute "facilitate the work of the arbitral tribunal and . . . provide it with all relevant documents, facilities and information." It can thus be expected that states parties might be tempted to bring the United States before an arbitral tribunal—even without expectation of a favorable result—in order to obtain sensitive information.

As noted in response to Senator Inhofe's Question 8, it is also of concern that nearly 20 percent of the parties that ratified the Treaty have not ratified the 1994 Agreement, and there is no way of knowing how a tribunal would interpret a dispute between the two.

Question 3. Your testimony suggests that you believe it is against U.S. interests to have an international regime for administering deep seabed mining rights in areas beyond the national jurisdiction of any state. Absent such an international regime, how could U.S. companies that wish to conduct mining in such areas have any certainty that their claims to mine sites will be respected by others?

Response. In ocean areas where there is no recognized sovereign, the U.S. Government could effectively assert its protection over pioneering American companies searching for mineral or other resources, an assertion backed by a strong Navy.

Question 4. The International Seabed Authority has been in existence for nearly a decade. What steps has it taken during this period that you believe are contrary to U.S. interests?

Response. While the ISA has been relatively inactive during its first decade of existence, U.S. funding and submission to its authority would undoubtedly expand result in efforts greatly to expand its organizational footprint, jurisdiction and powers in keeping with the vision of LOST's principal framers, namely that it would serve as a means of supplanting national authorities with self-funding supranational agencies and, over time, garrote sovereignty.

Evidence that an ulterior motive has prompted the relative quiescence of LOST-spawned organizations to date is supplied in response to Question 6 below.

Question 5. You asserted in a recent National Review article (2/26/2004) that the Convention would give the International Seabed Authority the power to impose production quotas for deep seabed mining and oil production. What is your basis for this assertion? Are you aware that the power of the ISA to impose production controls was eliminated by the 1994 Agreement restructuring the Convention's deep seabed mining regime?

At the end of the day, it is the Tribunal which will have the last word on what the Convention means. Whether the Tribunal will even recognize the 1994 Clinton Agreement is an open question, and there is no appeal from Tribunal decisions.

On the "production controls" point, it must be noted that the mere existence of the International Seabed Authority (ISA), its accompanying regulatory scheme, and a U.S. State Department assertion that there can be no valid title to any deep seabed tract except through the ISA are, in themselves, qualitative production controls that will at least limit and possible create actual disincentives to developing and exploiting seabed mining technologies.

Question 6. You asserted at the hearing "that people have behaved with greater circumspection and constraints on what they ultimately would like to see this supranational agency do, so as not to queer the deal on getting the Senate to go along with the ratification of this treaty." Are you suggesting that certain proponents of full U.S. participation in the Law of the Sea are engaged in an attempt to mislead the U.S. Senate? Who are these "people" to whom you are referring in your statement? What exactly is it that these "people" would like to see this supranational agency do? Please provide any relevant documentation to support your answers.

Response. I believe the following quotes from an article published in the European Journal of International Law, Vol. 7 (1996) No. 3, by Bernard Oxman validate my testimony. Professor Oxman was a U.S. negotiator of the Law of the Sea Treaty and twice testified in support of its ratification before Senate committees.

"[T]hose who wish to realize fully the contributions of the Convention to the rule of law will need to exercise restraint and wisdom in at least the immediate future lest they complicate the ratification process in one or more states. Politically, this suggests caution regarding the organization, composition and budgets of the new institutions established by the Convention. Legally, this suggests restraint in speculating on the meaning of the Convention or on possible differences between the Convention and customary law."

"From the perspective of strengthening the rule of law in international affairs and the peaceful resolution of disputes, our primary goal must be to promote compulsory arbitration or adjudication wherever it appears plausible for states to accept it."

"For those of us for whom strengthening the rule of law is the goal, and global ratification of the Convention is the means, it is essential to measure what we say in terms of its effect on the goal. Experienced international lawyers know where many of the sensitive nerve endings of governments are. Where possible, they should try to avoid irritating them."

"It is therefore ironic that while one of the most significant contributions of the Law of the Sea Convention to the rule of law is its requirement for adjudication or arbitration of disputes, the prospects for global ratification of the Convention may be placed in jeopardy by litigation in this delicate interim period, particularly with or between nonparties, over maritime jurisdictional issues."

"I do not dissent from the view that the development of international law benefits from more cases and decisions by the Court. My view is simply that, because of its compromissory clauses, a globally ratified Convention promises many more cases in the future, and that it would be unfortunate if one or two cases during this delicate interim period, when so many governments are considering ratification, had the effect of prejudicing that promise." (Emphasis added throughout.)

STATEMENT OF PAUL KELLY, SENIOR VICE PRESIDENT, ROWAN COMPANIES, INC., MEMBER, 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. I am here representing the U.S. Commission on Ocean Policy.

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

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

The Commission's resolution was forwarded to the President, Members of Congress, the Secretaries of State and Defense, and to other interested parties. I have attached a copy of our resolution for the record. The responses we received have

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

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

• The LOS Convention was described by those who appeared before the Ocean Commission as the "foundation of public order of the oceans" and as the "overarching framework governing rights and obligations in the oceans." The United States was involved in all aspects of the development of the Convention, including reshaping the seabed mining provisions in the early 1990's. As a consequence, the Convention contains many provisions favorable to U.S. interests. The oceans provide vital food and energy supplies, facilitate waterborne commerce, and create valuable recreational opportunities. It is in America's interest to work with the international community to preserve the productivity and health of the oceans and to secure cooperation among nations everywhere in managing marine assets wisely.

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

There are a series of issues currently being considered by parties to the Convention which could have tremendous economic implications for the United States. Of particular interest is the work of the Convention's Commission on the Limits of the Continental Shelf, which is charged with reviewing claims and making recommendations on the outer limits of the Continental Shelf. This determination will in turn be used to establish the extent of coastal state jurisdiction over Continental Shelf resources. There are several reasons why direct U.S. participation in this process would be beneficial, namely:

• The LOS Convention sets up the ground rules by which coastal nations may assert jurisdiction over exploration and exploitation of natural resources beyond 200 miles to the outer edge of the continental margin. This is particularly important to the United States, which is one of only a few nations in the world with broad continental margins.

• The continental margins beyond the United States' Exclusive Economic Zone (EEZ) are rich not only in oil and natural gas, but also appear to contain large concentrations of gas hydrates, which may represent an important potential energy source for the future.

The work of the Continental Shelf Commission is now at a critical stage. The Russians have submitted a claim in the Arctic and have received comments on their claim from the Commission. Other States are preparing their submissions, which are due in 2009 or within 10 years of a State's becoming a party, whichever is later. Considering the technical work to be done in order to delineate our own shelf, 10 years is a short time horizon. The Continental Shelf Commission's action on these submissions will directly impact U.S. jurisdictional interests, particularly in the Arctic. If we do not become a party to the LOS Convention, we are in danger of having the world leave us behind on issues of continental shelf delimitation because we will continue to be ineligible to participate in the selection of members of the Commission or nominate U.S. citizens for election to that body.

We need to conduct extensive multi-beam sonar mapping of the U.S. continental shelf, where substantial resources (including hydrocarbons, minerals and sedentary species) could become available under the LOS Convention provisions concerning extensions of the continental shelf. If the United States accedes to the Convention, it would be able to present evidence to the Continental Shelf Commission on the Limits of the Continental Shelf in support of U.S. jurisdictional claims to its continental shelf. The University of New Hampshire's Center for Coastal and Ocean Mapping/Joint Hydrographic Center, in conjunction with NOAA and USGS, has already identified regions in U.S. waters where the continental shelf is likely to extend beyond 200 nautical miles and is developing strategies for surveying these areas. Bathymetric and seismic data will be required to establish and meet a range of other environmental, geologic, engineering and resource needs.

• Acceding to the LOS Convention will also allow the United States to play an active leadership role in a host of other issues of economic importance. As a party to the Convention, the U.S. can participate fully in International Seabed Authority efforts to develop rules and practices that will govern future commercial activities on the deep seabed. Currently, the U.S. is relegated to observer status. In 1994 an agreement was reached addressing U.S. concerns on implementing the deep seabed mining provisions of the Convention, after which the Administration sent the treaty to the Senate for advice and consent. As a party to the Convention, the United States will be in a much stronger position to ensure the preservation of the balance between coastal state authority and freedom of navigation. The United States, whose international trade and economic health relies so heavily on maritime commerce, cannot afford to remain on the sidelines while parties to the LOS Convention make decisions that directly impact navigational rights and maritime commerce.

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

The United States is party to many international agreements including conventions pertaining to vessel safety, environmental protection and fisheries management which are based directly on the LOS framework. Those United States representatives who participate in the negotiation of these agreements, such as the U.S. Coast Guard, are among the strongest advocates for accession to the LOS Convention. In testimony before our Commission, then-Commandant Admiral James Loy, and more recently the current Commandant, Admiral Thomas Collins, both strongly supported United States accession to the LOS Convention.

The Coast Guard, which has played a lead role in developing international agreements on maritime safety, security and environmental protection at the International Maritime Organization (IMO), and also participates in fisheries negotiations, told our Commission that: "[A] failure to accede to the Convention materially detracts from United States credibility when we seek to advance our various ocean interests based upon Convention principles. Also, as a non-party, we risk losing our ability to influence international oceans policy by leaving important questions of implementation and interpretation to others who may not share our views."

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

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

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

U.S. accession to the LOS Convention has received bipartisan support from past and current Administrations. On November 27, 2001, Ambassador Sichan Siv, U.S.

representative on the United Nations Economic and Social Council, in his statement in the General Assembly on Oceans and Law of the Sea, said: "Because the rules of the Convention meet U.S. national security, economic and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the [LOS] Convention." More recently the G–8 Summit held in June, 2003, produced a G–8 Action Plan for Marine Environment and Tanker Safety which stated: "Specifically, we commit to: [1.1] The ratification or acceding to and implementation of the United Nations Convention on the Law of the Sea, which provides the overall legal framework for oceans."

The input received by the U.S. Commission on Ocean Policy reflects a broad consensus among many diverse groups in favor of ratification of the LOS Convention. 145 nations are now party to the Convention. There are many important decisions being made right now within the framework of the Convention which will impact the future of the public order of the oceans and directly impact U.S. interests. Until we are a party to the Convention, we cannot participate directly in the many bodies established under the Convention that are making decisions critical to our interests.

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

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

RESPONSES BY PAUL KELLY TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1a. Article 2(3) of the Treaty states "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." What is your interpretation of this provision?

Response. My interpretation of this provision is that a coastal state, when exercising sovereignty over its territorial sea, must do so consistent with other provisions of the Law of the Sea Convention and with other rules of international law.

Question 1b. Do you think all parties of this Treaty will interpret this provision the same?

Response. Article 2(3) reflects existing international law and practice. Article 2(3) is very similar to article 1(2) of the 1958 Convention on the Territorial Sea and Contiguous Zone, which requires parties to exercise sovereignty in their territorial sea "subject to the provisions of these articles and to other rules of international law." The United States is already a party to the 1958 convention. There is every reason to believe that parties to the Law of the Sea Convention will share a common interpretation of the provision's meaning.

Question 1c. How could this Treaty interfere with the United States' sovereign exercise of freedom of the seas and in what ways will that have an adverse effect on national security and the environment?

Response. The Law of the Sea Convention enhances the ability of the United States to defend essential national security and environmental interests. The Convention contains important provisions which were not included in earlier conventions, including articles which enhance freedom of navigation by providing rights of passage through straits and archipelagoes. These rights are critical to our military mobility and our national security interests. They facilitate maritime commerce, including transport of oil, vital to United States economic interests and energy security. The Convention also provides a framework for regional and international cooperation in protecting and preserving the marine environment. The Ocean Commission received input from a broad range of interests, including the Chief of Naval Operations and leading representatives from maritime transportation and offshore energy industries, all of whom strongly supported accession to the Convention as in the best interests of the United States.

Question 2. Do you believe it is in the best interest of the United States to vest control of seabed mining operations in countries which lack the necessary technology and capital to conduct such operations themselves?

Response. In my view, changes made to the seabed mining provisions have fully addressed earlier U.S. concerns, including concerns about the process for developing and implementing the seabed mining regime. In 1994, Part XI of the Convention dealing with deep seabed mining was successfully modified, consistent with free-market principles, to address all of the concerns previously identified by President Reagan and Congress. As a result of these legally binding changes, the United States is now guaranteed a permanent seat on the International Seabed Authority Council, the executive body that has primary responsibility for administering the deep seabed mining regime. The United States is also guaranteed a seat for the foreseeable future on the new Finance Committee, which has jurisdiction over financial and budgetary matters. The revised decisionmaking process requires consensus and therefore effectively gives the United States a veto over, among other things, all amendments to the deep seabed mining regime, adoption of rules and regulations, and budgetary and financial matters. Other substantive decisions are made under a "chambered" voting arrangement that allows the United States and just two other industrialized nations acting in concert to block a decision.

In presentations before the Commission on Ocean Policy, U.S. offshore industry representatives urged "immediate" Senate approval of the Convention, citing concerns about our ability to protect U.S. industry interests if we remain a non-party. The Ocean Commission agrees that the United States should become a party immediately and take advantage of the leadership opportunities, and the ability to shape future policies, presented by the modifications to Part XI.

Question 3. Do you believe that by acceding to the Treaty the United States would gain an adequately effective bargaining position to protect its current and future national policies and interests relating to national defense, seabed mining and environmental protection? Please explain in detail.

Response. On 14 November, 2001, the U.S. Commission on Ocean Policy unanimously adopted a resolution recommending that the United States immediately accede to the Law of the Sea Convention. This recommendation was based both on the powerful testimony in support of the Convention from a broad range of witnesses, and on the conviction that "there are compelling national security, jurisdictional, environmental, and economic interests" for U.S. accession.

Regarding national defense, the Convention codifies and strengthens freedoms of navigation and overflight essential to U.S. military mobility. The Navy and Coast Guard have testified that joining the Convention will strengthen our ability to defend these and other important maritime rights, and enhance our national and homeland security efforts.

Regarding seabed mining, the 1994 modifications to the deep seabed mining regime give the United States powerful means to protect U.S. interests, including a permanent seat on the ISA Council and veto power over amendments to the regime. The Convention also provides mechanisms to afford legal certainty for continental shelf claims, thereby providing U.S. industries with the certainty and "security of tenure" needed for capital-intensive deep-water projects offshore of the United States and around the world.

Regarding environmental protection, the Convention is carefully crafted to balance U.S. interests in protecting and preserving our marine environment with other important interests, such as freedom of navigation.

The United States can most effectively enhance our bargaining position and protect our current and future policies and interests by joining the other 148 nations that are party to the Convention. We cannot be as effective while we remain outside the convention that provides the framework for the future of ocean activities.

Question 4. What are your thoughts about developing countries having the capabilities to implement international laws relating to issues of our national security as well as regulating the marine environment?

Response. From my perspective as a member of the Ocean Commission and a representative of the ocean industry, the United States can best protect its interests through support for the rule of law on the oceans. A legal framework for ocean activities provides enhanced stability and certainty in support of U.S. national security interests, economic investment, and cooperation on marine environmental issues. A widely accepted legal framework also provides the best mechanism to counter actions taken by developed or developing countries that are inconsistent with that framework and detrimental to U.S. national security or environmental interests.

The Law of the Sea 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." All those who testified before our Commission, including representatives from the Depart-

ment of Defense, industry and environmental groups, stated that we would be in a better position to protect U.S. interests and rights under international law by joining with the other 148 nations that are party to the Convention. This would be the case whether we were dealing with issues that impact our national security, such as excessive maritime claims that purport to abridge our freedom of navigation, or with actions that threaten the marine environment.

Question 5. Can we predict with some degree of certainty whether the International Seabed Authority and its related tribunal will, over time, accrue any more powers than those currently provided to it in the Treaty or which they have already exercised?

Response. Under the terms of the Convention, the authority of the ISA is limited to administering the exploration and exploitation of minerals in areas of deep seabed beyond national jurisdiction, generally 200 miles from shore. The ISA has no other role and no general regulatory authority over other ocean uses, including freedom of navigation. Under the 1994 modifications to Part XI of the Convention, the United States is guaranteed a seat on the ISA Council in perpetuity if it becomes a party to the Convention. Decisions on approval of amendments to the Convention's seabed mining provisions must be made by consensus, and are therefore in effect subject to a U.S. veto. These provisions would apply to efforts to alter or enhance ISA authority over time. The adoption of rules and regulations implementing the seabed mining regime are also subject to consensus and a U.S. veto. Other substantive decisions of the Council are made under a voting arrangement that allows the United States and just two other industrialized nations acting in concert to block a decision. However, the United States can only take advantage of these provisions if it becomes a party to the Convention.

Question 6. Despite the clear requirements in Articles 208 and 210 of the Treaty which specify that related national laws must be "no less effective" than international rules, standards and recommended practices and procedures, the Committee received testimony to the effect that the United States would not be required to change any of its environmental laws to be in compliance with the Treaty. Are you certain that the Treaty could not be used to impose restrictions or requirements on the United States to limit or expand current or future U.S. laws and policies?

Response. Article 208 concerns pollution arising from seabed activities under national jurisdiction. There are no applicable international standards regarding these activities. The United States, however, has a substantial body of domestic law in place to protect our marine environment from possible pollution related to offshore activities under U.S. national jurisdiction. Article 210 concerns pollution from dumping. The United States is a party to the 1972 London Dumping Convention, which contains requirements for ocean dumping.

As evidenced by the 1994 modifications to the deep seabed mining regime, the international community is willing to make significant accommodations to encourage U.S. participation in international maritime regimes. The U.S. is already a recognized leader at the International Maritime Organization in developing more effective international measures to combat pollution from ships. Development of new international marine pollution standards for seabed activities within national jurisdiction or ocean dumping would be very unlikely to be achieved without direct U.S. participation and approval.

Question 7. Article 212 of the Treaty requires States to adopt laws and regulations for pollution from the atmosphere. How would the United States domestic policy need to be changed or altered to comply with the international laws, regulations, and recommended practices to address these concerns? And does this mean that other countries can use this provision to force the United States to regulate CO_2?

Response. Article 212 does not require the United States to comply with international laws, regulations, or standards. Article 212 only requires states to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere. The United States currently addresses these issues through the Clean Air Act. Other countries could not use the provisions of the Convention to force the United States to regulate carbon dioxide.

RESPONSE BY PAUL KELLY TO ADDITIONAL QUESTION FROM SENATOR MURKOWSKI

Question. Mr. Kelly, you heard me ask Mr. Leitner about his suggestion that the U.S. authorize civilian vessels to sail as privateers, and his response that he viewed that both as legal and as an extension of the U.S. legal system, inasmuch as vessels seized by privateers could be sold to benefit the victims of terrorism. I recognize that you are here on behalf of the U.S. Oceans Commission, but you have in the past

spoken as an expert for such groups as the American Petroleum Institute and the National Ocean Industries Association. As an expert, can you identify any vulnerabilities that might result to the U.S. international maritime industry from such an approach?

Response. The maritime industry has long supported U.S. efforts to develop the rule of law in ocean activities. A predictable legal regime provides the stability and certainty needed for capital intensive investments in offshore projects. Many of the provisions of the Law of the Sea Convention, such as those that delineate Exclusive Economic Zones and assist in delineation of Continental Shelf boundaries, further industry interests by creating a more predictable investment environment. The Convention creates a more attractive business climate by providing means for peaceful dispute resolution. The maritime industry also relies on the Convention's guarantees of navigational freedom essential to global commerce and U.S. economic security.

The sanctioning of privateers would introduce uncertainties and instability that run directly counter to ocean industry interests. This practice would certainly create additional risk for those considering investment in ocean industries, including a greatly increased potential for violence and conflict on the oceans. If other countries were to follow suit, the assets of U.S. ocean industries could potentially be seized and detained by privateers for whatever reasons they or their sponsors deemed appropriate, and freedoms of navigation jeopardized.

Authorizing privateers, aside from questions as to its legality, would be extremely harmful to U.S. interests in furthering the rule of law and the peaceful resolution of disputes around the globe. The use of privateers is also directly contrary to U.S. ocean industry interests. I would strongly recommend against further consideration of this idea.

RESPONSE BY PAUL KELLY TO ADDITIONAL QUESTION FROM SENATOR JEFFORDS

Question. Critics of the Law of the Sea have argued that it is against U.S. interests to have an international regime for administering deep seabed mining rights in areas beyond the national jurisdiction of any state. Absent such an international regime, how could U.S. companies that wish to conduct mining in such areas have any certainty that their claims to mine sites will be respected by others?

The International seabed Authority has been in existence for nearly a decade. Do you know of any steps it has taken during this period that are contrary to U.S. interests?

Would you state once more for the record why the oil and gas industry supports full U.S. participation in the Law of the Sea? Does such support extend across different segments of the industry?

Response. Absent an international regime, U.S. companies can not be certain that their claims to mine sites beyond the jurisdiction of any state will be respected by others. Working within the international deep seabed regime provides the certainty needed to ensure the security of tenure critical to capital-intensive, deep seabed mining.

I am not aware of actions taken by the ISA that are unfavorable to U.S. interests. On the contrary, the 1994 amendments to the deep seabed regime, in addition to giving the U.S. veto power over major decisions within the ISA, also recognize the seabed mine claims established on the basis of exploration already conducted by U.S. companies and provides assured access for any future qualified U.S. miners. However, the United States needs to become a party to the Convention to take advantage of these provisions and exert its leadership in implementing the deep seabed mining regime.

The offshore oil and gas industry supports the Convention for a variety of reasons. The Convention secures each coastal nation's rights to the living and non-living resources within the 200 mile EEZ, and broadens the definition of continental shelf in a way that favors the United States, one of the few nations with broad continental margins. The Convention establishes objective criteria for delineating the outer limits of the continental shelf, and provides a forum for dealing with potential disputes and other issues. As in the case of deep seabed mining, this provides additional certainty and security for investment in costly deep-water oil and natural gas development projects. Given the significant resource potential of the U.S. continental shelf, as well as U.S. companies' exploration interests in waters subject to foreign jurisdiction, the Convention clearly serves national energy security interests. The Convention also protects navigational rights and freedoms essential to the extraction and delivery of petroleum and petroleum products.

Support for the Convention extends throughout all segments of the offshore energy industry, ranging from production to drilling, engineering to marine and air transport, offshore construction to equipment manufacture and supply, and telecommunications to finance and insurance.

STATEMENT OF PETER LEITNER, AUTHOR

Mr. Chairman, members of the Committee, I would like to thank you for providing me the opportunity to testify before you today concerning the dangerous momentum to ratify the United Nations Convention on the Law of the Sea. This seriously flawed document was rightly rejected by President Reagan as it embodies a wide range of precedents, obligations, and restrictions that are deleterious to American national and economic security interests. Indeed, the Treaty and its many precedent setting provisions is a direct assault on the sovereignty of the United States and the supremacy of the Nation State as the primary actor in world affairs.

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

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

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

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

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

and the military, political and technological implications arising from them. I followed this publication with an article in World Affairs entitled: "A Bad Treaty Returns: The Case Against the Law of the Sea Treaty."

The specific issue before this Committee today concerns the environmental aspects of the Treaty and whether they are in the U.S. national interest. While the Treaty represents an attempt to locate in one place many pre-existing environmental agreements it is also an attempt to codify traditional State practice. While the environmental provisions were largely viewed as being among the less obnoxious aspects of the Treaty it was largely because they do very little to advance the environmental protections aside from setting a symbolic and dangerous precedent by creating a supranational regulatory and taxing organization with its own judicial process and unconstrained enforcement potential. The creation of yet another International Court where the United States or our citizens can be dragged before politically motivated foreign jurists to adjudicate and set penalties is not a pleasant prospect.

But even more importantly, the Treaty and its environmental provisions and the context they were negotiated in are relics of an earlier era—an era where environmental damage was presumed to be accidental or incidental to economic activity. The current post-9/11 era, however, is defined by the non-conventional use of all tools available to a non-state or state-sponsored terrorist, or proxy warrior, to create a weapon of mass destruction. The very environment we cherish and this Committee seeks to protect and preserve is a likely battleground in this new era. The presumptions that underlie the environmental provisions of the Law of the Sea Treaty and other key elements of the document are woefully inadequate to meet the threats facing the United States in this very dangerous unconventional post-9/11 world.

We have ample evidence of terrorists targeting maritime commerce as a means of waging their worldwide attacks. A critical aspect of their planning is to cause as much environmental degradation as is possible. For terrorists with limited means or desire to engage in, or sustain, combat operations this is a lucrative area for them to attack the West. This method of fighting turns traditional Western war fighting doctrine based upon limiting collateral damage as much as humanly possible—on its head. Terrorists and their State Sponsors have high regard for the environment but, unfortunately, they see it as a "force multiplier" not as a treasure to be preserved. Recall the oil well fires in Kuwait set by Saddam's retreating troops. Hideous environmental and health effects resulted from intentionally using the natural resources as a weapon. Recall the terrorist attack on the French oil tanker Limburg (October 10, 2002) carrying 158,000 tons of crude oil where the goal was to generate as large an oil spill as possible.

Imagine if you will, the scuttling of a Supertanker off our coast and the intentional, again think of the word intentional, release of millions of gallons of petroleum products into the water column. If done on the Grand Banks it would destroy some of the world's most productive fisheries for generations. If done near a coastal nuclear power plant it can cause irreversible damage, or at a minimum, force it to shut down for years as its coolant is dependent upon clean coastal waters. Fears that a terrorist operation may use a ship to spread an air-borne pathogen or toxin such as Anthrax along our densely populated coastline are very real. So too is the possibility of utilizing an LNG tanker as an enormous Fuel Air Explosive. The several instances of Container Ships being used to mount terror attacks, such as the suicide bombings in Israel last week is a great cause for alarm. Recalling the extensive damage Texas City, Texas and Halifax, Nova Scotia were subjected to as a result of vessel-borne accidents should never be far from our minds.

The point of all this is that the environmental provisions of the Law of the Sea Treaty are inadequate to address the most likely and potentially most devastating, environmental threats facing the United States today. Of course, the environmental provisions are also closely coupled with the navigation and high seas articles found elsewhere in the Treaty—they are, in fact, inseparable. These treaty provisions afford a measure of immunity and freedom of access to our coastlines that, in the current era, are inimical to our national interests and the health and safety of the American public. While I am not advocating a draconian reversal of hundreds of years of traditional state practices I am stating that we are better off, as a Nation, relying on the ambiguities of constantly evolving traditional practice than binding ourselves to a formal treaty that will severely constrain our ability to protect our population from devastating attack.

The United States should take the lead in developing new practices on the oceans that will at once facilitate commerce and peacetime deployment of warships but also protect our shores from the terrorist scourge. The President's Proliferation Security Initiative is an example of such modern and creative thinking. This US-led multinational program of high seas interdiction and vessel boarding is barred by the Law

of the Sea Treaty yet it is our overriding national security interest to execute. Ratification of the Treaty would effectively gut our ability to intercept the vessels of terrorists or hostile foreign governments even if they were transporting nuclear weapons. We must ensure that we not binding the government of the United States to a legal regime that makes us more vulnerable and trades the lives of our innocent citizens for the sake of participating in yet another unnecessary Treaty.

While some may offer hormone-driven arguments that the United States will pursue its interests without regard for Treaty constraints history and actual practice show us that our legal community will over time strangle out unilateral actions in the interest of protecting our decisionmakers from exposure to lawsuits or charges in an international court.

Additionally, I would suggest that the U.S. may be well served by resurrecting the historic use of Letters of Marque in both the war on Terrorism and the protection of our coastal environment. It is obvious that the Federal Government is facing many simultaneous missions that take precedence over traditional offshore environmental protection activities. This necessary overextension, arising from the war on terror, results in shortages of vessels and crews required for environmental patrols. Letters of Marque, last used during the War of 1812, effectively enabled privateers to destroy the Barbary Pirates and is a concept whose time has come, again! American Fishermen and merchant seamen idled by quotas, regulation, and predatory foreign competition can be mobilized to patrol the marine environment. They can also be authorized to seize terrorist assets and provide material assistance to the families of Americans victimized by terrorism awarded punitive damages by US courts. Such modern-day Privateers would be legally deputized to act as agents of the US Courts, the President, Congress, or State Governors to protect the environment or fight terrorism by depriving terrorists of their economic assets.

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

The most vigorous supports of the Treaty are largely a constellation of narrow single interest groups who are willing to overlook Treaty shortcomings so long as their pet rock is included. There is also an interesting psychological phenomenon I call the "Unrequited Love Syndrome" that characterizes some experts who after 30 or so years of involvement in the Treaty would rather accept a defective Treaty than leave this world with an unfinished legacy. Only vigorous and complete oversight by the Congress will provide the big-picture assessment necessary to determine whether this Treaty is in our collective national interest.

Again, I thank you for you indulgence and stand ready to answer any questions.

Law of the Sea Treaty:
A Defective Document That Should Not Be Ratified

Dr. Peter M. Leitner

March 23, 2004

1

Dean Rusk

July 28, 1978

"The one-nation, one-vote principle is very dangerous. We must avoid the possibility that a "swarming majority" will dictate terms to us."

"If the authors of the U.N. charter were writing with the insight to foresee the proliferation of small states by the dozens then they would have authored a bicameral body with majority interests in one and interest group representation in the other."

2

- LOST was fatally flawed prior to 9-11
  -- This document was born of the climate in the 1970's and 1980's
- It was irrelevant and unnecessary prior to 9-11 and is dangerous and obstructive in the Post-9-11 world
- US National Security interests will be severely undermined by the Treaty
  -- Undermines the PSI and our ability to manage the maritime threat.
  -- Inhibits Interdiction rights of the United States
  -- Mandates the transfer of critical "national security" information regarding the submarine characteristics, features and mapping of U.S. off-shore areas. This data can be readily used by foreign military forces or terrorists in mounting attacks upon the CONUS.
- The Treaty does not solve those sovereignty or territorial disputes that are likely flashpoints for future wars.

3

- Where specific language was contained in the Treaty the "Agreement" simply substitutes ambiguity
- 31 years after UNCLOS III was convened nations still claim territorial seas of differing breadths
- The Treaty does not obviate the need for FON challenges
- The power projection ambitions of the PRC are much more evident now than in the 70's and 80's.
- Many key signatories to the Treaty have selectively acceded to the Treaty
  -- reservations, self-serving definitions, etc.
- The so-called "1994 Agreement" that purports to "Fix" the treaty is a dubious document that has no prior precedent.
- The original Treaty is intact, in all respects, but the fiction of the "Agreement" is being used as a "sleight of hand" by the State Department and the UN.
- The Treaty still creates an International Organization with the power to tax, regulate, license, and deny access on 7/10ths of the surface of the planet.

4

- This new organization will have the power to generate its own income by chartering its own business organizations.
- The Treaty provides "cover" for hostile foreign powers to acquire sophisticated technologies that cannot be otherwise justified.
- Since the Treaty was negotiated the international export control apparatus has been dismantled -- there is no safety net in place.
- Treaty proponents are, in reality, an array of narrow special interest groups.
- The Big-Picture of whether the Treaty is in our essential national interest is not being addressed. Many elements of the Treaty fall in the "nice to have" category but in times of national crisis its provisions will be ignored.
- As the treaty does little toward diffusing serious simmering conflicts it is at best essentially useless from a security standpoint.
- Another "big picture" issue concerns the powers being vested in the ISA and its subordinate organizations. This one-nation/one vote organization does not have the equivalent of a Security Council or "senior body" with a veto power over excesses committed by the lower body.

5

As a matter of policy, activities in the international Area should take into "particular" consideration the interests and needs of developing States.

The Convention urges promoting the participation of developing States in activities in the Area.

The Convention seeks to ensure the expansion of opportunities for participation in deep seabed mining, participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States, and protection of developing countries from adverse effects on their economies.

The Agreement urges contractors and their respective sponsoring States to cooperate with the ISA in facilitating access to technology by the Enterprise or its joint venture, or by the developing State.

The Agreement provides for establishment of an economic assistance fund for those developing countries suffering serious adverse effects to their land-based production of minerals due to seabed mining operations.

The combined effect of these provisions is to preserve a special status for developing States, at the expense of the United States and other industrialized nations and their companies.

6

The 1994 "Agreement"

A parallel construct that leaves the Treaty text unchanged

Purports to forever alter the Treaty but the Treaty is untouched

Signatories have their own interpretations of the actual meaning and status of the Agreement

Replaces direct language and financial burdens with ambiguous wording and leaves details to be worked out later

Adds additional uncertainty regarding access, ownership, finances, profitability, technology transfer, etc.

7

The 1994 "Agreement"

Deliberate Ambiguity

The Convention continues to provide for the creation of the Enterprise, the operating arm (mining company) of the Seabed Authority.

While the Agreement and Annex do not eliminate the Enterprise or the requirement that a miner give half of its mine site to the Enterprise and developing countries they add ambiguity.

To what extent are the requirements providing the Enterprise with free, fully-explored mine sites consistent with subjecting it to the same terms and conditions as other commercial enterprises?

How firm is the assurance that technology will be acquired from seabed miners by the Enterprise under "fair and reasonable commercial terms" when the miners have to seek permits and approvals that could possibly be delayed or withheld as a means of leverage or other political pressures brought to bear?

8

The 1994 "Agreement"

Section 5. Technology Transfer

"States Parties undertake to cooperate fully and effectively with the Authority for this purpose and to ensure that contractors sponsored by them also cooperate fully with the Authority"

The 1994 "Agreement"

Section 8. Financial Terms Of Contracts

Consideration should be given to the adoption of a royalty system or a combination of a royalty and profit-sharing system.

The fee for processing applications for approval of a plan of work limited to one phase, either the exploration phase or the exploitation phase, shall be US$ 250,000.

The 1994 "Agreement"

Section 8. Financial Terms Of Contracts

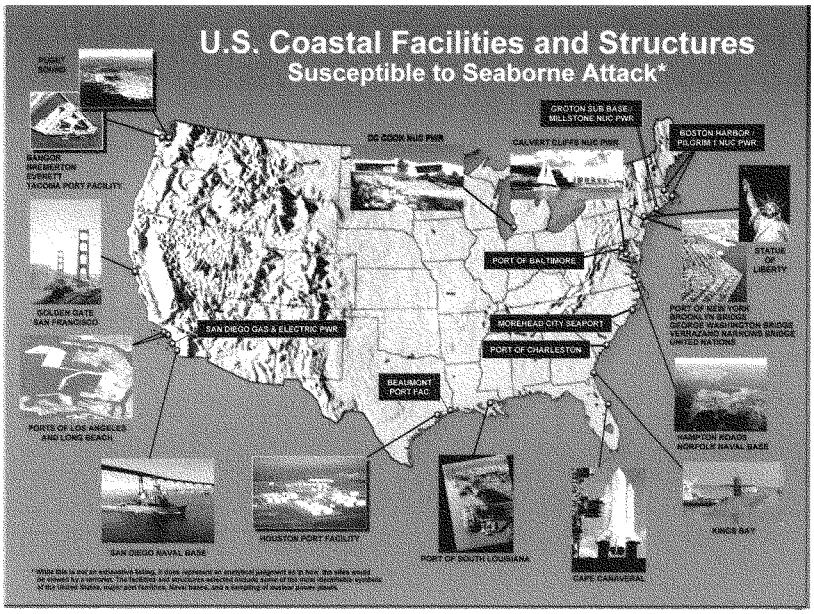
An annual fixed fee shall be payable from the date of commencement of commercial production. This fee may be credited against other payments due under the system adopted in accordance with subparagraph (c). The amount of the fee shall be established by the Council . . .

The system of payments may be revised periodically in the light of changing circumstances . . .

11

LOST vs. Homeland Security

12



LOST Undermines PSI

"Security Plan Against the Proliferation of Weapons of Mass Destruction" (abbreviated as PSI) that was proposed by President Bush when he visited Poland on May 3, 2003.

The objective of the Bush administration in proposing the PSI was to carry out interception of ships suspected of transporting raw materials for the manufacture of weapons of mass destruction to and from so-called "rogue nations" along with countries that share the same viewpoint as the United States.

The PSI is seen as a violation of international law, particularly the 1982 United Nations Convention on the Law of the Sea. The Convention on the Law of the Sea has clearly defined provisions on the right of navigation on the high seas.

High Seas Interdiction & Boarding are Essential Elements of the PSI

In cases of boarding and interception, the Convention stresses the need for "reasonable ground".

According to the Convention, warships and government vessels of other States engaged in the transport of weapons on the high seas on the basis of noncommercial service should enjoy complete immunity rights and they may not be boarded or intercepted by other States.

In addition, interception on the high seas also involves a basic issue in international law, that is, for non-signatory states of the treaty on nuclear proliferation, it is not illegal to transport nuclear materials and missiles on ships flying one's own flag nor is it illegal to carry out commercial trading of ammunitions and weapons.

Article 87

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines, subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 89

Invalidity of claims of sovereignty over the high seas

No State may validly purport to subject any part of the high seas to its sovereignty.

Article 90

Right of navigation

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

Article 95

Immunity of warships on the high seas

Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

Article 96

Immunity of ships used only on government non-commercial service

Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.

Article101
Definition of piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article110
Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
   (a) the ship is engaged in piracy;
   (b) the ship is engaged in the slave trade;
   (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
   (d) the ship is without nationality; or
   (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

Article 110
Right of visit (cont.)

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

Schizophrenic U.S. Policy Assertions

Promotion of LOST concepts further undermines our ability to protect our shores.

Schizophrenic U.S. Policy Assertions

Haiti: Coastal Protection

The United States protested Haiti's attempt to expand the competence of its contiguous zone to include protection of national security interests. Thus, in 1989 the U.S. protested Haiti's Decree No. 38 of July 12, 1977, stating, in part:

"... ***the 1982 United Nations Convention on the Law of the Sea, does not recognize the right of coastal states to assert powers or rights for security purposes in peacetime that would restrict the exercise of the high seas freedoms of navigation and overflight beyond the territorial sea."***

Namibia: EEZ Infringement

In a 1990 diplomatic note to Namibia the U.S. expressed its concern over Namibia's claim to establish control within the full extent of its 200-mile exclusive economic zone to prevent infringement of its fiscal, customs, immigration, and health laws. The protest note read, in part, [54]

"... the right of a coastal state to prevent infringement of its fiscal, customs, immigration, and health laws within its territory or territorial sea does not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured."

23

Schizophrenic U.S. Policy Assertions

Sri Lanka: Anti-Terror Measures

The Government of the United States acknowledges the efforts of the Government of Sri Lanka to interdict maritime activities of armed anti-government groups. The United States Government recognizes the right of the Government of Sri Lanka under customary international law as reflected in article 25 of the 1982 Convention on the Law of the Sea to prevent passage which is not innocent and to suspend temporarily, in specified areas of its territorial sea, innocent passage of foreign ships if such suspension is essential to its security. However, the Notice to Mariners is not in accordance with the right of innocent passage because the suspension of innocent passage is overly broad and because the duration of the suspension is not indicated as being temporary

24

Schizophrenic U.S. Policy Assertions

Vietnam: Prior Permission for Warships

In a decree of March 17, 1980, Vietnam claimed that military vessels must have its permission and must also give notice before entering Vietnam's contiguous zone. The United States protested these claims in 1982.

"The Government of the United States of America also wishes to refer to specific provisions of the Decree of March 17, 1980 which assert jurisdiction in a manner which is contrary to international law with respect to the activities of foreign vessels operating in the territorial sea or the contiguous zone of the Socialist Republic of Vietnam, including, inter alia: a claim that submarines in the contiguous zone must navigate on the surface and show their flag; a claim that aircraft may not be launched from or taken aboard ships operating in the contiguous zone; and, a claim that, before entering the contiguous zone or the territorial sea, ships equipped with weapons must take prescribed steps to render such weapons less readily available for use...[I]nternational law limits the jurisdiction which a coastal state may exercise in maritime areas. It is the view of the government of the United States of America that the aforementioned claims made in the decree of March 17, 1980 exceed such limits."

25

Schizophrenic U.S. Policy Assertions

Yemen: Prior Notification for Nuclear Materials

In 1977 the People's Democratic Republic of Yemen -Yemen (Aden) -claimed that "foreign nuclear-powered ships or ships carrying nuclear material shall give...prior notification...." The United States protested saying, in part:

"...that the internationally recognized legal right of innocent passage through the territorial sea may be exercised by all ships, regardless of type of cargo, and may not in any case be subjected to a requirement of obtaining prior authorization from or giving notice to the coastal State..."

26

Environmental Threats

- Contingency planning assumes accidents or "lone wolf" causation.
- Post-9-11 world is very different from the 1970's & 1980's presumptions
- EEZ & High Seas freedoms need to be constrained due to WMD threats from terrorist groups

27

Container Ships are High Risk Terrorist Vehicles

THE ATTRACTION

- **Volume & distribution: needle in a haystack**
- **Sender's ability to mask identity**
- **Automated processes: minimal inspection at both ends**
- **May be carried by trusted ship and crew**
- **Once aboard ship – massive disincentives to divert**
- **Container becomes the weapon**
- **Useful for smuggling weapons**
- **Range: large heavy cargoes – hidden small cargoes**
- **Precision targeting through use of GPS**
- **Inland travel to multiple destinations & transiting US**
- **Multiple payoff - loss of life/economic disruption/ simultaneity of attack**

28

Container Threat Matrix

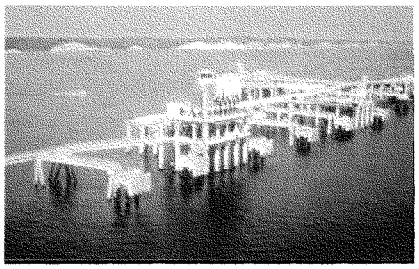
6M containers enter US from overseas

Weapon Characteristic	*Ease of Acquiring Weapon*	*Likelihood of Container Use*	*Threat Characteristics*	*Potential Impact*	*Likelihood of Detection*
Nuclear weapon	Very difficult	Medium	Control of weapon vital	Very High	Low/Medium
Radiological Weapon	Fairly easy	High	Spent fuel dispersed by explosion	High	Medium
Conventional Explosive	Easy	Medium	Fertilizer bombs	Medium	Medium
Biological Weapon	Difficult for most deadly agents	Low, better alternatives	Maybe against food/in narcotics	High, very high	Low
Chemical Weapon	Easy	Medium	Chemicals routinely travel in Containers	Medium	High (Discrimination problem)
Smuggling	Easy	High	Humans and Weapons (Stinger Missile)	High if Stingers	Medium

LNG Tankers vs. Nuclear Power Plants

Cove Point vs. Calvert Cliffs

Cove Point

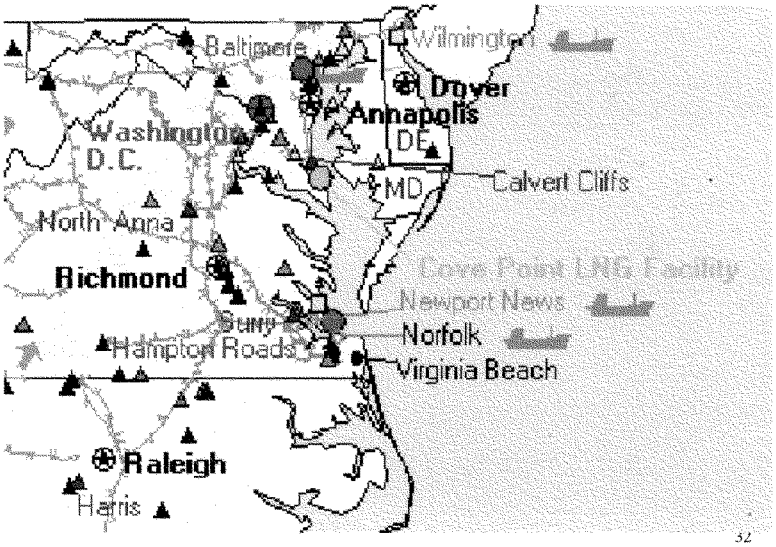


The spillage of the entire contents of a full LNG storage tank can ignite creating a large unusually hot fire that produces thermal radiation. This intense heat causes severe burns in as little as 3 seconds; spontaneous combustion of clothing and wood; and the loss of structural integrity in metal.

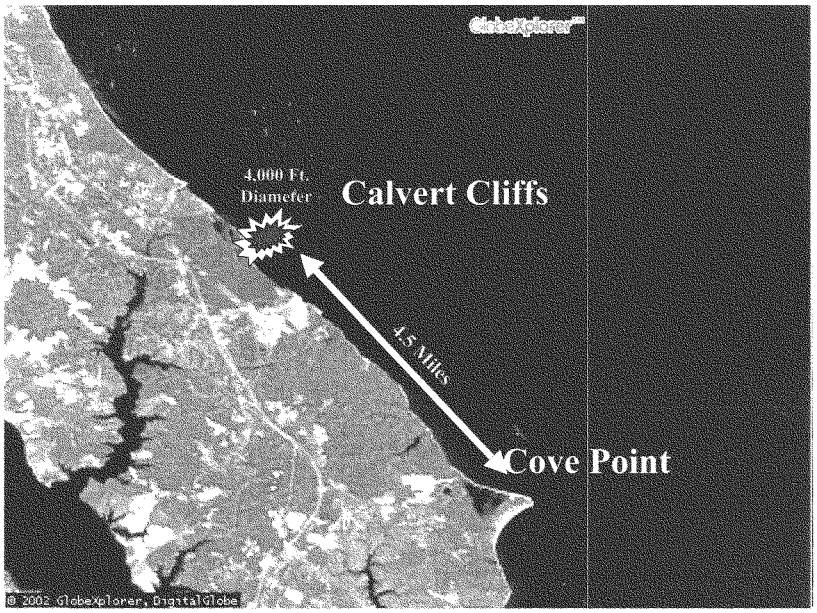
An LNG tank spill can also produce a flammable vapor plume. The danger zone can extend to a radius of up to approximately 4,000 ft. in diameter, creating the potential for serious personal injury and property damage or destruction.

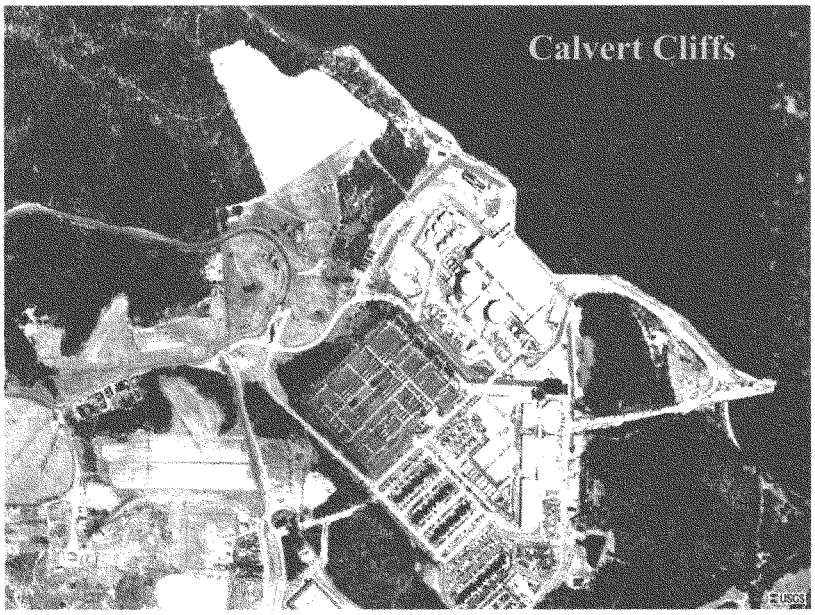
Another major safety concern is an LNG tanker spill on the water. The hazard from such an accident is the creation of a flammable vapor plume that can travel up to two miles creating fire risk for everything in its path.

31



32


GlobeXplorer
4,000 Ft.
Diameter
Calvert Cliffs
4.5 Miles
Cove Point
© 2002 GlobeXplorer, DigitalGlobe


Calvert Cliffs
USGS

Freedom of Navigation Program

- Still Needed With or Without the Treaty
- Excessive Coastal Claims Continue
- Large Numbers of LOST Signatories Flout its Provisions
- Traffic Separation Schemes & Vessel-source Pollution Control Legislation Being Used to Interfere With Transit Passage
- "Reasonable" Legislation & Regulations by Coastal States is Difficult to Overcome
- "Non-tariff Barriers" is an Excellent Example of Effective Indirect Control

35

Selected Excessive Maritime Claims

Cuba	Require state aircraft to comply with directions from air traffic control within flight information region
Albania	Prior permission for warship to enter the territorial sea
Algeria	Prior permission for warship to enter the territorial sea
Bangladesh	Excessive straight baselines; claimed security zone
Burma	Excessive straight baselines; claimed security zone
Cambodia	Excessive straight baselines; claimed security zone
Croatia	Prior permission for warship to enter the territorial sea
El Salvador	200 nautical miles (nm) territorial sea
Iran	Excessive straight baselines; prior permission for warship to enter the territorial sea
Kenya	Excessive straight baselines; historic bay claim (Ungwana Bay)
Liberia	200 nm territorial sea
Libya	Claims all waters south of 32-30 north latitude Gulf of Sidra closure line as internal waters
Malaysia	Excessive restrictions on military activities in exclusive economic zone
Maldives	Prior permission for warship to enter the territorial sea
Malta	Prior permission for warship to enter the territorial sea
Nicaragua	200 nm territorial sea
Pakistan	Claimed security zone; excessive restrictions on military activities in the exclusive economic zone
Philippines	Excessive straight baselines; claims archipelagic waters as internal waters
PRC	Excessive straight baselines; prior permission for warships, Territorial Claims in S & E. China Seas
Saudi Arabia	Excessive straight baselines; claimed security zone
Seychelles	Prior permission for warship to enter the territorial sea
Sierra Leone	200 nm territorial sea
Somalia	200 nm territorial sea; prior permission for warship to enter the territorial sea
Sudan	Prior permission for warship to enter the territorial sea; claimed security zone
Syria	35 nm territorial sea; prior permission for warship to enter the territorial sea
UAE	Prior permission for warship to enter the territorial sea; claimed security zone
Viet Nam	Excessive straight baselines; claimed security zone; prior permission for warship to enter the territorial sea
Yemen	Prior permission for warship to enter the territorial sea; claimed security zone

36

Protests to claims involving pre-conditions for warship innocent passage have been lodged by the United States to the following states:

Albania	Korea, South
Algeria	Libya
Antigua and Barbuda	Maldives
Bangladesh	Malta
Barbados	Mauritius
Brazil	Oman
Bulgaria	Pakistan
Burma	Philippines
Cambodia	Poland
China	Romania
Congo	Seychelles
Denmark	Somalia
Djibouti	Sri Lanka
Egypt	Sudan
Finland	Sweden
Grenada	Syria
Guyana	Vietnam
India	Yemen
Iran	Yugoslavia

37

PRC Restrictions

Under the shield of the UNCLOS, Beijing has enacted marine environment laws and navigation regime legislation that may be invoked to shape and channel shipping movements in coastal and international waters, thereby having the practical effect of denying access.

38

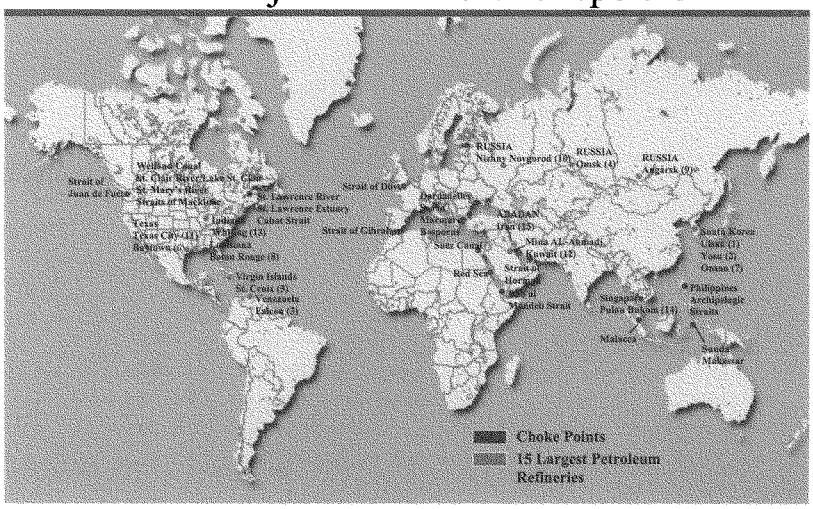
Article 21 of the LOS Convention empowers a coastal state to adopt, with due publicity, laws and regulations relating to innocent passage through the territorial sea in respect of all or any of the following eight subject areas (which do not include security):

- The safety of navigation and the regulation of marine traffic (including traffic separation schemes).
- The protection of navigation aids and facilities and other facilities or installations.
- The protection of cables and pipelines.
- The conservation of living resources of the sea.
- The prevention of infringement of the fisheries regulations of the coastal state.
- The preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof.
- Marine scientific research and hydrographic surveys.
- The prevention of infringement of the customs, fiscal, immigration or sanitary or regulations of the coastal state.

This list is exhaustive and inclusive.

39

World's 15 Largest Petroleum Refineries and Major Maritime Chokepoints



Choke Points

15 Largest Petroleum Refineries

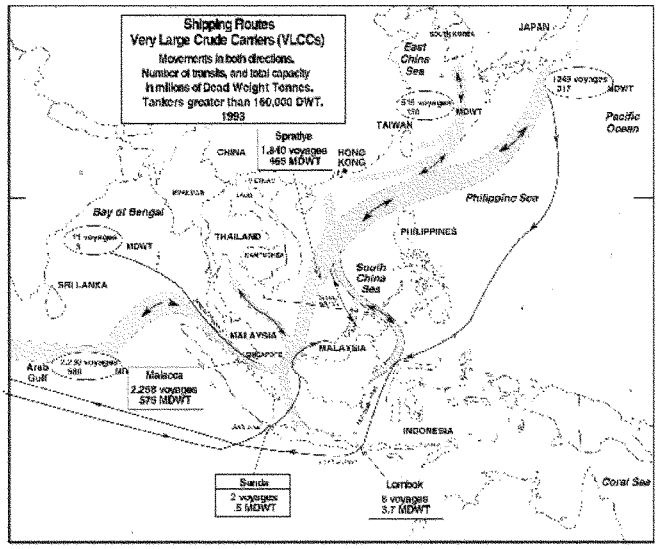
Disputes in the South & East China Seas

The Treaty does nothing to defuse likely flashpoints of future wars.

41

South China Sea Transits

- More than half of the world's annual merchant fleet tonnage passes through the Straits of Malacca, Sunda, and Lombok, with the majority continuing on into the South China Sea.
- Oil flows through the Strait of Malacca leading into the South China Sea are three times greater than through the Suez Canal/Sumed Pipeline, and fifteen times greater than oil flows through the Panama Canal.
- Virtually all shipping that passes through the Malacca and Sunda Straits must pass near the Spratly Islands. The other major shipping lane in the region uses the Lombok and Makassar Straits, and continues into the Philippine Sea. Except for north-south traffic from Australia, it is not used as extensively as the Strait of Malacca and the South China Sea, since for most voyages it represents a longer voyage by several hundred miles.
- Nearly two-thirds of the tonnage passing through the Strait of Malacca, and half of the volume passing the Spratly Islands, is crude oil from the Persian Gulf. Oil flows through the Strait of Malacca were 10.3 million barrels per day in 2002, and rising Asian oil demand could almost double these flows over the next two decades.
- Northeast Asian nations are heavily dependent upon energy shipments through the South China Sea. More than 80% of the crude oil supplies for Japan, South Korea, and Taiwan flow through the Sea from the Middle East, Africa, and South China Sea nations such as Indonesia and Malaysia. LNG (above) and coal from Indonesia, South Africa, and Vietnam are also shipped via this route. As a result, about two-thirds of South Korean energy supplies, and almost 60% of Japan and Taiwan's energy supplies flow through the Sea. 42

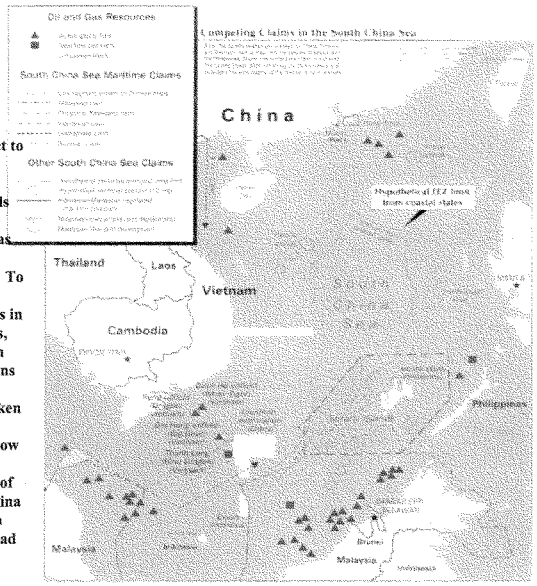


13

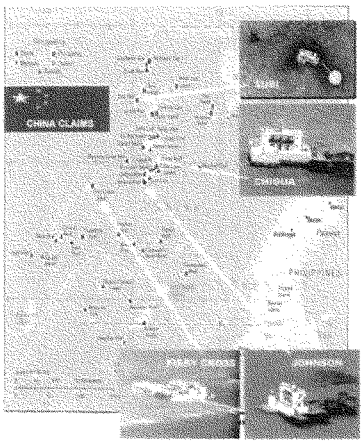
Article 121, states that rocks that cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

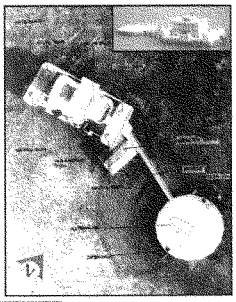
The establishment of the EEZ resulted in overlapping claims in semi-enclosed seas such as the South China Sea. The EEZ gives nations around the region the right to establish a settlement on any of the islands within their EEZ. As such, South China Sea claimants have clashed on various occasions as they tried to establish outposts on the islands (mostly military) in conformity with Article 121 of the UNCLOS, in order to strengthen their claims.

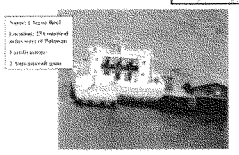
PRC Territorial Claims

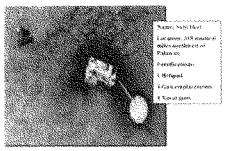


In 1992 the PRC passed a special territorial sea and contiguous zone act to legalize its claims to the Spratlys. Article Two of this legislation specifically identifies both the Paracels and Spratly archipelagoes as Chinese territory, and even uses the Spratlys as base-points for drawing baselines delimiting China's territorial waters. To uphold this claim to title, since 1988 China has deployed some 260 marines in garrisons on eight of the Spratly islets, and several helicopter pads have been constructed. The map depicts locations of major Chinese structures in the Spratlys. Most of these reefs were taken from Vietnam after fighting in 1988. Chinese-built concrete "fortresses" now exist on Johnson Reef, Chigua, Subi, and Fiery Cross. Mischief Reef, east of Chigua, was occupied since 1995. China occupies Fiery Cross Reef, Cuarteron Reef, Johnson Reef, Collins Reef, Eldad Reef, Chigua Reef, Subi Reef, and Philippine-claimed Mischief Reef.



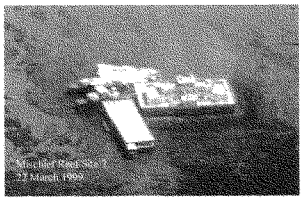


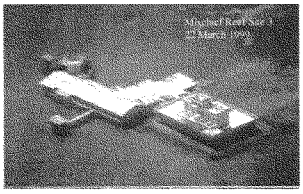




PRC in the Spratlys

PRC in the Spratlys



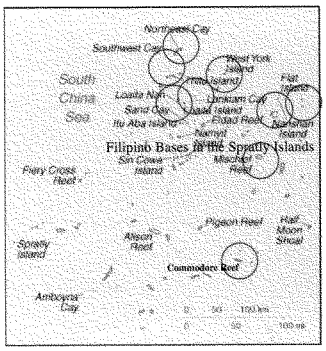


This aerial photo shows new construction activity at a second Chinese occupied area on Mischief Reef. It was also released by the Philippine Department of National Defense on 10 November 1998. In the foreground, the octagonal structures built in early 1995 can be seen with portions of the platform covered by shrouds. In the background, the construction workers can be seen erecting a large, truss structure. On the central platform, personnel can be seen around a large, black object surrounded by sandbags. The object appears to be an anti-aircraft or anti-ship weapon system. However, the type and operational status of the probable weapon system is not evident.

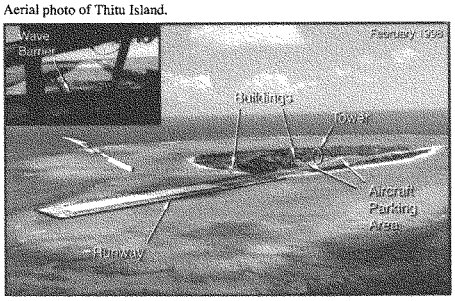
47

Philippines Claim

595 soldiers garrisoned on at least nine principal islands and assert claims to some 22 other islets, reefs, and shoals; including Mischief Reef that China now occupies, Commodore Reef, Northeast Cay, Pag-asa (Thitu), West York, Lankian Cay, Loaita, Flat, and Nashnan.

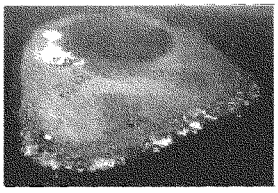


Aerial photo of Thitu Island.

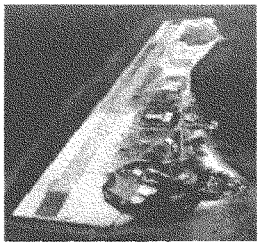


48

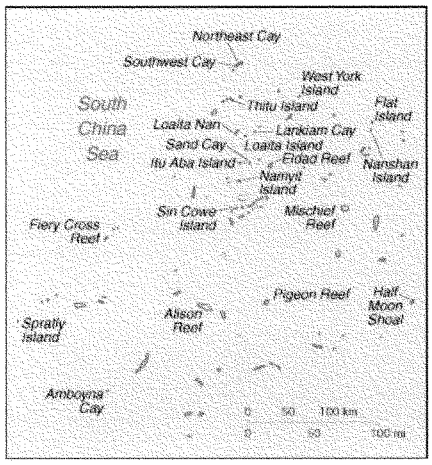
Malaysian Claim



Swallow Reef (Layang Layang)

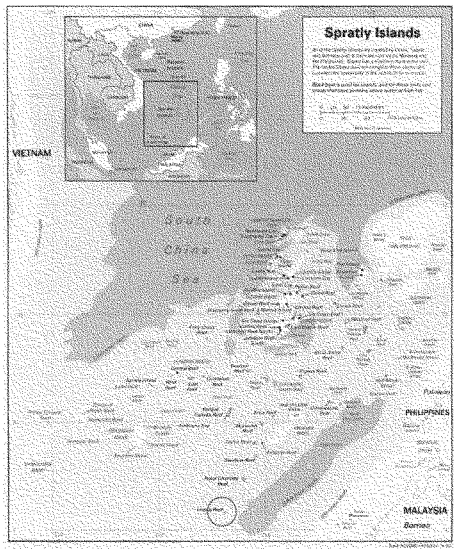


Malaysia has 70 troops on three atolls and asserts claims to nine other geological formations in the area; including; Swallow Reef (aka Layang Layang), Ardasier Bank (07N38, 113E56), Erica Reef, Mariveles Reef, and Royal Charlotte Bank (06N57, 113E35).



Vietnam Claims

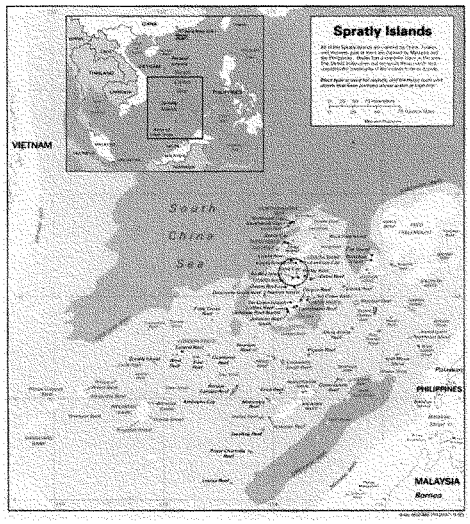
Vietnam claims the entire Spratlys archipelago and has occupied at least 25 islands, reefs, and cays with 600 troops, mainly in the western and central Spratly Islands (Tröôøng Sa), including Spratly Island, Ladd Reef, West Reef, Central Reef, East Reef, Amboyna Cay, Pearson Reef, Alison Reef, Cornwallis Reef, Barque Canada Reef, Sand Cay, Collins Reef, Sin Cowe, Great Discovery Reef, Namyit, Petley Reef, and Southwest Cay.



Brunei Claims

Brunei occupies one (1) island, Louisa Reef; the southernmost Spratly Island.

51



Taiwan Claims

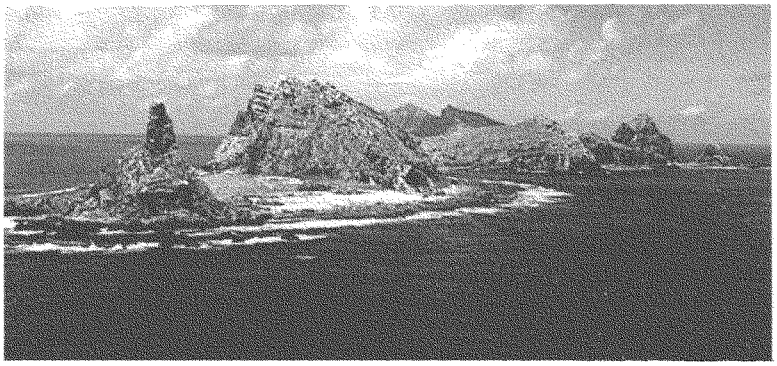
Taiwan occupies one (1) island, Itu Aba; in the north central part of the Spratly Islands.

52

Senkaku Islands Dispute

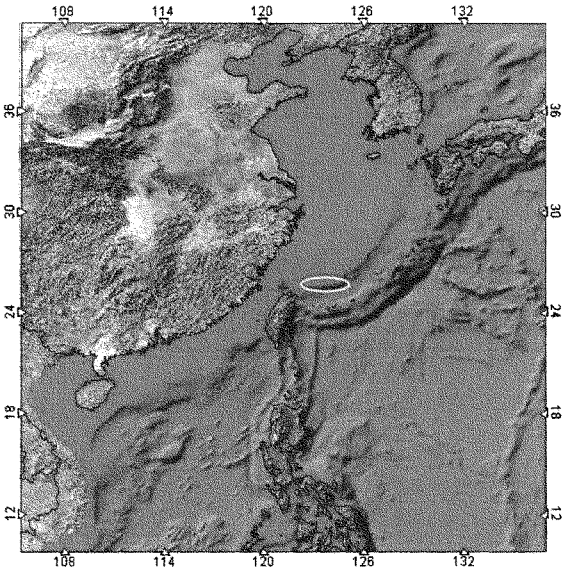
53

Senkaku Islands



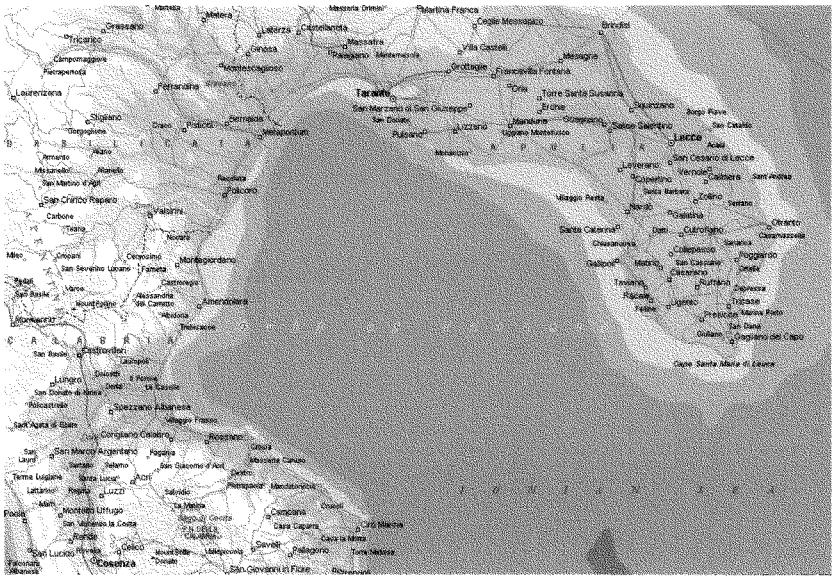
29

Senkaku Islands

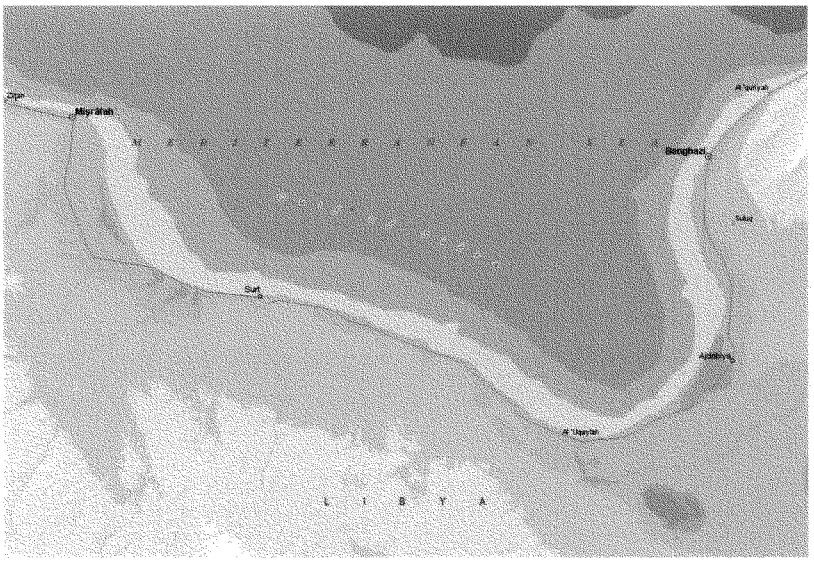


30

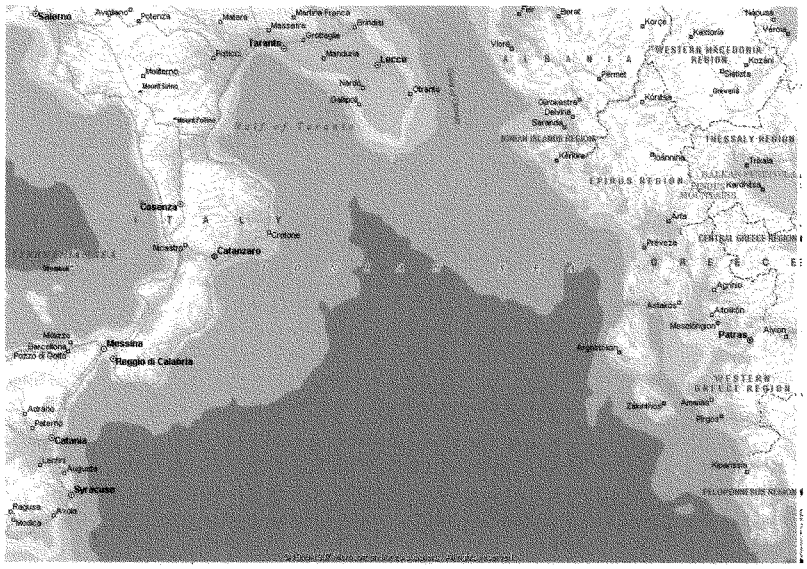
Historic Bays Conflict


Taranto
Lecce
Cosenza
Foggia

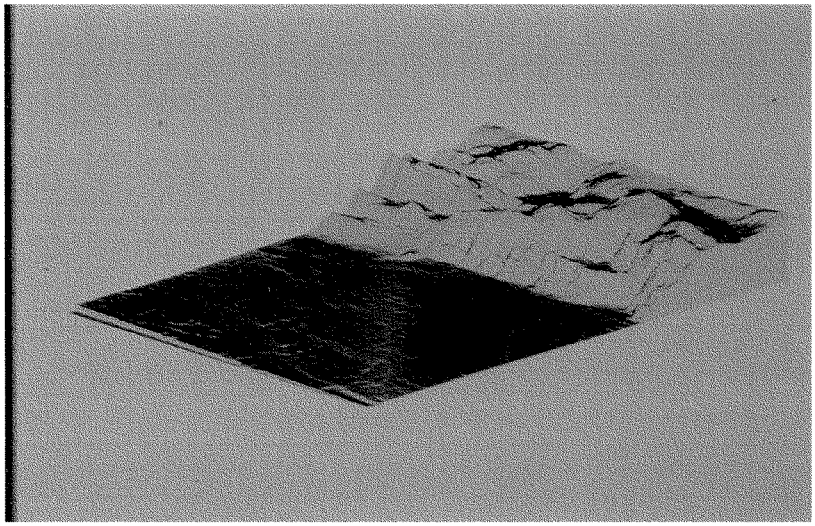
32


Misratah
Benghazi
Sirt
L I B Y A

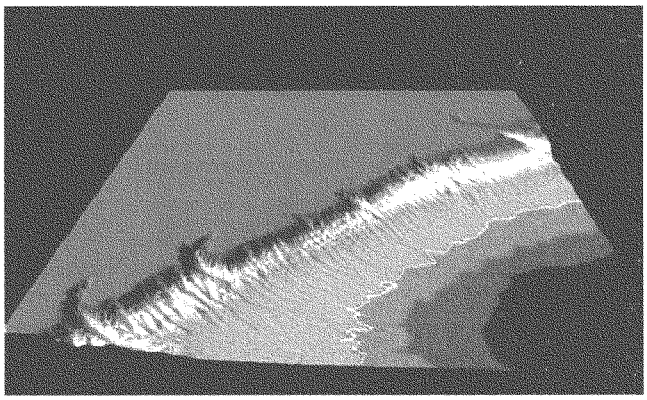
33


Salerno
Potenza
Taranto
Lecce
Cosenza
Catanzaro
Messina
Reggio di Calabria
Catania
Syracuse
Korçë
Kastoria
Vlorë
Fier
Berat
Tirana
Durrës
Kërçovë
Ioannina
Tríkala
Karditsa
Arta
Préveza
Agrinio
Patras
Argostólion
Zákynthos
Amalías
Pýrgos
Kavalaríta
Sparta
Gjirokastër
Delvinë
Sarandë
Korçë
Fier
Vlorë
Berat
Durrës
Tirana
Elbasan
Shkodër
Kukës
Gjirokastër
Sarandë
Korçë
Kastoria
Florina
Kozani
Grevena
Ioannina
Tríkala
Karditsa
Arta
Préveza
Agrinio
Argostólion
Zákynthos
Amalías
Pýrgos
Kavalaríta
Sparta
Patras
Alyon
Messina
Reggio di Calabria
Catania
Syracuse
Ragusa
Pozzallo
Avola
Augusta
Lentini
Palermo
Trapani
Marsala
Mazara
Agrigento
Gela
Ortigia
Pozzallo
Barcellona
Milazzo
Pozzo di Gotto
Cosenza
Crotone
Catanzaro
Nicastro
Vibo Valentia
Potenza
Matera
Avigliano
Martina Franca
Brindisi
Massafra
Grottaglie
Taranto
Manduria
Lecce
Nardò
Gallipoli
Otranto
Molfetta
Bari
Monopoli
Mola di Bari
Mesagne
Brindisi
Ostuni
Fasano
Monopoli
Mola di Bari
Molfetta
Bari
Trani
Barletta
Manfredonia
Foggia
Lucera
Troia
Bovino
Ascoli Satriano
Melfi
Venosa
Lagonegro
Sapri
Policastro
Vallo della Lucania
Sala Consilina
Eboli
Salerno
Avellino
Benevento
Caserta
Nola
Ischia
Pozzuoli
Napoli
Sorrento
Capri
Gaeta
Formia
Latina
Anzio
Nettuno
Ostia
Fiumicino
Civitavecchia
Tarquinia
Viterbo
Bolsena
Orvieto
Terni
Rieti
Spoleto
Foligno
Perugia
Assisi
Gubbio
Urbino
Pesaro
Fano
Senigallia
Ancona
Jesi
Macerata
Tolentino
Ascoli Piceno
Teramo
Pescara
Chieti
Lanciano
Vasto
Termoli
Campobasso
Isernia
Cassino
Frosinone
Rome

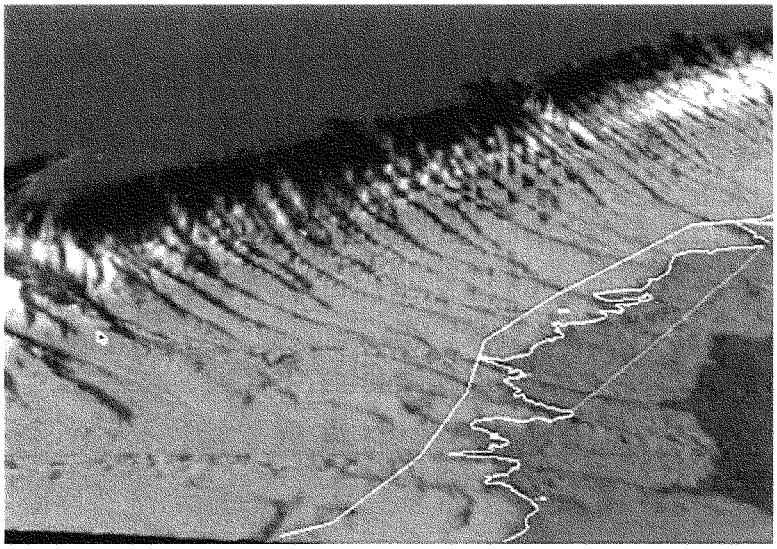
1980's Era Resolution

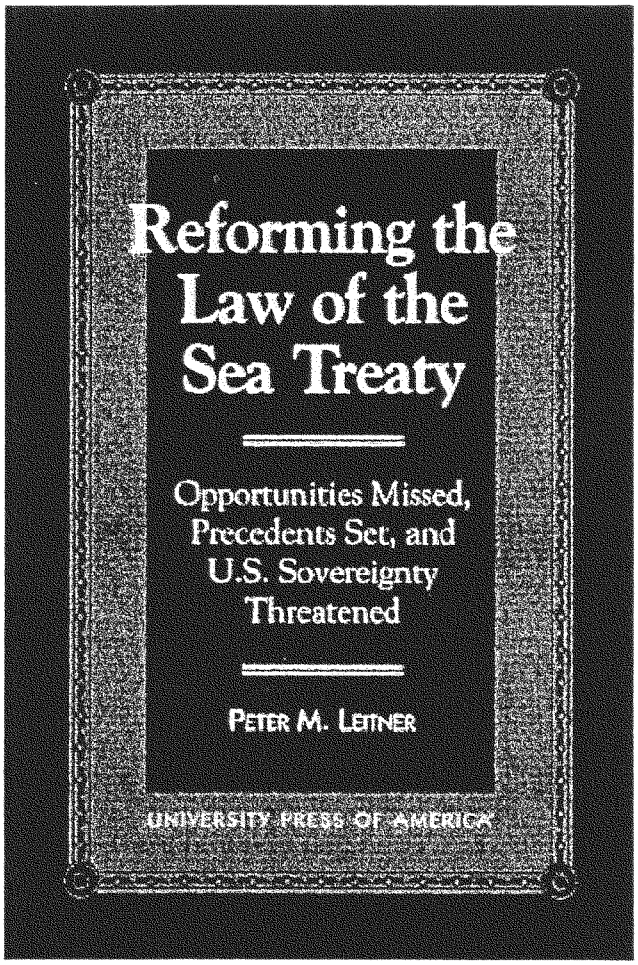


Present Day Resolution



Present Day Resolution




Reforming the Law of the Sea Treaty
Opportunities Missed, Precedents Set, and U.S. Sovereignty Threatened
PETER M. LEITNER
UNIVERSITY PRESS OF AMERICA

American Letter of Marque

The Letter below is an example of an American letter of marque that was issued in the War of 1812 to Captain of the Prince of Neufchatel, comprising 18 guns and 129 men, by James Madison, President of the United States of America. This letter is archived in the Public Record Office in Richmond, Surrey in the UK (High Court of Admiralty HCA32/1342).

Letter of Marque carried by Captain Millin of the American privateer Prince of Neufchatel during the War of 1812.
James Madison, President of the United States of America,
To all who shall see these presents, Greeting:

BE IT KNOWN, That in pursuance of an act of congress, passed on the 26th day of June one thousand eight hundred and twelve, I have Commissioned, and by these presents do commission, the private armed Brig called the Prince Neufchatel of the burden of three hundred & Nineteen tons, or thereabouts, owned by John Ordronaux & Peter E. Trevall of the City & State of New York and Joseph Beylle of Philadelphia in the State of Pennsylvania Mounting eighteen carriage guns, and navigated by one hundred & twenty nine men, hereby authorizing Nicholas Millin captain, and William Stetson lieutenant of the said Brig and the other officers and crew thereof, to subdue, seize, and take any armed or unarmed British vessel, public or private, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, or within the waters of the British dominions, and such captured vessel, with her apparel, guns, and appertenances, and the goods or effects which shall be found on board the same, together with all the british persons and others who shall be found acting on board, to bring within some port of the United States; and also to retake any vessel, goods, and effects of the people of the United States, which may have been captured by any British armed vessel, in order that proceedings may be had concerning such capture or recapture in due form of law, and as to right and justice shall appertain. The said Nicholas Millin is further authorized to detain, seize, and take all vessels and effects, to whomsoever belonging, which shall be liabel thereto according to the law of nations and the rights of the United States as a power at war, and to bring the same within some port of the United States, in order that due proceedings may be had thereon. This commission to continue in force during the pleasure of the president of the United States for the time being.

GIVEN under my hand and seal of the United States of America, at the City of Washington, the twelfth day of December in the year of our Lord, one thousand eight hundred and fourteen and of the independence of the said states the thirty ninth.

BY THE PRESIDENT James Madison
Jas. Monroe, Secretary of State.

A Bad Treaty Returns

THE CASE OF THE LAW OF THE SEA TREATY

Peter M. Leitner is a senior strategic trade advisor at the Department of Defense. The opinions expressed herein are the author's alone and do not represent the views of the Department of Defense, the government of the United States, or any organization.

By PETER M. LEITNER

> [A] treaty is likely to be a highly deceptive document, creating illusory security or a false set of expectations about the way nations party to it are likely to behave in the future. . . .
>
> I would recall George Kennan's comment that the most fundamental error of United States foreign policy is the belief that international law can actually temper the dangerous ambitions of governments. For the United States to accept a treaty on law of the sea which is less than ideal from the standpoint of protecting substantive national interests because some positive premium value is placed on the treaty itself—on its mere existence—is to make a fundamental error of judgment. The error lies in assigning a positive, premium value to the existence of a law of the sea treaty. Assuming such a positive value stems from a misperception about the role and place of treaties in regulating the conduct of nations. (Knight 1981, 1)

On 9 July 1982, President Reagan announced that the United States would not become a signatory to the UN Convention on the Law of the Sea. This rejection was preceded by a series of events that cast serious doubt that the United States intended to sign the treaty. In March 1981, the president announced that his administration would undertake a comprehensive review of the draft treaty to assure that it met U.S. interests. On 29 January 1982, he reported that the results of the review concluded that major elements of the deep seabed mining provisions were not acceptable and would have to be changed during the final (8 March–30 April 1982) negotiating session in New York.

The Third UN Conference on the Law of the Sea, which had been meeting periodically since 1973, drafted language on a broad range of issues, including territorial seas, economic zones, environmental protection, fishing rights, ownership and management of continental shelves, exploration and exploitation of seabed resources, rights of passage through, under, and over straits for international navigation, and new fora for settlement of disputes. But major sections of the deep seabed mining provisions were unacceptable to the United States and most industrialized allies. The concern that the Reagan administration voiced over the draft treaty led them to replace a significant segment of the U.S. delegation and suspend negotiating efforts while it conducted a review to determine the degree to which the treaty met U.S. interests.

That review culminated in the presidential statement of 29 January 1982 that most provisions of the draft were acceptable and consistent with U.S. interests but that major elements of the deep seabed mining portion were not. The president identified six necessary changes to the deep seabed mining provisions before the treaty could be supported by the United States. As Reagan stated,

> We will seek changes necessary to correct those unacceptable elements and to achieve the goal of a treaty that:
>
> • Will not deter development of any deep seabed mineral resources to meet national and world demand;
>
> • Will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the International Authority, and to promote the economic development of the resources;
>
> • Will provide a decision making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
>
> • Will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;
>
> • Will not set other undesirable precedents for international organizations; and

• Will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

The U.S. delegation had a difficult task on returning to the eleventh session of the conference, billed as the final negotiating session, to renegotiate elements of the treaty to achieve the president's stated objectives. When the conference opened on 8 March 1982, the U.S. delegation presented a list of general principles for consideration. These were promptly rejected, however, by the Group of 77 (a coalition that included over 110 third world countries organized into a fairly cohesive voting bloc), which demanded a listing of specific word change amendments to the text, arguing that the time for the negotiation of basic principles had long since passed. The U.S. delegation prepared what became known as the "Green Book," a compilation of over 100 proposed amendments. This, too, was rejected as a basis for negotiation—the Group of 77 insisted that the proposed amendments would affect the basic character of the treaty and were thus unacceptable.

Negotiations between the United States and the Group of 77 continued through intermediaries for the duration of the conference. The primary set of intermediaries known as the Group of 11 (Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden, and Switzerland) offered numerous compromise texts, but they were largely ineffective in an atmosphere of increasing polarization.

On 30 April 1982, the last day of the conference, the leadership attempted to have the treaty adopted by consensus, but the United States exercised its right to have the treaty, as a whole, put up for a two-thirds vote. The final outcome was 130 in favor and 4 against, with 17 abstentions. The four states voting against adoption of the treaty were the United States, Israel, Turkey, and Venezuela. The seventeen abstentions were cast by the United Kingdom, the Federal Republic of Germany, Belgium, the Netherlands, Luxembourg, Italy, Spain, Thailand, and the Soviet bloc with the exception of Romania.[1] Two countries with major potential for ocean mining, France and Japan, voted in favor of the treaty.

When the conference concluded, the United States began another review of the outcome of the negotiations, the results of which President Reagan announced on 9 July 1982:

> Our review recognizes . . . that the deep seabed mining part of the convention does not meet United States objectives. For this reason, I am announcing today that the United States will not sign the convention as adopted by the Conference, and our participation in the remaining Conference process will be at the technical level and concerned with those provisions that serve United States interests.

1994 TREATY MODIFICATIONS

In 1990, UN Secretary General Javier Perez de Cuellar initiated consultations among interested governments aimed at achieving universal participation in the convention. Factors contributing to this renewed pressure included the desire for universal participation, improvements in the international political climate, changes in economic ideology that meant greater acceptance of free-market principles, and the steady increase in the number of ratifications toward the sixty required to bring the convention into force.

In April 1993, the Clinton administration announced that it would actively participate in the consultations on the outstanding issues in the deep-seabed portions of the convention. The consultations led to adoption, on 28 July 1994, by the UN General Assembly (by a vote of 121 in favor [including the United States] to 0 against, with 7 [Colombia, Nicaragua, Panama, Peru, Russian Federation, Thailand, and Venezuela] abstentions, and 36 nations absent) of Resolution 48/263, opening for signature an agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. The agreement amended various seabed-related parts of the convention.

On 7 October 1994, President Clinton transmitted to the Senate the 1982 United Nations Convention on the Law of the Sea and 1994 agreement relating to the Implementation of Part XI of the United Nations convention (Treaty Document 103-39). The package was referred to the Senate Committee on Foreign Relations. On 16 November 1994, the UN Law of the Sea Convention entered into force but without accession by the United States. A primary question facing the Senate is whether the amendments offered in the agreement sufficiently alter the direction of the convention's deep seabed mining provisions to make it acceptable to those in the United States who oppose ratification.

The 1994 agreement is touted by the UN Secretary General to be an integral part of the convention package that entered into force on

16 November 1994 and addresses issues related to decision making, review conference, technology transfer, and obstacles to development. In the event of inconsistencies, the agreement and annex language take precedence over convention language. The annex contains the referenced changes to part XI and annexes III and IV of the convention, while the agreement defines the legal relationship between the convention and the agreement, explains the ways in which states may consent to be bound by the agreement, and sets the terms of entry into force of the agreement and its provisional application. However, the legal or binding nature of this agreement is both unprecedented and untested. As a result, the permanence of the changes achieved by this agreement are more a matter of conjecture, or possibly wishful thinking, than definitive judgment.

SUPERFICIAL CHANGES ARE INADEQUATE

While a number of changes appear to have been achieved by the 1993–94 negotiations, their depth, substance, effectiveness, and legality are highly suspect. The new agreement "does not, even purport to amend the convention. It establishes controlling 'interpretive provisions' that will control in the event of a dispute. This is not an approach that gives confidence to prospective investors in ocean mining" (Hoyle 1994).

Adherence to the Agreement and the Convention

The agreement was opened for signature for a twelve-month period, starting 28 July 1994. After that date, any ratification, formal confirmation of, or accession to the convention is also automatically consent to be bound by the agreement. Since the purpose of the agreement is to promote universal participation in the convention, the agreement uses several ways to achieve consent to the agreement. At the same time, the language on consent also had to respond to the legal requirements of the sixty-plus states that had already ratified or acceded to the convention as well as to accommodate those states that had not ratified or acceded to the convention. In addition, the agreement had to take effect as the convention entered into force in order to maintain the integral link between the two. That link required use of provisional application as a procedure for operation of the agreement.

Effective 16 November 1994, the agreement was applied provisionally, pending its entry into force. For each country, provisional application was to be "in accordance with . . . national or internal laws and regulations." Provisional application of the agreement will terminate on its entry into force or on 16 November 1998. States that (1) voted for adoption of the agreement, (2) signed the agreement, (3) consented in writing to its provisional application, or (4) acceded to the agreement will all apply the agreement provisionally, with certain exceptions. Those exceptions include any state that voted in favor but before 16 November 1994, and notified the United Nations in writing that it would not apply the agreement provisionally or that it would consent to provisional application only on subsequent signature or written notification and any state that signed the agreement but notified the United Nations in writing at the time of signature that it would not apply the agreement provisionally.

The United States announced, when it signed the agreement on 29 July 1994, that "it intends to apply the agreement provisionally. Provisional application by the United States will allow us to advance our seabed mining interests by participating in the International Seabed Authority from the outset to ensure that the implementation of the regime is consistent with those interests."

Adherence to the Agreement: Provisions

> The most curious and potentially most threatening aspect of the UN Law of the Sea process is provisional application. We are told that the Administration intends to sign or in some other way commit the United States to the "Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea" this summer. The Administration does not intend to submit the "agreement" and the 1982 convention for advice and consent for some years, possibly not until mid-1998. In the meantime, the United States as a signatory of the "Agreement" may become a "Provisional Member" of the Council, the executive organ of the Seabed Authority. We are told by the Administration that United States domestic seabed mining law will continue to control until the United States becomes a full Contracting Party to the United Nations Convention on the Law of the Sea by ratification. At the same time, the convention appears to favor those countries which apply to the Seabed Authority for mining rights in the interim. (Hoyle 1994)

Article 4 (3) of the agreement sets forth the ways in which a state or entity may express its consent to be bound by the agreement:

(a) signature that is equivalent to consent to be bound;
(b) signature subject to ratification or formal confirmation, followed by ratification;
(c) signature subject to a procedure set out in Article 5; and
(d) accession.

Article 5 provides an unprecedented "simplified" procedure to be used by any of the sixty states that ratified or acceded to the convention before the agreement was adopted in July 1994 and then subsequently signed the agreement. Upon their signature, such states will automatically be considered parties to the agreement as of 28 July 1995, unless they notify the United Nations they do not wish to be bound by the agreement in this way. If a state uses that notification, it may become bound only by specific act of ratification or formal confirmation.

The agreement will enter into force thirty days after the date on which forty states have established their consent to be bound, provided that at least seven are "pioneer investors with at least five of the seven being developed or [industrialized] states." For each state establishing consent to be bound after entry into force of the agreement, entry into force takes place thirty days following establishment of the consent to be bound.

HOW DID THE TREATY GET THIS WAY?

Four seminal events marked the errant course that led to the eventual rejection of the treaty by the United States. These are:

• The acceptance without definition, of the principle that the mineral resources of the seabed, in areas beyond national jurisdiction, are "the common heritage of mankind." While the principle is a noble statement and easily acceptable, it has come to be defined in such a way that justifies the creation of a supranational regulatory agency that will control most activities occurring within the "area."

• The 1975 proposal to the UN General Assembly, by then-Secretary of State Henry Kissinger, to support a "parallel system" of ocean mining whereby commercial miners and their sponsoring states would support direct competitive UN mining operations in the deep seabed. This bombshell of a proposal was a complete surprise to U.S. industry, other government departments, and even to most of the U.S. Law of the Sea delegation. While aimed at cooling off New International Economic Order rhetoric in other UN fora by throwing them a bone, this action raised the Group of 77's level of expectation of further concessions and was a contributing factor in emboldening them.

• The U.S. decision to return to treaty negotiations even after a small group of developing country delegates fundamentally altered the agreed-on ocean mining negotiating text after the sixth session of the conference was adjourned. The U.S. decision to return was, in effect, acceptance of the legitimacy of an illegitimate anti-free enterprise text and created an insurmountable obstacle to achieving an acceptable treaty.

• The U.S. decision to provide conference participants full access to a U.S.-financed model of an ocean mining venture. While the purpose was to narrow the debate on levels of taxation, fees, and production limits to be placed on potential ocean miners, its effect was to provide ammunition to third world negotiators to use against U.S. free market proposals.

The Common Heritage of Mankind Principle

In a 1967 statement at the United Nations, Ambassador Pardo of Malta proposed that seabed resources be regarded as the "common heritage of mankind" and that this area not be subject to national appropriation. Two years later, the General Assembly passed the Moratorium on Seabed Exploration and Exploitation (Resolution 2574-D (XXIV)), which called on all states to refrain from seabed resource exploitation until the establishment of an international seabed regime that would administer the area in the interest of all mankind. The General Assembly Declaration of General Principles on the Seabed (Resolution 2749 (XXV)), adopted in 1970, endorsed the common heritage principle but included no definition of the area itself. The United States and many other nations opposed the Moratorium Resolution.

The common heritage concept has wide support among both developing and developed nations, including the United States. However, interpretations of this principle differ markedly. The developed nations feel that free and open exploitation of the seabeds, as long as territorial sovereignty is not claimed, is in the interest of all nations and allowable under both the common heritage principle and the traditional doctrine of freedom of the high seas. The developing nations, however, lean toward a more collectivist interpretation of the term "common heritage of mankind" to mean that individual states are barred from exploiting mankind's possession unless it is conducted under the aus-

pices of a generally accepted international regime. Despite these differing interpretations, the principle itself has been the chief impetus behind efforts to establish an International Seabed Authority to administer the "common heritage" in the interest of all mankind.

The Parallel System of Mining

In an attempt to accelerate the pace of the treaty negotiations, Secretary of State Kissinger made an unprecedented offer to the UN General Assembly. The deal he proposed in 1975 sought:

> to ensure that all nations, developed and developing, have adequate access to seabed mining sites:
>
> • The United States proposes that the treaty should guarantee nondiscriminatory access for states and their nationals to deep seabed resources under specified and reasonable conditions. The requirement of guaranteed access will not be met if the treaty contains arbitrary or restrictive limitations on the number of mine sites which any nation might exploit. And such restrictions are unnecessary because deep seabed mining cannot be monopolized: there are many more productive seabed mining sites than conceivably can be mined for centuries to come.
>
> The United States accepts that an "Enterprise" should be established as part of the International Seabed Resource Authority and given the right to exploit the deep seabeds under the same conditions as apply to all mining.
>
> • The United States could accept as part of an overall settlement a system in which prime mining sites are reserved for exclusive exploitation by the Enterprise or by the developing countries directly—if this approach meets with broad support. Under this system, each individual contractor would propose two mine sites for exploitation. The Authority would then select one of these sites, which would be mined by the Authority directly or made available to developing countries at its discretion. The other site would be mined by the contractor on his own.
>
> • The United States proposes that the International Authority should supervise a system of revenue sharing from mining activities for the use of the international community, primarily for the needs of the poorest countries. These revenues will not only advance the growth of developing countries; they will provide tangible evidence that a fair share in global economic activity can be achieved by a policy of cooperation. Revenue sharing could be based either on royalties or on a system of profit sharing from contract mining. Such a system would give reality to the designation of the deep seabeds as the common heritage of all mankind.
>
> • Finally, the United States is prepared to make a major effort to enhance the skills and access of developing countries to advanced deep seabed mining technology in order to assist their capabilities in this field. For example, incentives should be established for private companies to participate in agreements to share technology and train personnel from developing countries. (Kissinger 1976, 540–41)

This Kissinger sop to the Group of 77, in an attempt to placate ever-increasing New International Economic Order demands, opened up a Pandora's box of convoluted logic, historic precedents, and escalating demands that set the stage for even bolder expectations by the Group of 77. Expectations and perceptions of U.S. weakness set the stage for the Engo treachery at the sixth session of the negotiations.

Engo's Treachery

The sixth session of the conference was held from 23 May–15 July 1977. As was the standard practice since UNCLOS III first convened in 1972, the work of the conference was organized around three committees. Committee I dealt with seabed mining issues. Committee II focused on fisheries, territorial sea claims, and activities on the continental shelf. Committee III dealt with dispute settlement, research, and environmental matters.

While the sixth session made slow but steady progress on most issues, Committee I, under the chairmanship of Paul Bamala Engo of Cameroon, was responsible for fanning a smoldering set of confrontational North/South issues into a conflagration whose effects are still felt today, some twenty years later.

The following excerpts from the U.S. delegation report describe the events, as well as the mood, of that period most effectively:

> Under the fair and judicious leadership of Minister Jens Evensen of Norway a responsible and effective discussion of seabed issues took place. This discussion and the texts formulated by Minister Evensen offered real prospects that the impasse on seabed mining issues could be resolved on terms acceptable to both the developed and developing nations.
>
> Regrettably, however, the new "composite" text concerning the system of exploitation and governance of the deep seabed Area (Part XI) is now fundamentally unacceptable. It deviates markedly from the proposed compromise text which had been prepared on the basis of full, fair and open discussion under Minister Evensen's leadership.
>
> The Evensen text, although not without problems, was generally viewed as a useful basis for further negotiation. The newer text—produced in private, never discussed with a representative group of concerned nations, and released only after this session of the Conference terminated—cannot be viewed as a responsible substantive contribution to further

negotiation. Indeed, the manner of its production—treating weeks of serious debate and responsible negotiation as essentially irrelevant—raises an equally serious procedural problem: whether the Law of the Sea Conference can be organized to treat deep seabed issues with the seriousness they, and the Conference which depends on their satisfactory resolution, demand.

Among the serious points of substantive difficulty in the latest deep Seabeds text, and the system it would define are the following:

- It would not give the reasonable assurance of access that is necessary if we and others could be expected to help finance the Enterprise and to accept a "parallel system" as a basis of compromise.
- It could be read to make technology transfer by contractors a condition of access to the deep seabed—subject, at least in part, to negotiation in the pursuit of a contract.
- It could be read to give the Seabed Authority the power effectively to mandate joint ventures with the authority as a condition for access.
- It fails to set clear and reasonable limits on the financial burdens to be borne by contractors; indeed it simply combines a wide range of alternative financial burdens, as if such a combination could be a compromise—when, in fact, it is likely to prove a compound burden sufficient to stifle seabed development.
- It would set an artificial limit on seabed production of minerals from nodules—which is not only objectionable in principle; it is also far more stringent than would be necessary to protect specific developing country producers from possible adverse effects, and is incompatible with the basic economic interests of a developing world generally.
- It would give the Seabed Authority extremely broad new, open-ended power to regulate all other mineral production from the seabed "as appropriate."
- It would appear, arguably, to give the Authority unacceptable new power to regulate scientific research in the Area.
- It would fail adequately to protect minority interests in its system of governance and would, accordingly, threaten to allow the abuse of power by an anomalous "majority."
- It would allow the distribution of benefits from seabed exploitation to peoples and countries not party to the convention.
- It would seriously prejudice the likely long-term character of the international regime, by requiring that—if agreement to the contrary is not reached within 25 years—the regime shall automatically be converted into a "unitary" system, ruling out direct access by contractors, except to the extent that the Authority might seek their participation in joint ventures with it.

With this unfortunate, last-minute deviation from what had seemed to be an emerging direction of promise in the deep seabed negotiations, I am led now to recommend to the President of the United States that our government must review not only the balance among our substantive interests but also whether an agreement acceptable to all governments can best be achieved through the kind of negotiations which have thus far taken place. (U.S. Department of State 1977, 5-6)

It was astounding that after months of public brooding over the Engo double-cross, the Carter administration decided to return to the conference and continue negotiations based on the Engo draft. The United States lost enormous ground at that point when it "blinked first" in the game of chicken between the interests of industrialized states and the redistributive demands of the Group of 77 promoting the New International Economic Order.

The Odyssey of the MIT Model

Within the context of UNCLOS III technical negotiations over the creation of a future seabeds regime, the old maxim "knowledge is power" had taken on a special meaning. While the accumulation, manipulation, and selective dissemination of specialized bits of information is a powerful negotiating tool, the premature or unnecessary release of information may erode one's own negotiating position.

One of the most notable characteristics of Committee One (Deep Seabed Regime) negotiations throughout the life of UNCLOS III prior to the seventh session convening in 1978 in Geneva was the paucity of technical information concerning future ocean mining operations. Prior to Geneva'78, the main source of technical information had been the United Nations Secretariat, which attempted to quantify the potential impact that ocean mining would have on traditional mineral markets. Lacking more accurate information, the secretariat made reasoned estimates of nodule mineral content and abundance based on an extremely weak database. As a result, the secretariat studies, although quite interesting to read, were painfully inadequate from a technical standpoint.

Until that point, only the United States and a handful of other industrialized potential ocean mining countries had some degree of understanding of the likely economic dynamics of an ocean mining operation. As most of the hard data associated with projecting internal rates of return for business activities are considered proprietary, even sponsoring governments did not have complete information.

In spite of this widely perceived lack of hard data, the conference sought to regulate an as yet nonexistent industry about which nothing for

certain was known. In an attempt to overcome the obvious handicap created by an informational vacuum, the Sea Grant program of the National Oceanic and Atmospheric Administration (NOAA) commissioned the Massachusetts Institute of Technology (MIT) to create a detailed computer model of a future U.S. ocean mining corporation. This project sought to be able, by building in a high degree of flexibility, to predict the economics of a commercial venture under a variable set of assumptions and

The motivation behind releasing the model was to prevent, through education, the expression of unrealistic proposals, which would confuse the negotiating process.

was to be used for U.S. government planning and negotiating purposes.

The research yielded a computer model that estimated the costs a first-generation ocean mining operation in the Eastern Pacific would likely encounter. The results were released in a report dated March 1978 entitled "A Cost Model of Deep Ocean Mining and Associated Regulatory Issues" (Massachusetts Institute of Technology 1978) and was distributed within the United States and a number were supplied to the UN Secretariat for distribution among all of the national delegations to UNCLOS III.

The wide distribution of the MIT model (a problem that the U.S. delegation refused to recognize) raised the state of negotiations at UNCLOS to a level that the United States and its industrialized allies were ill-prepared to manage. While a slow, evolutionary process of sophistication within Committee One was underway prior to Geneva, it was possible to influence the conference gradually toward the U.S. position both by waiting for a gradual weakening of the Group of 77 as a dominating political bloc and by selectively releasing information to the conference.

The release of the MIT model had a threefold effect on the conference:

(1) The model instantly galvanized participants along a generally accepted set of assumptions. This was most clearly expressed in the statement of Tommy Koh of Singapore, chairman of the subgroup of financial experts:

> In the group of financial experts we were immediately confronted with the need to agree on a set of assumptions. Without an agreed framework of assumptions it would not have been possible for us to carry on with our discussions. We agreed that the best study to date was that undertaken by the Massachusetts Institute of Technology, entitled "A Cost Model of Deep Ocean Mining and Associated Regulatory Issues," hereinafter referred to as the MIT Study.

The act of agreeing on a common set of principles raised the tenor of negotiations to a level far more advanced than previously anticipated. This quantum leap in the level of discussions obviously caught the U.S. negotiators unprepared as they were forced to admit, after repeated questions from other delegates, that the administration had not acted on such advanced questions as the domestic tax treatment to which contributions to an international authority would be subject. This admission proved an embarrassment to the U.S. delegation and should have served as a warning of other potential embarrassments that the delegation would face later.

(2) The model had the psychological effect of imparting to LDC conference participants an air of expertise regarding an advanced technological subject, thereby making them "as sophisticated" technically as their DC counterparts. This mind-set of presumed technical equality created an atmosphere conducive to the proliferation of unrealistic proposals. It was suddenly quite easy, and in some respects more legitimate, to seize on a particular number in the study and "run with it" without necessarily understanding how the number was determined or what its interrelationship with other assumptions might be.

(3) The presentation of the model and the subsequent release and promotion of conflicting data on the part of the U.S. delegation resulted in a cascade of technical misinformation.

It was counterproductive for the United States to release a complete information package one day, which it touted as "the best available data," and to apologize for inaccurate bits and pieces the next day. This was particularly serious because those assumptions within the model that the United States had been trying to withdraw from discussion provide the economic/commercial underpinnings of the entire industry as postulated in the model. To the more suspicious delegations, the process created an image of tinkering with the figures in an attempt to put U.S. proposals in the most favorable light. Under such negotiating conditions, it was difficult for the United States to criticize other dele-

gations for submitting proposals that may be considered outrageous or unsubstantiated. In effect, the conflicting nature of the U.S. presentation bestowed an equivalent legitimacy on all parties regarding the validity of their proposals.

With this experience fresh in their minds it was rather startling that the U.S. delegation compounded its errors by sponsoring a special seminar at Cambridge under the auspices of MIT for the express purpose of imparting to a score of LDC delegations a degree of sophistication in the use of the model. The delegates were given open access to the model itself. In addition, the MIT team and the U.S. delegation established an on-line capability while the conference was underway when it reconvened in New York that August.

Most striking in all of this unprecedented generosity to U.S. negotiating adversaries was the timing. The United States provided the means to undermine its technical proposals only one year after the Engo treachery at the sixth session. That treachery immediately followed Kissinger's offer of a parallel system of mining replete with loan guarantees for third world and UN activities. Such lemming-like behavior on the part of U.S. negotiators was unfortunately not an aberration; it was repeated several times in negotiations in other fields with equally disastrous results.

It is interesting to note that the motivation behind releasing the model was to prevent, through education, the expression of unrealistic proposals, which would confuse the negotiating process. However, this well-intentioned action brought about exactly what it sought to eliminate.

WHO HAS RATIFIED UNCLOS?

The legitimacy of any regime depends on a variety of factors, including its perceived importance, relevance, reasonableness, and practicality. These factors are in large part influenced by the power and importance of states that recognize, or are parties to, the regime. In the case of UNCLOS, 1993 saw the unprecedented fact of a treaty entering into force having been ratified by over sixty states (six of which are landlocked), without the participation of any Western industrialized nations.

Such a prospect was of great concern to treaty signatories because they feared it would be doomed to irrelevancy. Fearing such an outcome for the UN's premier New International Economic Order achievement, then-Secretary General Javier Perez de Cuellar, himself a former UNCLOS delegate, reopened talks in 1993 aimed at making the treaty more palatable to the industrialized countries.

Prior to the 1994 agreement, most industrialized countries followed the U.S. lead in refusing to accede to the treaty. Some shared the various concerns expressed by the United States. Others, however, were fearful that without U.S. participation and contribution of 25 percent of all financial assessments they would be required to bankroll the treaty themselves. Perhaps this is the ultimate source of U.S. leverage in governing the support of other nations as nonparticipants in the treaty.

As shown in table 1, the list of treaty ratifiers is long but unimpressive and collectively account for less than 58 percent of the annual UN schedule of assessments. A UN-sponsored ocean mining corporation relying on these subscribers would be financially unviable and little threat to a nonparticipating United States. Table 2 lists those countries that have chosen to remain outside of the treaty regime. As of March 1997, 116 nations had deposited their instruments of ratification or accession (U.S. Department of State 1997).

DEPARTMENT OF DEFENSE AND THE NAVY SUPPORT THE TREATY

After the Clinton administration participated in the 1993–94 revision negotiations, both the House and the Senate held hearings on the status of the UNCLOS and the prospects of U.S. ocean mining. The administration attempted to convince Congress that participation in the UNCLOS is overwhelmingly in the U.S. national interest, primarily on the basis of sea power and naval mobility issues. The arguments presented by representatives of the Joint Chiefs of Staff, Department of Defense (DOD) General Counsel, and the Coast Guard, however, stated essentially that the United States would benefit from the possible reduction in excessive maritime claims by coastal states through lessening the need for a shrinking U.S. Navy to engage in challenges of coastal state claims. It should be noted that DOD's long-standing support for the treaty has nothing to do with the 1994 agreement. In fact, DOD has been a consistent treaty proponent since 1982, addressing only the narrow issue of freedom of navigation. In the view of the Joint Chiefs of Staff:

> Remaining outside the LOS convention would have the undesirable effect of placing the U.S. Freedom of Navigation (FON) program "center stage" as the primary U.S. instrument for chal-

TABLE 1
States Party to the Law of the Sea Convention (As of March 1997)

African	Asian	Eastern European	Latin America and Caribbean	Western Europe and Others
Algeria (.01)	Bahrain (.01)	Bosnia-Herzegovina (.02)	Antigua & Barbuda (.01)	Australia (1.46)
Angola (.01)	Brunei (.02)	Bulgaria (.10)	Argentina (.48)	Austria (.85)
Botswana (.01)	Burma (.01)	Croatia (.10)	Bahamas (.02)	Finland (.61)
Cameroon (.01)	China (.72)	Czech Republic (.32)	Barbados (.01)	France (6.32)
Cape Verde (.01)	Cook Islands	Macedonia (.01)	Belize (.01)	Germany (8.94)
Comoros (.01)	Cyprus (.03)	Georgia (.16)	Bolivia (.01)	Greece (.37)
Cote d'Ivoire (.01)	Fiji (.01)	Romania (.15)	Brazil (1.62)	Iceland (.03)
Djibouti (.01)	India (.31)	Russia (5.68)	Costa Rica (.01)	Ireland (.20)
Egypt (.07)	Indonesia (.14)	Slovakia (.10)	Cuba (.07)	Italy (4.79)
Gambia (.01)	Iraq (.14)	Slovenia (.07)	Dominica (.01)	Malta (.01)
Ghana (.01)	Japan (13.95)	Yugoslavia (.11)	Grenada (.01)	Monaco (.01)
Guinea (.01)	Jordan (.01)		Guatemala (.02)	Netherlands (1.58)
Guinea-Bissau (.01)	Kuwait (.20)		Guyana (.01)	New Zealand (.24)
Kenya (.01)	Lebanon (.01)		Haiti (.01)	Norway (.55)
Mali (.01)	Malaysia (.14)		Honduras (.01)	Spain (2.24)
Mauritania (.01)	Marshall Is. (.01)		Jamaica (.01)	Sweden (1.22)
Mauritius (.01)	Micronesia (.01)		Mexico (.78)	
Mozambique (.01)	Mongolia (.01)		Panama (.01)	
Namibia (.01)	Nauru		Paraguay (.01)	
Nigeria (.16)	Oman (.04)		St. Kitts and Nevis (.01)	
Sao Tome and Principe (.01)	Pakistan (.06)		St. Lucia (.01)	
Senegal (.01)	Palau		St. Vincent and the Grenadines (.01)	
Seychelles (.01)	Papua New Guinea (.01)		Trinidad and Tobago (.04)	
Sierra Leone (.01)	Philippines (.06)		Uruguay (.04)	
Somalia (.01)	Saudi Arabia (.80)			
Sudan (.01)	Singapore (.14)			
Tanzania (.01)	S. Korea (.80)			
Togo (.01)	Sri Lanka (.01)			
Tunisia (.03)	Tonga			
Uganda (.01)	Vietnam (.01)			
Zaire (.01)	Samoa (.01)			
Zambia (.01)	Yemen (.01)			
Zimbabwe (.01)				
33 (.56)	32 (17.68)	11 (6.82)	24 (3.23)	16 (29.42)

Source. U.S. Department of State 1997.
Note. Figures in parentheses indicate the percentage of the UN budget that each state is assessed annually (United Nations 1997).

lenging excessive claims. Although the FON program is intended to be neither provocative nor controversial, some states view it as such. According to a 1992 State Department study of illegal claims, the U.S. was then actively protesting illegal claims by more than thirty states at the rate of 30 to 40 protests per year. This year, more than sixty states are making such claims. Of particular concern to DOD are claims asserting that the rights of transit passage (through an international strait) or innocent passage (through territorial waters) are conditioned on prior notification by warships. We are also concerned with claims of "security zones" or illegal baselines which have the effect of delimiting large ocean areas as territorial sea or internal waters. U.S. policy has been to challenge systematically those claims—both diplomatically and operationally—through the FON program.

U.S. accession to the Convention should help moderate the proliferation of excessive maritime claims. It is important to note that such claims are not being made by some anti-U.S. bloc, but by virtually all coastal states—including many of our friends and closest allies. They range from Italy's noncompliant historic bay claims, to Canada's excessive baseline claims. Other examples include Indonesia's restrictive archipelagic sea lanes passage claims and Peru's restriction on aircraft overflight.

This is not to suggest unreasonable unilateral claims which attempt to restrict navigation will cease once the United States becomes party to the LOS convention. Coastal states

TABLE 2
States Not Party to the Law of the Sea Convention (As of March 1997)

African	Asian	Eastern European	Latin America and Caribbean	Western Europe and Others
Benin (.01)	Afghanistan (.01)	Albania (.01)	Chile (.08)	Andorra (.01)
Burkina (.01)	Bangladesh (.01)	Armenia (.08)	Colombia (.11)	Belgium (.99)
Burundi (.01)	Bhutan (.01)	Estonia (.05)[a]	Dominican Rep (.01)	Canada (3.07)
Cent. African Rep (.01)	Cambodia (.01)	Holy See	Ecuador (.02)	Denmark (.70)
Chad (.01)	Iran (.60)	Hungary (.01)	El Salvador (.01)	Liechtenstein (.01)
Congo (.01)	Israel (.26)[a]	Latvia (.10)	Peru (.06)	Luxembourg (.07)
Equatorial Guinea (.01)	Kazakhstan (.26)	Lithuania (.11)	Suriname (.01)	Portugal (.24)
Eriteria (.01)	Kiribati[a]	Moldova (.11)	Venezuela (.40)	San Marino (.01)
Ethiopia (.01)	Kyrgystan (.04)	Poland (.38)		Turkey (.34)
Gabon (.01)	Laos (.01)	Switzerland		United Kingdom (3.27)
Lesotho (.01)	Maldives (.01)	Ukraine (1.48)		United States[b] (25.00)
Liberia (.01)	Nepal (.01)			
Libya (.21)	N. Korea (.04)[a]			
Madagascar (.01)	Qatar (.04)			
Malawi (.01)	Solomon Islands (.01)			
Morocco (.03)	Syria (.03)			
Niger (.01)	Tajikistan (.03)			
Rwanda (.01)	Thailand (.13)			
South Africa (.34)[a]	Turkmenistan (.04)			
Swaziland (.01)	Tuvalu[a]			
	UAE (.19)			
	Vanuatu (.01)			
20 (.75)	22 (1.75)	11 (2.33)	8 (.70)	11 (33.71)

[a]Estonia, Israel, Kiribati, North Korea, South Africa, and Tuvalu are not listed in any region by the United Nations.
[b]Technically, the United States is not a member of any region, but is considered a part of Western Europe & Others for electoral purposes.
Source. U.S. Department of State 1997.
Note. Figures in parentheses indicate the percentage of the UN budget that each state is assessed annually (United Nations 1997).

> make excessive claims because they believe such claims to be in their national interest and because they believe they can enforce those claims. With the U.S. as a party, fewer states are likely to view such claims as legitimate or enforceable. With clear support from the U.S., other nations will be more willing to undertake independent or cooperative freedom of navigation operations to challenge such claims. As a party, our diplomatic challenges will clearly carry greater weight. (Adm. Center in U.S. Senate 1994)

This rather weak, one-dimensional argument for acceptance of the treaty pales in significance with the severe problems embedded in Part XI, including the vulnerability of advanced U.S. deep ocean technology to technology transfer, which carries with it serious strategic consequences, principally in the antisubmarine warfare (ASW) arena.

In addition, DOD expressions of concern over moving the FON program to "center stage" as the primary means of challenging excessive maritime claims are rather odd as the FON program has been "center stage" since President Carter began it in 1979. Indeed, with or without a UNCLOS, a primary peacetime mission of the Navy is, and will continue to be, FON activities, although perhaps on a slightly less frequent basis.

Unbelievably, in 1995, Navy lawyers were said to have briefed civilian military sealift command charter vessel masters that the continuing cutback of navy surface combatants required that unarmed cargo vessels will be ordered to conduct FON challenges. "Not to worry," they told these startled merchant seamen, "a combatant will be over the horizon just in case there is any trouble."

GAINS AND LOSSES FOR THE UNITED STATES FROM UNCLOS

In assessing the gains and losses to the range of U.S. ocean interests, it becomes clear that the United States has very little to gain but much to

lose by accession to UNCLOS. This analysis is drawn from Gary Knight's presentation to the American Enterprise Institute.

> *Deep Seabed Mining.* Presumably what we want is politically and economically secure access to deep seabed mineral resources for companies or consortia operating from the United States. What we have now (and under a no-treaty regime) is a legal right to mine nodules from the deep ocean floor. That right stems from two factors—first, the *res nullius* character of deep seabed resources, which remain such in spite of General Assembly resolutions on the subject and the UNCLOS negotiations (neither of which has a law-making function), and second, the notion of freedom of the high seas, which gives unrestricted access to ocean space for the purpose of appropriating *res nullius* objects.
>
> What would we obtain under a law of the sea treaty? The proposed treaty would deny nondiscriminatory access and would make it extremely difficult for American and other developed countries' corporations to participate in deep seabed mining.
>
> *Navigation.* What the United States desires is unrestricted (i.e., freedom of the high seas) navigation in exclusive economic zones (EEZ) and the right of submerged transit through straits consisting entirely of territorial waters. What we have now is an existing international legal right to engage in all freedoms of navigation more than three nautical miles from the coast.
>
> What would we obtain under a law of the sea treaty? We would have, at best, ambiguous rights of freedom of navigation in EEZ's and submerged transit through straits. Put another way, the difficulty of establishing our legal right to EEZ navigation and submerged straits passage would be no more difficult under an existing customary international law argument than under the convoluted text of the proposed UNCLOS.
>
> The issue then becomes, What will this nation gain or lose in the rest of the treaty? As noted above, we lose substantially on the deep seabed mining issue, and we are probably better off under a no-treaty regime for continental shelf resource exploitation, scientific research, and fisheries purposes. Thus, to suggest that the treaty provisions on navigation are somehow worth trading away a preferred position on other issues is nonsense—there simply is no enhanced value for navigation in the treaty to trade away. (Knight 4–6)

In assessing the gains and losses to the range of U.S. ocean interests, it becomes clear that the United States has very little to gain but much to lose by accession to UNCLOS.

CRITICAL TECHNOLOGIES AT RISK

Although the 1994 treaty modifications have toned down some of the most direct mandatory technology transfer requirements, the treaty still places at risk some very sensitive, and militarily useful, technology which may readily be misused by the navies of ocean mining states. These include: underwater mapping and bathymetry systems, reflection and refraction seismology, magnetic detection technology, optical imaging, remotely operated vehicles, submersible vehicles, deep salvage technology, active and passive military acoustic systems, classified bathymetric and geophysical data, and undersea robots and manipulators.

The military application of these technologies would provide new anti-submarine warfare (ASW) capabilities, strategic deep-sea salvage abilities, and deep-water bastions for launching sub-surface ballistic missiles (SSBM's). With or without the mandatory technology transfer provisions contained in the UNCLOS, U.S. participation would provide a "legal" conduit and cover to justify the acquisition of state-of-the-art deep ocean devices and technology that have profound national security implications. Ocean mining activities by the Enterprise or third world nations, such as China or India, can provide plausible justification for successfully purchasing technologies that, in the absence of ocean mining, would likely be denied on national security grounds.

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

The justification used by the PRC is its pioneer investor status awarded by the UNCLOS PrepCom in 1993. Ostensibly, the equipment will be used for manganese nodule exploration

within the Clarion/Clipperton fracture zone. Unfortunately, such surveys should take only several months at sea to accomplish. In part, this is due to the rapid wide-swath capability of the system they purchased and to their choice of minesite locations on, or adjacent to, heavily prospected and claimed nodule fields.

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

UNCLOS MILITARY COMMITMENTS?

In a well-timed contribution to the debate on UNCLOS, the Center for Naval Analysis (CNA) published a strong analysis on the potential for the International Seabed Authority to take on a blue water police/enforcement role in support of treaty provisions. CNA demonstrated that there is ample precedent and existing regulatory flexibility whereby, if states parties cooperate, the ISA may develop a military arm that may not only radically extend the functions and purposes envisioned for it by the United States and its industrialized allies but may one day directly threaten U.S. high seas and economic zone interests as well. "The development of international maritime law, especially the Third UN convention of the Law of the Sea (UNCLOS III), has established a legal environment in which the UN could take on a variety of new low-intensity policing functions in support of international agreements. This is especially important in areas of international straits because attempts to police straits could lead to disputes, perhaps even conflicts. For many nations, this mission area could involve coast guards as well as civilian maritime agencies" (Sands).[2]

> An issue recently raised in Congress, and particularly in the Senate, revolves around the extent to which U.S. participation in a decision of a UN body—in this case the UN Security Council and its votes on UN peacekeeping—might commit the United States to expend funds and provide personnel for an action not approved by Congress. . . . Some in Congress might want to have similar consultations and reporting requirements instituted as a way of keeping up with the work of the International Seabed Authority and its organs and bodies. (Browne)

Given the ambiguity embedded in the charter, rules, regulations, and scope of the ISA as well as the highly uncertain ability of the United States or its allies to significantly influence events within the new organization, the potential of the ISA becoming a runaway train cannot be dismissed. Some of the most likely areas where the ISA may attempt to apply naval power, according to CNA, are: enforcement of fisheries regulation, measures to protect the marine environment,[3] protect sea and air traffic, convoy and escort of selected traffic on the high seas,[4] and protection of offshore assets such as petroleum platforms, deep-water off-shore port facilities, pipeheads, ocean mining claims and operations.

DANGEROUS PRECEDENTS

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

The stakes for which the United States was playing in UNCLOS extended well beyond the relatively parochial interests of tuna fishermen, peacetime sailors, or future ocean miners. What was being decided was nine-fold.

First, the establishment of a far-reaching precedent regarding control over traditionally "nonterritorial areas." This precedent not only will dictate future oceanic arrangements, but may well encompass such areas as Antarctica and outer space.

Second, the precedent of bestowing on LDCs effective control over corporate activities beyond their national borders, most graphically seen in the deep seabed negotiations, may

snowball beyond oceanic areas and provide the procedural avenues and negotiating cohesiveness necessary to allow them to place stricter international controls over the activities of multinational corporations in general.

Third, it is possible that the voting arrangements being adopted for a new International Seabed Authority, based on a one-nation, one-vote principle, which refuses to recognize the institution of an interest group veto as exists in the UN Security Council, may eventually create a ground swell within the United Nations itself to revamp the existing voting arrangements and eliminate the Security Council.

Fourth, the momentum generated at UNCLOS by the combination of LDC steamroller-like tactics and U.S. negotiating weakness may effect other alterations in institutional arrangements and global power structures, which can only be estimated now.

Fifth, the ISA, if established in its present form, would be a major disincentive to investment, which will effectively shut out the United States from access to future sources of strategic minerals and unnecessarily perpetuate U.S. import dependence.

Sixth, the most curious and potentially most threatening aspect of the UN Law of the Sea process is provisional application. The administration does not intend to submit the "agreement" and the 1982 convention for advice and consent for some years, possibly not until mid-1998. In the meantime, the United States as a signatory of the "agreement" may become a "provisional member" of the Council, the executive organ of the Seabed Authority (Hoyle 1994). While provisional application is not a new procedure, it is not commonly used. Article 25 of the 1969 Vienna convention on the Law of Treaties recognizes the procedure.

Seventh, the structure, powers, functions, and voting arrangements in the ISA carry the potential for an aggressive enforcement capability developing within UNCLOS. Such a capability may have a military component that may complicate, rather than lend order to, ocean activities. In addition, the United States may find itself facing an unanticipated set of future international political and financial obligations as a result.

Eighth, the compulsory dispute settlement features of the treaty are of concern.

> The Senate has historically been reluctant to accept broad compulsory dispute settlement language in treaties pending before it. For example, after nearly 15 years of off-and-on debate, the Senate, in 1935, rejected U.S. adherence to the 1920 Statute of the Permanent Court of International Justice (PCIJ), the judicial arm of the League of Nations. In 1946, when the Senate gave its advice and consent to U.S. ratification of the Statute of the International Court of Justice (ICJ) and acceptance of the compulsory jurisdiction of the Court (under Article 36, paragraph 2 of the Statute), it added the words "as determined by the United States" (the Connally reservation) to indicate the United States would determine whether a question was within its domestic jurisdiction and thus beyond the jurisdiction of the World Court. (This Article 36 declaration was withdrawn, effective April 1986, by the executive branch.) In May 1960, the Senate considered the four 1958 Law of the Sea conventions and an Optional Protocol providing for the compulsory jurisdiction of the ICJ in disputes over the interpretation or application of the conventions. The Senate rejected the Optional Protocol.
>
> This concern that the United States maintain control over what actions might be taken against it, internationally, was reinforced during the last months of 1994, during congressional consideration of the Uruguay Round GATT Agreements, the World Trade Organization, and its dispute settlement procedures. As a potential complaining party, the United States wanted a strengthened and expedited process; however, as a potential subject of a complaint, the United States wanted to protect its sovereign control over its own enacted laws and interests. (Browne)

Ninth, UNCLOS provides a plausible cover for foreign navies wishing to build a modern anti-submarine warfare or submarine launched ballistic missile firing location capability to acquire the necessary acoustic, bathymetry, and signal processing systems. This may already be happening in the case of the People's Republic of China.

TREATY STATUS — OVERSTATED CLAIMS

The greatest single accomplishment touted by the administration in seeking Senate ratification of the treaty and the 1994 agreement has been a guaranteed seat on the influential Council of the International Seabed Authority. While it may be premature to assess whether the Council will live up to its potential, there is no truth to assertions that the United States is guaranteed a seat on that body. The overselling of the treaty is most evident on this issue.

U.S. Pattern of Ingratiation and Deception

The Clinton administration, in a desperate attempt to portray the UNCLOS as being in the national interest and worthy of ratification, has

compromised away long-term Council representation in exchange for securing a quick seat prior to Senate consideration. This exercise in "political optics" occurred during the ISA debate over Council representation in the Consumers/Importers Chamber.

> The meeting of Group A—the consumers/importers group—was attended by Belgium, Cape Verde, China, France, Germany, Japan, Marshall Islands, the Republic of Korea, Russian Federation, United States and United Kingdom. (UN Document SEA/1494, 1)
>
> The United States, United Kingdom, Russian Federation, Japan, Germany, Belgium, and Italy expressed their interest in nomination to the Council. Belgium, Italy, and Germany withdrew their requests on the understanding that the principle of rotation would provide opportunities for their election to the Council at a later date. The group agreed to nominate Japan, Russian Federation, United Kingdom, and United States to the Council, with Russian Federation and United States for election for a two-year term and Japan and the United Kingdom for a four-year term.
>
> The acceptance by the Russian Federation and the United States of two-year terms was on the understanding that the Assembly would affirm that the Council would include the Eastern European State having the largest economy as well as the State having the largest economy on the date of entry into force of the Convention, should those States seek re-election to the Council. The acceptance was also predicated on the understanding that the principle of rotation would apply to Japan and the United Kingdom after four years. (UN Document SEA/1473, 6)

Why did the United States and the Russian Federation accept two-year terms instead of vying for the two four-year appointments? The Russians believed that they had struck a deal whereby the other group members agreed to re-elect them after the initial two-year term expired and that Japan and the United Kingdom would face a mandatory rotation. The United States, while confirming the Russian view of the two-year term, stated that the re-election conditions and mandatory rotation of the United Kingdom and Japan did not apply to U.S. acceptance of a two-year term.

> WESLEY S. SCHOLZ (United States), speaking as coordinator of group A, said that . . . he had assumed that the group had agreed on the nomination of the United States and Russia for two-year terms and the United Kingdom and Japan for four-year terms, assuming that certain conditions had been met.
>
> The United States had agreed to a two-year term, the United Kingdom and Japan had agreed to four year terms, and the Russian Federation had agreed to a two-year term, on the conditions stipulated in the report of the President. (UN Document SEA/1473, 10)

It is remarkable that an administration that is strongly promoting U.S. accession to the UNCLOS would be willing to volunteer the United States to a diminished role within its key decisionmaking body. The failure of the United States to press for re-election guarantees—as the Russians have—may readily be construed as the act of a desperate delegation attempting to project the appearance of influence at any price in order to deceive the Senate into ratification of the UNCLOS.

The Russian representative, recognizing the potential for a serious North/South rift, stated that "the challenge of agreeing on equitable geographical distribution was only part of the problem facing the Assembly. As in the negotiation period for the convention, a majority had agreed on a position that was not workable. Realization of that fact had led to negotiation of the agreement on the implementation of Part XI. The agreement had been hastily drafted, and compromise had been reached only through some sacrifice. The Assembly was now being challenged to put into practice both the convention and the agreement. The Assembly should not pit the South against the North, as there were a number of States actively preparing to exploit the resources of the seabed" (UN Document SEA/1469, 6).

Unfortunately, the potential for polarization among ISA members is high and will likely be exacerbated by future financing problems, lack of significant achievements, resistance by some member states to back radical initiatives, slow development of seabed resources, and a lack of hoped for revenue sharing. These issues need to be fully explored during the future ratification debate.

BOTTOM LINE

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

years of post-UNCLOS III ratification debate, and two more years of negotiation of the agreement, Nicaragua, Peru, Ecuador, and El Salvador still claim 200-mile territorial seas and refuse to become parties to the convention.

> With regard to Nicaragua and Peru, their abstention could be due to their claim to the 200-mile territorial sea, which is not in conformity with the Convention.
>
> The reasons for the absence or non-participation of these states are not clear. Only Turkey explained that it had some difficulties with certain provisions of the Convention. Ecuador and El Salvador may have chosen not to vote because of their claim to the 200-mile territorial sea. (Hayashi, 5-6)

In fact, the Turkish problems with the UNCLOS may eventually lead to a major shooting war between Turkey and Greece. In July 1995, the Turkish Parliament issued a strong warning to Greece not to extend its territorial sea to twelve nautical miles as allowed in the convention. The Parliament, concerned that an extension of Greek territorial sea limits to twelve nautical miles would make 70 percent of the Aegean Sea a "Greek lake," empowered the government to take all measures, including military actions if necessary, to protect the vital interests of Turkey. "The balance in the Aegean was established with the Lausanne Peace Treaty of 1923 at which time the territorial waters of both countries were at three miles" (Jane's 1995, 11). On the other hand, the regulatory, political, technological, economic, and possibly military concessions embedded in the treaty represent a set of potential threats and traps that the United States should not walk blithely into.

Treaty supporters within the United States now include a number of former treaty opponents who appear to have resigned themselves to a "this is the best deal we are likely to achieve" philosophy after the Clinton administration's failure to press hard for real change during the 1993–94 renegotiation. To cite the administration's weak negotiating skill or its failures to argue on behalf of basic U.S. national security interests in international forums makes a poor rationale for ratification of a treaty.

There is a common misperception that existing national security export control mechanisms will act as a safety net to ensure that the treaty will not serve as a conduit for militarily critical technology to be exported to potential adversaries. Unfortunately, the "stovepiped" nature of many government policy actions masks the fact that the Clinton administration has virtually eviscerated the export control process within the U.S. government and has dismantled the international regulatory mechanism as well (Leitner, 1995). There is no longer a reliable safety net to prevent foreign military or intelligence services from using the treaty as a cover to acquire highly strategic state-of-the-art technology that may be used to enhance power projection or regional destabilization activities.

CONTRACTING OUT U.S. FOREIGN POLICY

If there is one overarching characterization that can describe U.S. participation in UNCLOS, it is taking a giant step forward in the continuing delegation of U.S. foreign policy to the United Nations. Recent milestones along this path include U.S. initiatives to multinationalize peacekeeping operations such as that in Bosnia, "humanitarian relief" operations as in Somalia and Rwanda, and actual belligerent military operations like the Gulf war.

Ironically, this "contracting out" of U.S. foreign policy is quietly taking place against the backdrop of a growing domestic debate on whether to repeal the War Powers Act, which places strict limits on the president's ability to use military force in support of foreign policy objectives. Would the lifting of War Powers Act restrictions lead the president to commit U.S. forces to ever more complicated and dangerous UN-sponsored military operations? Would the potential military commitments hidden in UNCLOS have a greater likelihood of developing? Will the United States eventually find itself in the position of "world policeman," being assigned roles and missions dictated by others?

Many of those in favor of repealing the War Powers Act argue that meddlesome congressional oversight and second-guessing of presidential prerogatives are burdensome constraints. Imagine the second-guessing and interest group politics imposed by 170 nations and their bloated bureaucracy of international civil servants as the "contracting out" of U.S. foreign policy continues.

The International Seabed Authority and UNCLOS represent the surrender, with little or no compensation, of a variety of tangible U.S. security and sovereignty equities over a geographic area encompassing 70 percent of the earth's surface. The administration is attempting to bind this nation to a treaty and a bureaucratic organization whose basic operating principles are inimical to U.S. interests and that, to

date, is officially recognized only by third world and landlocked states.

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

> This negotiating principle is part of a wider technique: *prior concession*. It consists of ceding in advance, even before negotiations begin, what should be the subject of the negotiations and which the West should propose at the end of the talks, not at the start, and then only in exchange for a carefully weighed and at least equivalent counterconcession. (Revel 1983, 249)

It is disturbing to note the extremes to which the Clinton administration may be willing to go in order to secure ratification of this treaty. A persistent rumor has been circulating among Law of the Sea watchers for the past two years that significant political pressure was applied to the Lockheed Corporation to force it to silence its opposition to the treaty and the 1994 agreement. As the story goes, at a 1994 interagency meeting where irritation was expressed over vocal treaty opponents, a naval officer volunteered to "take care" of Lockheed. At that time, Lockheed was at a very delicate stage of its controversial merger with Martin-Marietta and extremely sensitive to external factors that could raise government objections to the merger. Reportedly, Lockheed personnel, summoned by senior management, were ordered to cease public criticism of the treaty. Congressional review could uncover the truth behind the rumor and expose the parties involved.

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

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

Unfortunately, the Law of the Sea Treaty goes far beyond the Ghali plan and may indeed be viewed as a harbinger of future UN efforts to spin-off or reformulate its activities in such a way as to insulate itself from, and possibly become ascendant to, the sovereign character of nation-states. Unless the United States is willing to insist on further renegotiation of the treaty to protect these and other vital interests, the Senate will have little alternative other than rejection and refusal to ratify. Rejection by the Senate appears to be the only action capable of serving as the catalyst to bring all parties back to the table.

NOTES

1. Of the seventeen countries abstaining, all but Belgium, Italy, Luxembourg, Spain, the Federal Republic of Germany, and the United Kingdom signed the treaty in December 1982.

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

3. The Antarctic Treaty internationalized and demilitarized the Antarctic continent and provided for its cooperative exploration and future use. Several countries have claimed sovereignty over areas of Antarctica, claims that the United States and the former Soviet Union did not recognize. Rivalry backed by the threat or use of military force for control of exploitable economic resources is still only a theoretical possibility, and one that still looms small given past scientific cooperation and the continent's isolation. Resource exploitation could in the near term raise environmental protection concerns, about which naval forces operating under a UN aegis could be

called on to respond because of the Antarctic Treaty and the continent's location and isolation. For a text of the Antarctic Treaty, see United States (1982).

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

REFERENCES

Associated Press. 1992. "Worries About Plutonium Ship." 21 September.

Barber, Ben. "Dole Bill Threatens Funding for UN." *Washington Times*. 18 January, 1.

Browne, Marjorie Ann. 1995. *The Law of the Sea Convention and U.S. Policy.* Congressional Research Service. IB95010. January.

———. 1983. *The Law of the Sea Conference: A U.S. Perspective.* Congressional Research Service. IB81153. March.

Hayashi, Moritaka. 1995. "Prospects for a Universal Acceptance of the Part XI Agreement." Remarks to *Symposium on Implementing the United Nations Convention on the Law of the Sea.* Georgetown University Law School. 27 January, 5–6.

Hoyle, Brian J. 1994. *Testimony Before the U. S. House of Representatives,* Committee on Merchant Marine and Fisheries, Subcommittee on Oceanography, Gulf of Mexico and the Outer Continental Shelf. 26 April.

Justus, John R. 1995. *Ocean Mining.* Congressional Research Service. IB74024. August.

Kissinger, Henry. 1976. "The Law of the Sea Treaty: A Test of International Cooperation." Address before the Foreign Policy Association, UN Association, et. al. 8 April. *Department of State Bulletin* 1922. 26 April, 540–41.

Knight, Gary. 1995. "Legal Aspects of Current United States Law of the Sea Policy." Paper presented to American Enterprise Institute Conference on United States Interests in the Law of the Sea: Review and Analysis. 19 October, 1.

Leitner, Peter M. 1995. *Decontrolling Strategic Technology, 1990-1992: Creating the Military Threats of the 21st Century.* Lanham, Md.: University Press of America.

———. 1996. *Reforming the Law of the Sea Treaty: Opportunities Missed, Precedents, and U.S. Sovereignty Threatened.* Lanham, Md.: University Press of America.

Leitner, Peter M. and Ronald J. Stupak. 1997. "Ethics, National Security, and Bureaucratic Realities: North, Knight, and Designated Liars." *American Review of Public Administration* 27: 61–75.

Leitner, Peter M. 1997. "Feeding the Dragon: Technology Transfer and the Growing Chinese Threat." Testimony before the U.S. Congress, Joint Economic Committee. 17 June.

Massachusetts Institute of Technology, Sea Grant Program. 1978. *A Cost Model of Deep Ocean Mining and Associated Regulatory Issues.* MIT Sea Grant Program Report MITSG-78-4. March.

Offley, Ed. 1992. "U.S. to Help Japan Protect Plutonium Ship, Sources Say." *Seattle Post-Intelligencer.* 6 November, 1.

Paul, Ron E. 1983. "Remarks Addressed to the U.S. House of Representatives on April 28, 1992." *Congressional Digest.* January, 23–25.

Reagan, Ronald. 1983. Statement on United States Oceans Policy, 10 March. *Public Papers of President Reagan,* 378–79.

Revel, Jean-François. 1983. *How Democracies Perish.* Garden City, N.Y.: Doubleday & Company.

Sands, Jeffrey I. 1993. *Blue Hulls: Multinational Naval Cooperation and the United Nations,* CNA CRM 93-40. July.

Sanger, David E. 1992. "Japan's Plan to Ship Plutonium has Big and Little Lands Roaring." *New York Times.* 5 October, 1.

Smith, Robert W. and J. Ashley Roach. 1995. *Limits in the Seas.* U.S. Department of State 36. 11 January.

"Turkey Warns Greece to Keep its Distance at Sea." 1995. *Jane's Defense Weekly.* 15 July, 11.

U.S. Department of State. 1977. *Delegation Report of the Sixth Session of UNCLOS. May 23–July 15, 1977,* 5-6.

———. 1997. Office of Ocean Affairs. *Parties to the Law of the Sea Convention: By Region.* Washington, D.C. 13 March.

U.S. General Accounting Office. 1979. *The Law of the Sea Conference—Status of the Issues, 1978.* ID-79-6. 9 March, 6.

———. 1982. *Ocean Mining: Actions Needed to Make it Happen, 1982.*

U.S. Senate. 1975. Committee on Interior and Insular Affairs. *Current Developments in Deep Seabed Mining.*

U.S. Senate Foreign Relations Committee. 1994. Statement by Rear Admiral William D. Center, Deputy Director, International Negotiations, J-5 Directorate, Joint Staff. 11 August.

United Nations. 1992. *Basic Facts About the United Nations.* New York.

United Nations Information Center. 1997. *Members of the United Nations.* Washington, D.C.

U.S. $5.00
Canada $6.50

WORLD AFFAIRS

A QUARTERLY REVIEW OF INTERNATIONAL PROBLEMS

Russia, NATO Enlargement, and the Baltic States
Stephen Blank

"Safe Passage": The Rocky Road to a Middle East Peace
Aharon Klieman

A Bad Treaty Returns: The Case of the Law of the Sea Treaty
Peter M. Leitner

The U.S.-Japan Joint Declaration: Strategic Implications for Taiwan's Security
Chin Chu-Kwang

Religion, Politics, and Assassination in the Middle East: The Messianic Model
Sonia L. Alianak

Winter 1998 Volume 160 Number 3

RESPONSES BY PETER LEITNER TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1a. Article 2(3) of the Treaty states "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." What is your interpretation of this provision?

Response. The manner in which this article is constructed in effect appears to "grant" sovereignty to the Coastal State as if sovereignty didn't exist prior to the appearance of this Treaty. In fact, traditional practice between States has long recognized the concept of a Territorial Sea and the exercise of sovereign rights with this area. The historic debate has been over the breadth of this coastal zone not over its fact or the fact of sovereignty. The arrogant tone of Article 2(3) is an example of an attempt to effectuate a reversal of the traditional concept that only States are sovereign or can exercise sovereign powers. A strict reading of this Article reveals an underlying belief that an international organization is superior, or above, the Nation State. This revisionist concept serves as the ideological and philosophic basis behind imbuing the International Seabed Authority and its Agencies with sovereign powers themselves, i.e., taxation, judicial, military, etc. Its implications go even further to imply that sovereignty is a privilege to be granted to a Nation by this U.N. based organization rather than an inherent right of a Nation State. This superior/inferior assertion is an attempt to undo the continuous evolution of the Nation State that began in the 1400's and replace it with an ideologically loaded and discredited belief in a "global commons" approach.

Question 1b. Do you think all parties of this Treaty will interpret this provision the same?

Response. No. I believe the industrialized and seafaring nations will refuse to recognize, that by acceding to this Treaty they have agreed to relegate themselves to a subservient position vis-a-vis the Third World and Anti-Western dominated International Seabed Authority. On the other hand, those countries hostile to the existing World Order will surely use this "signing away" of sovereignty to their advantage. We should expect future cases and rulings in the Law of the Sea Tribunals and elsewhere that will use this fact to weaken the existing global political structure while seeking to impose increasingly onerous redistributive policies and edicts. Such developments will certainly be to the detriment of the United States.

Question 1c. How could this Treaty interfere with the United States' sovereign exercise of freedom of the seas and in what ways will that have an adverse effect on national security and the environment?

Response. There are a number of ways that US sovereign rights will be adversely affected. For instance, in the interest of providing differential treatment for developing countries the Treaty Organization may simply decide to exempt so-called disadvantaged states from many of the environmental, wildlife management, taxation, and burdensome resource exploitation provisions. This possibility is clearly present in the Kyoto Protocol that was rejected by the United States as a patently unfair agreement that placed the bulk of the burdens and sacrifices upon the industrialized nations while exempting Communist China, and most of the Third World nations. By inviting the misuse of environmental provisions of the treaty, they can be readily used against the United States and our military forces around the world. For instance, the Seabed Authority may tolerate, or encourage, Coastal States to refuse transit or innocent passage for nuclear powered warships. This is a phenomenon that has frequently happened in the past and continues to this day. In fact, several Treaty signatories are currently requiring prior permission for such vessels as well as conventional warships. While the U.S. views such claims as not permitted under the Treaty States are pressing such demands nonetheless.

Question 2. What are your thoughts about developing countries having the capabilities to implement international laws relating to issues of our national security as well as regulating the marine environment?

Response. This Treaty clearly gives developing countries a forum to effectuate such policies. In fact, the "one-nation, one-vote" bedrock principle running throughout the Treaty provides the ideological basis for dominating this organization as well as its rulemaking and judicial bodies. The historic animosity of a large percentage of the membership of the U.N. General Assembly toward the United States has long been part of the political machinations underlying the Law of the Sea Treaty negotiations and has carried over into its creation, the International Seabed Authority. Given the domination of this organization by such hostile interests it should be expected that its actions, policies, and rulings will favour redistributive ideologies and uneven application of rules and regulations that will operate to the detriment of the United States.

Question 3. What are the implications for the U.S. of acceding to the Treaty and becoming a member of the International Seabed Authority?

Response. The implications are manifold and exceedingly dangerous. On the macro level would be our endorsement of anti-nation state provisions and philosophies that are directly inimical to the well being of our citizens. Such provisions will have the following effects:

- Erosion of U.S. Sovereignty

  Ceding of sovereign powers to the ISA

  Allow Direct & Indirect Taxation of U.S. citizens, entities, and Government by an international organization.

  Foster discriminatory resource exploitation policies and practices that act to the detriment of the US economy and citizenry.

  Allow direct revenue generation by an international organization so as to minimize its exposure to US political pressure by freeing itself from their traditionally total reliance upon doinations of capital and equipment from Nation states.

  U.S. persons will likely be subjected to discriminatory and uneven Regulatory requirements intended to provide an unfair advantage to others for ideological or political reasons.

  U.S. persons will likely be subjected to discriminatory and uneven Licensing requirements intended to provide an unfair advantage to others for ideological or political reasons.

- Self-enforcement of Decisions

  The creeping jurisdiction of the law of the Sea Tribunal reveals the potential for increasingly bold and confrontational "legal" rulings. As the International Seabed Authority can determine its own jurisdiction the potential for interference with US naval missions is increasingly likely.

  In addition, nothing in the Treaty precludes the International Seabed Authority from raising a Navy to enforce its own rules & regulations.

- Use of Force

  The use of force on the high seas against another State is clearly outlawed by Art. 88.

  The Treaty does not ban the existence of Navy's, but aggressive activities they may engage in are a Treaty violation.

  Art. 301—goes even further to announce that "no use of force is permitted to include: blockades, embargos, etc., barred. It should be noted that the Treaty does not define "military activities" or what constitutes "force" or "aggressive" thus providing the maximum degree of political action for the Seabed Authority.

Question 4. Can we predict with some degree of certainty whether the International Seabed Authority and its related tribunal will, over time, accrue any more powers than those currently provided to it in the Treaty or which they have already exercised?

Response. Yes, in fact a recent case heard by the Tribunal—called the MOX Case—the tribunal asserted jurisdiction over activities taking place on land with no direct contact with the oceans. In this case, the Government of Ireland sought a ruling to prevent the British from operating a Mixed Oxide nuclear fuel fabrication plant asserting that its run off may adversely effect the environment of the Irish Sea. Although the UK representative argued that the Tribunal had no jurisdiction over land-based activities the Tribunal decided to take the case anyway. As a treaty member the UK was bound by this assertion of jurisdiction and was compelled to participate in the deliberations. This case is an early warning of future abuses that we should expect to materialize—particularly if the U.S. ratifies the Treaty.

There is considerable concern that these judicial entities may become a back-door attempt to create an International Criminal Court—a treaty that the U.S. strongly rejected. It is entirely possible that the Tribunal may accept cases against US political leaders, soldiers, sailors, airmen, or marines for participating in hostile actions that are contrary to the statements of principle embodied in Treaty Articles 88 and 301. As with the MOX affair, any Nation can petition the Tribunal to accept a case—nothing precludes criminal charges—as there are no bounds set within the Treaty as to the jurisdiction of this body it can decide to involve itself in any issues it chooses. As a result, there is no limit upon the ability of the ISA to accrue powers far beyond those it has chosen to exercise at this point in time. U.S. ratification will bind the United States to a runaway train that is ideologically opposed to most of the free market, human rights, and sovereignty principles so dear to our national character.

Question 5. Do the environmental provisions of the Treaty protect or expose the high seas and U.S. coastline to environmental threats?

Response. The Treaty both protects and exposes the United States to environmental risks. While the Treaty recognizes a wide variety of international conventions and agreements pertaining to fisheries, marine mammals, and the environment that the US is a party to it also exposes the US to serious environmental risks by making illegal such self-defense measures as the Proliferation Security Initiative (PSI). The PSI is the only multinational mechanism available to defend the US Coastline, fisheries and offshore facilities against acts of terrorism. Terrorists can readily target environmentally sensitive of our coastal zones for attack as part of a campaign of economic warfare. The Treaty does not include Terrorism and other potential threats among the reasons it enumerates that justify interdicting and/or boarding vessels on the high seas. Thus, the Treaty is outdated and irrelevant to the contemporary threats we face compared with those envisioned in the 1970's when such portions of the Treaty were negotiated.

Question 6. Would the Treaty constrain the U.S. from acting unilaterally on the high seas in protecting its national interests?

Response. Yes. The Treaty only allows interdiction and boarding of suspicious or hostile vessels, for example, only under certain limited conditions. The so-called "Right of Visit" in Article 110 only allows interdiction and boarding on the High Seas if: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting; (d) the ship is flying a false foreign flag or refusing to show its flag.

Most of the contemporary national security problems the United States is faced with and is likely to face in the future are not covered by those factors. For instance, under the Treaty the US has no right to interdict vessels suspected of facilitating terrorist activities or the illegal proliferation of missiles, Weapons of Mass Destruction (WMD), narcotics, etc. Given the deadly range of many types of WMD it is imperative to intercept such cargos long before they enter a State's coastal zones. The Treaty prevents the US from doing this and may assess penalties or impose punitive measures for such actions. It is even possible that the ISA may someday provide warships to escort proliferators so that the principle of non-interdiction will be maintained.

Australia has been roundly criticized by Treaty members for suggesting that it is in its national interest to declare a 1,000 mile security zone. The Australian concept is more of a maritime identification area that recognizes the danger of seaborne terrorist threats to its population and attempts to provide strategic depth for self-defense purposes. Like the US-led Proliferation Security Initiative the Australian identification zone was furiously criticized and objected to by many Treaty members.

Question 7. From a national security perspective, are we better off with or without the Treaty?

Response. We are clearly better off as a Nation without the Treaty or remaining outside of the Treaty. Several of the hoped for national security benefits that the Treaty was purported to offer have never materialized. Many Treaty members still require prior notification of warships entering their coastal zones. Many Treaty members still have onerous restrictions on the movement of Nuclear Powered warships entering their coastal zones. Many Treaty members still maintain excessive claims to offshore areas. Many Treaty members are ignoring Treaty requirements for measuring their coastal baselines. Many Treaty members persist in making unacceptable "historic waters" claims in attempts to place vast ocean territory off limits to all foreign maritime, aviation, or naval activity.

These excessive claims fall into the following areas:

- Breadth of Territorial Sea
- Baselines From Which Claims are Measured
- Security Zones
- Prior Permission and Notification Regimes
- Clearance Requirements on Sovereign Immune Aircraft Over International Waters
- Restrictions on Military Activities in the EEZ

Examples of such claims are:

Selected Excessive Maritime Claims

Cuba	Require state aircraft to comply with directions from air traffic control within flight information region

Selected Excessive Maritime Claims—Continued

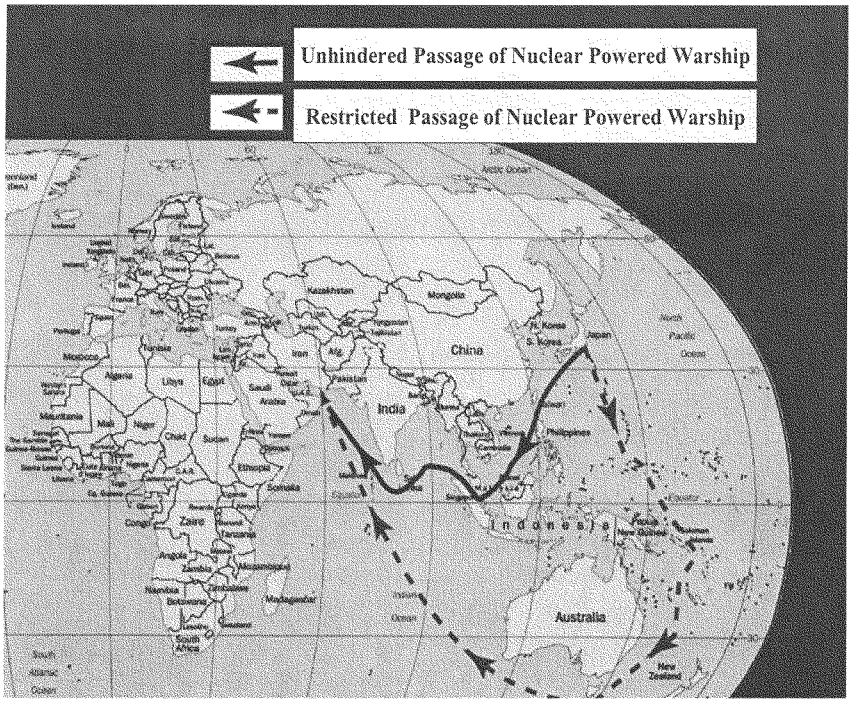
Albania	Prior permission for warship to enter the territorial sea
Australia	Straight Baselines, & Historic Claims
Algeria	Prior permission for warship to enter the territorial sea
Bangladesh	Excessive straight baselines; claimed security zone
	Foreign warships must obtain permission prior to transiting territorial sea
	Straight baseline
	Jurisdiction to enforce laws/regulations in security zone
Burma	Excessive straight baselines; claimed security zone
	Requires prior notice for foreign warships to enter Territorial Sea & Maritime Zones
	Security jurisdiction claimed within contiguous zone
	Authority to subject freedom of navigation and of overflight w/in EEZ
	Straight baselines
Canada	Straight Baselines
	Fishing jurisdiction beyond 200 nm
Cambodia	Excessive straight baselines; claimed security zone
	Foreign warships must obtain permission prior to transiting territorial sea. Jurisdiction over Security Zone.
	Require foreign military vessels permission
	Straight Baselines
China	Permission reqd to enter Terr Sea or Contiguous Zone
	Control in contiguous zone
	Straight Baselines
Croatia	Prior permission for warship to enter the territorial sea
El Salvador	200 nautical miles (nm) territorial sea
India	Foreign warships must provide notice prior to entering territorial sea.
	Security powers in contiguous zone
	Straight Baselines & Historic Claims
	Permission reqd to conduct exercises in EEZ
Indonesia	Foreign warships must obtain permission prior to transiting territorial sea
	U.S. recognizes straight baseline est 1999
Iran	Excessive straight baselines; prior permission for warship to enter the territorial sea
Kenya	Excessive straight baselines; historic bay claim (Ungwana Bay)
Liberia	200 nm territorial sea
Libya	Claims all waters south of 32–30 north latitude Gulf of Sidra closure line as internal waters
Korea, North	50nm beyond territorial sea off east coast and to limits of EEZ off west coast.
	Navigation or overflight by any vessel requires prior permission
	Straight Baselines
Korea, South	Foreign warships must obtain permission prior to transiting territorial sea
	Straight Baselines
Malaysia	Permission reqd to conduct exercises in EEZ
	Prior authorization for nuclear powered ships to enter territorial seas.
Maldives	Prior permission for warship to enter the territorial sea
Malta	Prior permission for warship to enter the territorial sea
Mauritius	Prior notification for warships to transit territorial sea.
	Permission required for warships and subs to transit EEZ.
Mexico	Straight Baselines
	Internal waters w/in Gulf of California
Nicaragua	200 nm territorial sea
Pakistan	Claimed security zone; excessive restrictions on military activities in the exclusive economic zone
Philippines	Excessive straight baselines; claims archipelagic waters as internal waters
Russia	Innocent passage of foreign warships permitted along specified routes w/in terr sea
	Foreign warships must obtain authorization prior to transiting territorial sea.
	Straight Baselines
Saudi Arabia	Excessive straight baselines; claimed security zone
Seychelles	Prior permission for warship to enter the territorial sea
Sierra Leone	200 nm territorial sea
Somalia	200 nm territorial sea; prior permission for warship to enter the territorial sea
Sri Lanka	Foreign warships must obtain permission prior to transiting territorial sea.
	Historic waters in Palk Strait and Palk Bay (intl waters), and in Gulf of Mannar (terr sea).
	Contiguous zone including claimed security jurisdiction.
Sudan	Prior permission for warship to enter the territorial sea; claimed security zone
Syria	35 nm territorial sea; prior permission for warship to enter the territorial sea
Taiwan	Straight Baselines
UAE	Prior permission for warship to enter the territorial sea; claimed security zone

Selected Excessive Maritime Claims—Continued

Vietnam	Foreign warships must seek permission to enter contiguous zone/territorial sea at least 30 days in advance; no more than three warships may be present in territorial sea at one time and submarines must navigate on surface; prior to entering territorial sea or contiguous zone, ships must place weapons in non-operative positions. Contiguous Zone claim includes jurisdiction over security matters. In contiguous zone, submarines required to navigate on the surface and show flag; and aircraft prohibited from being launched from or taken aboard ships.
	Before entering territorial sea or contiguous zone, ships required to place weapons in non-operative positions.
	Straight Baselines
Yemen	Prior permission for warship to enter the territorial sea; claimed security zone

The implications of these Excessive Claims by Treaty members is important to note from several perspectives: First, they reveal an underlying hypocrisy as States are simply choosing to use those parts of the Treaty they like while ignoring the rest; Second, the US Navy's hope that US accession to the Treaty will obviate their need to make Freedom of Navigation challenges is proven to be a fundamental miscalculation; Third, the financial and mobility costs to the US Navy as Treaty members manipulate various interpretations of its provisions will be very high. Finally, the Treaty can readily be used to inhibit the United States from responding to a crisis in a timely way thus influencing its outcome to our detriment.

The following chart illustrates the cost and delay effect of preventing our nuclear powered warships from transiting a critical body of water due to restrictions imposed by coastal states not party to the future crisis. In this instance, our battle group would require an additional 15 days to transit an additional 5,800 nm at a cost of at least $7–$8 million. By the time they arrive the battle may have been lost before we are able to influence events.



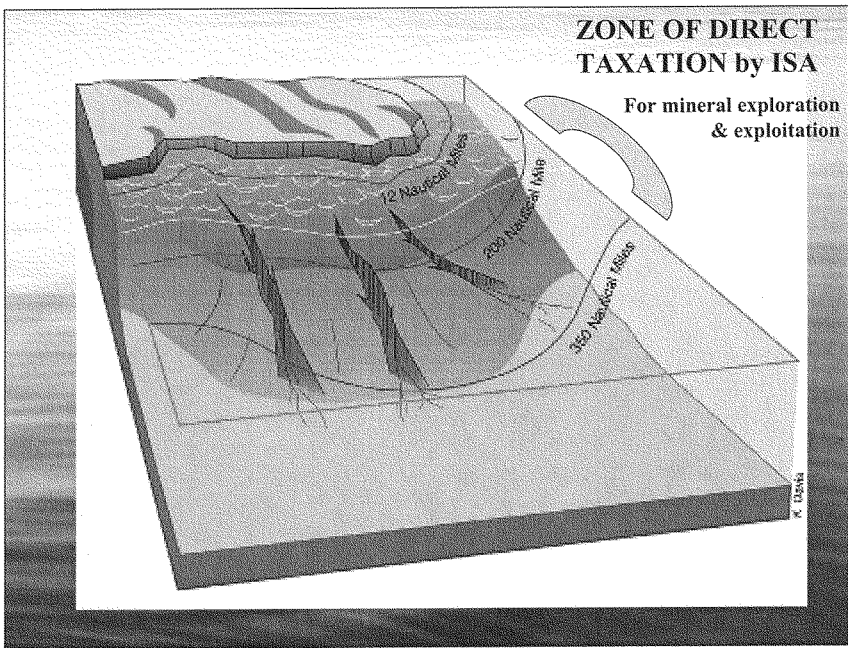
Question 8. Does the 1994 Agreement that President Clinton negotiated fix the problems in the Treaty that caused President Reagan to reject it?

Response. No. The legality of the 1994 Agreement that purports to fundamentally alter the character and wording of the Treaty is highly suspect. The Treaty was set in stone in 1982 when the Final Act was signed and negotiations ended. Article 155, states that it cannot be modified until Fifteen years from 1 January of the year in which the earliest commercial production commences under an approved plan of work has passed. No commercial plan of work has been approved to date. In addition, many, about 20 percent, of those States that have ratified the Treaty have not ratified the 1994 Agreement. In addition, many states have made declarations upon ratification that have the effect of nullifying broad portions of the Treaty. Since "reservations" are not allowed under the terms of the Treaty States have been making declarations instead. The effect is the same—States are picking and choosing which aspects of the Treaty it will abide by and which it will ignore.

Question 9. Is there anything you would like to add?

Response. Ratification of this Treaty will assist in the creation of the first International Organization capable of raising revenue in a direct manner—that being through direct taxation of States, imposition of user fees upon individuals or corporations, imposition of production quotas, etc. The International Seabed Authority is an extraordinarily dangerous precedent in international relations and represents the establishment of an uncontrollably independent entity with dominion over 3/4's of the Earth's surface.

The following chart reveals that portion of the coast where petroleum recovery, for instance, will be taxed at the rate of 7 percent by the International Seabed Authority. This "royalty" demand, in effect, concedes ownership of the oceans and its resources by this new organization—a precedent we as a Nation will live to regret.



RESPONSES BY PETER LEITNER TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. You referred in your oral testimony to a case in which the Chinese government was able to obtain sensitive technology by virtue of "their status as a pioneer investor under the Law of the Sea Treaty." Did you learn of this example in your personal capacity or as an employee of the United States Department of Defense? If you learned of this example in the course of your employment with the Department of Defense, did you go through the proper clearance procedures before using the example in your testimony before the Environment & Public Works Committee? Please provide any relevant documents substantiating your claims with re-

spect to this example and any documents regarding appropriate clearance procedures. Specifically, please provide any documents that will substantiate your implicit assertion that the Chinese government would have been unable to obtain these technologies from any Nation other than the United States and that the Chinese government would have been unable to obtain these technologies but for their participation in the Law of the Sea Treaty.

Response. Yes, the incident was encountered as a rep of the Department of defense. In fact, the case became a major interagency issue as I was denying the PRC access to this technology as part of the export licensing process. Unfortunately, as with most national security export cases that arose during the mid to late 1990's the technology was eventually released to the PRC.

I have formally written about this incident with the explicit approval of the Defense Department. In fact, the incident is described in my book entitled: "Reforming the Law of the Sea Treaty: Opportunities Missed, Precedents Set, and U.S. Sovereignty Threatened", University Press of America, 1996. The book underwent the full pre-publication security review process within the Defense Department and was approved for public release. I have included some of the appropriate passages below. If you require the official security review publication approval you are welcome to file a Freedom of Information request with the Department of Defense.

Question 2. You stated in your oral testimony that the Convention was "rejected by President Reagan." Are you aware of President Reagan's March 10, 1983 Statement of United States Oceans Policy, in which he stated that the "United States is prepared to accept and act in accordance with the balance of interests [in the Convention] relating to traditional uses of the oceans"?

Response. I am well aware of each of these matters. President Reagan's strategy, upon rejection of good-faith U.S. attempts to negotiate modifications to the Treaty, was to pick and choose those aspects of the Treaty that represent traditional international law and State practice and reject the rest. The White House was convinced that the Treaty offered nothing new regarding naval mobility or navigation issues and the US was able to achieve all of its essential interests while rejecting and remaining outside of the Treaty.

Question 3. Are you aware that in the same statement, President Reagan stated that the "United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction"? In light of these statements, would you now concede that President Reagan rejected only the deep seabed mining provisions of the Convention contained in Part XI and that, in doing so, he did not abandon the U.S. interest in working with other countries to develop a deep seabed mining regime that would satisfy U.S. interests? If you will not concede these points, please provide documentation supporting your statement.

Response. No, I would make no such concession as the nature of the little syllogism you have constructed is wrong, based upon a misinformed reading of history, and displays a lack of understanding of not only Reagan administration intent but a lack of awareness of their intensive efforts and initiatives to create an alternative to the Treaty by engaging "like-minded" states in the pursuit of a "Reciprocating States Regime". I would suggest that your Staff acquire copies of the Deep Seabed Hard Minerals Resources Act—passed by both the House and Senate and signed into law by President Reagan to become familiar with attempts to work with other States to create a regime that will facilitate access to these valuable natural resources.

Question 4. You stated in your written testimony that "[t]he presumptions that underlie the environmental provisions of the Law of the Sea Treaty and other key elements of the document are woefully inadequate to meet the threats facing the United States in this very dangerous unconventional post-9/11 world." Are you suggesting that environmental laws and practices (national or international) rather than specific anti-terrorism laws and practices are appropriate vehicles for dealing with terrorist threats, including those threats that seek to utilize environmental destruction as what you refer to as a "force multiplier"? Are your aware of any specific provisions in the 1982 Convention or the 1994 Agreement that would prohibit States from enacting new laws and regulations to deal with acts of environmental terrorism?

Response. The Law of the Sea Treaty prohibits participants from engaging in high seas interdictions, vessel boarding, or seizures unless they are conducted for one of four very narrow reasons. The conducting of such interceptions and inspections is vital for the U.S. to protect its coastlines from being approached by vessels engaged in Terrorist activities or vessels transporting weapons of mass destruction among

rogue states and proliferators. Unfortunately WMD and/or Terrorism are not among the "legal" reasons for interception allowed under the Treaty. As far as the Treaty is concerned, vital U.S. Anti-terrorist measures such as the Proliferation Security Initiative would be deemed illegal activities. Several LOS ratifiers have already announced that PSI is illegal and not allowed by the Treaty. If these members decided to bring the issue before the LOS Tribunal in Hamburg they would likely win a ruling stating that the PSI is a form of international Piracy. Of course while we believe PSI to be a legitimate act of collective self-defense and counter-terrorist policy it is likely that the 3rd World dominated Tribunal will not rule in our favor.

In addition, it is likely that the environmental provisions of the Treaty will be used against the United States in some novel areas such as: defining SONAR, so crucial to our military capabilities, as causing harm to whales and other marine mammals and barring its use in all ocean areas under its jurisdiction.

Question 5. You stated in your written testimony that "[r]atification of the treaty would effectively gut our ability to intercept the vessels of terrorists or hostile foreign governments even if they were transporting nuclear weapons." What is your basis for this assertion? Can you point to any specific provisions of the Convention that give the United Nations a role in deciding when and where a foreign ship at sea may be boarded? Are you aware that the basic rules for boarding and searching foreign ships at sea, which are contained in the 1958 Geneva Conventions on the Law of the Sea and to which the United States is already a party, are unchanged in the 1982 Convention on the Law of the Sea? Moreover, are you aware that the 1982 Convention provides additional authority for a coastal State to board a foreign ship in its exclusive economic zone if the ship is suspected of violating its laws for the protection of the marine environment? Finally, are you aware that the resolution of advice and consent now before the Senate states 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"?

Response. My answer to this portion is largely answered in my response to the previous question. As for the Senate's Resolution regarding self-defense during periods of armed conflict—I am distressed that you do not appear to comprehend that the language you quoted is meaningless in the current War on Terrorism. As the United States has not declared War—legally we are not in a state of war. The "powers" you believe the Treaty bestows upon coastal states during peacetime are piteously weak in preventing a terrorist or terrorist WMD attack upon the United States.

Question 6. You stated in your oral testimony that "the Law of the Sea Treaty specifically states that the traffic in weapons is a normal commercial activity engaged in by states" and that, as a result, the United States would "have no right under the treaty to interdict [a ship carrying weapons]." What specific provision of the Treaty are you referring to and what does it say?

Response. It is a long-established principle that Arms Sales are a normal feature of international commerce. Individual States choose to regulate such commerce according to their unique legal traditions but it is normal and legitimate nonetheless. As I replied earlier, there are only four reasons when interdiction or interception is legitimate—the transport of arms on the High Seas to other States or private customers is not among them. Since the Treaty explicitly allows interdiction only under certain very limited instances any other motivations during the peacetime application of the Treaty are not allowed.

Question 7. You stated in your oral testimony that the Law of the Sea creates an "international body" that "has the ability to regulate seven-tenths of the earth's surface." Are you referring to the International Seabed Authority? If you are referring to the International Seabed Authority, what is your basis for the assertion that this body "has the ability to regulate seven-tenths of the earth's surface"? Please provide specific textual references from the relevant parts of the Convention and the 1994 implementing agreement. Are you aware that the regulatory authority of the International Seabed Authority is limited to regulation of deep seabed mining? Are you aware that the International Seabed Authority has no role with respect to any other activity on the oceans? Are you aware that the Convention provides specific protection for rights of navigation and overflight and for the conduct of marine scientific research?

Response. Are you aware that the Law of the Sea Tribunal in Hamburg—one of the specialized Agencies created by the Treaty—has unlimited and self-defining jurisdiction? The Tribunal has already asserted jurisdiction over non-ocean activities that occur on land under the theory that what happens there may eventually affect

the oceans. The jurisdiction of this organization is not limited to the Seabed. In fact, its self-defining charter is unconstrained by the Treaty. The jurisdiction International Seabed Authority is likewise not limited to the deep seabed. It has authority over the vast areas Continental Shelf that lie beyond the 200 nm zone as well.

STATEMENT OF BERNARD H. OXMAN,[1] PROFESSOR OF LAW, UNIVERSITY OF MIAMI

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.

It was my privilege to submit testimony on this matter before the Senate Committee on Foreign Relations on October 14, 2003. While that testimony is included in the Report of that Committee, I thought it would be useful to include much of it in this statement for the benefit of this Committee, but to add additional comments that may be of particular interest to this Committee.

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.

I hope the Committee will also bear in mind that the Law of the Sea negotiations were a long-term bipartisan effort to further American interests that engaged high level attention in successive Administrations and distinguished members of both Houses of Congress. President Nixon had the vision to launch the negotiations and establish our basic long-term strategy and objectives. President Ford solidified important trends in the negotiations by endorsing fisheries legislation modeled on the emerging texts of the Convention. President Carter attempted to induce the developing countries to take a more realistic approach to deep seabed mining by endorsing unilateral legislation on the subject. President Reagan determined both to insist that our problems with the deep seabed mining regime be resolved and to embrace the provisions of the Convention regarding traditional uses of the oceans as the basis of U.S. policy. President George H.W. Bush seized the right moment to launch informal negotiations designed to resolve the problems identified by President Reagan. President Clinton's Administration carried that effort through to a successful conclusion. And now the Administration of President George W. Bush has expressed its support for Senate approval of the Convention and the 1994 Implementing Agreement.

Mr. Chairman, I agree with the Administration. I urge the Senate to accept the recommendation of the Committee on Foreign Relations, adopted by a vote of 19–0, and approve the Resolution of Advice and Consent contained in its Report. They have taken the right action at the right time. It is in the interests of the United States to become party to the Convention and the Implementing Agreement 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. The challenges may change, but our basic interests in using the sea to meet those challenges have never been more important. Our security is dependent upon the unimpeded 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.

> 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

---

[1] Professor of Law and Director of the Ocean and Coastal Law Program, 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. Served in 2003 as Judge ad hoc of the International Tribunal for the Law of the Sea.

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.[2]

HISTORICAL SETTING

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.

There was an accelerating collapse of any semblance of consensus on the fundamental question: Where is there freedom and where is there sovereignty? 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.

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."[3]

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 with-

[2] 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) (appended to this statement).

[3] 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 NonSeabed Mining Provisions of LOS Treaty,* 79 AJIL 151 (1985).

in 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 with 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.[4]

It took another 13 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."[5]

President Reagan expressly recognized that the rules set forth in the Convention constitute the platform of principle on which we operate. 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. There is indeed no plausible alternative for the foreseeable future. What then are the advantages of becoming a party?

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;
- the enhancement of our credibility and effectiveness when we invoke the provisions of the Convention as binding treaty obligations and insist that other states respect our rights and freedoms under those provisions; 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;
- 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, four main advantages of widespread, including U.S., ratification have been identified:

- 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.

---

[4] Elliot L. Richardson, *Power, Mobility and the Law of the Sea*, 58 Foreign Affairs 902 (1980).

[5] Statement by the President, United States Oceans Policy, Mar. 10, 1983, 19 Weekly Comp. Pres. Docs. 383 (1983).

- 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 that 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.[6]

To these I might add that other coastal states that have yet to become party to the Convention and its implementing agreements are more likely to follow suit once we are party to all of them. Canada ratified the Convention within weeks after the Bush Administration testified in support of the Convention last fall. Several weeks after that, the European Union and its 15 member states became party to 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 North America 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, Ambassador Stevenson's and my published observations on the specific benefits to the United States of ratification of the Convention are appended to this statement.[7] These observations were prepared at a time when 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. Let me therefore elaborate a bit more.

PART XI AND THE 1994 IMPLEMENTING AGREEMENT

I once heard an informed observer say that the problem with the Law of the Sea Convention is that in life you get only one chance to make a first impression. This was doubtless a reference to the problem of deep seabed mining that bedeviled the law of the sea negotiations in the 1970's and early 1980's. Much has changed since then.

The question concerns the mining of the deep seabeds beyond the limits of the continental shelf. The Law of the Sea Convention substantially expands the definition of the continental shelf to include the entire continental margin (which embraces the geographic continental shelf, continental slope, and continental rise) as well as all areas within 200 miles of the coast even if they lie beyond the continental margin. Because the existence of oil and gas deposits is closely associated with the geology of the continental margin, the purpose and effect of this definition of the continental shelf is to place seabed oil and gas deposits under coastal state control.

What remains are the hard minerals of the deep seabeds beyond the continental shelf as defined in the Convention, including manganese nodules found at or near the surface of deep seabeds. Even at the time the Convention was first negotiated, some promising hard mineral deposits had been identified, but to this day commercial production of deep seabed hard minerals has yet to begin. In my view, this fact contributed to an important anomaly in the law of the sea negotiations. The Conference was able to deal with the significant established interests of states in national defense and international security, oil and gas, navigation and overflight, fisheries, protection of the environment, smuggling, and virtually all other matters without serious intrusion of underlying philosophical differences and without so-called North-South confrontations.

The exception was deep seabed mining. The early draft texts issued by the chairman of the committee responsible for the deep seabed mining negotiations tended, in one degree or another, to reflect attitudes fashionable among developing countries at the time. These texts were not well received in the United States and other Western countries. Even the Soviets complained.

While painstaking progress was made in narrowing differences over the years, at the time President Reagan took office there were three basic choices: (1) continue

[6] Panel Study, note 3 *supra*, at 172.
[7] Note 2, *supra*.

to attempt to whittle away at the details, (2) withdraw from the Conference, or (3) identify and confront the most significant flaws frontally and seek basic changes. President Reagan chose the last of these. He identified certain key objectives with respect to the deep seabed mining regime, and stated: "The United States remains committed to the multilateral treaty process for reaching agreement on Law of the Sea. If working together at the Conference we can find ways to fulfill these key objectives, my administration will support ratification."[8]

Some further progress was made in the negotiations, but unfortunately there was insufficient will to rethink certain provisions, and the text adopted in 1982 did not adequately accommodate the points made by President Reagan.

On March 10, 1983 President Reagan made a major statement on United States Oceans Policy. He said:[9]

- The United States will not sign the Convention "because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries."
- The Convention's provisions with respect to traditional uses of the oceans "fairly balance the interests of all states."
- The "United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans such as navigation and overflight. In this respect, 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 "United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention" and "will not acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."
- "I am proclaiming today an Exclusive Economic Zone."[10]
- The "United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction."

The text of the Statement itself rebuts the misleading characterizations that have been revived in recent weeks. It is evident that President Reagan rejected the deep seabed mining provisions, not the remainder of the Convention. Indeed, he made clear our determination to implement, abide by and ensure respect for the important rights and freedoms the Convention elaborates. It is also evident that even in rejecting the deep seabed mining provisions of the Convention, he did not abandon our interest in working with other countries to develop a satisfactory regime.

The truth, Mr. Chairman, is that just as President Nixon determined the basic and ultimately successful strategy for achieving an acceptable convention with respect to most issues, so President Reagan determined the basic and ultimately successful strategy for producing a widely ratified Convention by resolving the deep seabed mining issue: identify the flaws, refuse to accept a text that does not reasonably address those problems, and leave the door open.

It took some time before the developing countries were ready to talk again. In the interim, communism collapsed, more market-oriented economic policies took hold throughout the world, and it became evident that a universal convention could not be achieved without resolving the deep seabed mining problem. The Administration of President George H.W. Bush determined that these developments created an opportunity to resolve the problem, and undertook to explore the possibilities with a representative group of interested countries assembled by the U.N. Secretary General. The result is the 1994 Implementing Agreement, which makes major changes in the deep seabed mining regime.

Mr. Chairman, the 1994 Implementing Agreement reasonably resolves the problems identified by President Reagan. Appended to this statement is a copy of my

---

[8] Statement by the President, U.S. Policy and the Law of the Sea, Jan. 29, 1982, 18 Weekly Comp. Pres. Docs. 94 (1982).

[9] Note 5, *supra*.

[10] See Proclamation 5030, Mar. 10, 1983, 19 Weekly Comp. Pres. Docs. 384 (1983) (footnote added). This Proclamation implements the rights of the United States as a coastal state as set forth in some of the most important provisions of the Law of the Sea Convention.

detailed analysis of the ways in which the 1994 Agreement accommodates the points raised by President Reagan.[11]

Many of the critical comments made about the effect of the deep seabed mining provisions are influenced primarily by decades-old impressions, not by the 1994 Implementing Agreement, which expressly provides that it prevails over any conflicting provisions in the Convention. It is claimed, for example, that the Seabed Authority can impose productions quotas and mandate transfer of technology. That is not so. The 1994 Implementing Agreement removed the offensive provisions on those subjects.

Many other claims are simply misplaced. There is no transfer of sovereignty or wealth to the International Seabed Authority.

We have never claimed sovereignty over the seabeds beyond the continental shelf, and have consistently taken the position that any such claim would be unlawful. This is made abundantly clear by our own Deep Seabed Hard Minerals Act. We neither have nor assert jurisdiction over the activities of foreign states and their nationals on the deep seabeds.

Nothing that could rationally be called sovereignty was conferred on the Seabed Authority. The powers of the Seabed Authority are very carefully defined and circumscribed, and are controlled by a Council on which we will have a permanent seat and a veto over regulations. Private companies have the right to apply for and receive long-term exclusive rights to mine sites on a first-come, first-served basis and have legal title to the minerals they extract. All parties to the Convention are obliged to respect those mining rights and recognize that legal title.

It was we, over the opposition of many developing countries, who successfully sought judicial review to make sure that the Seabed Authority respects the limits on its powers and the rights of miners, and who in addition successfully sought commercial arbitration to protect miners' contract rights.

It was President Nixon who proposed that miners should pay a reasonable sum in respect of the minerals they remove from the deep seabeds, as they now do on land and in offshore areas subject to coastal state jurisdiction. No American administration, and to my knowledge no mining company, ever objected to that idea. The question is the formula. We were successful in the Implementing Agreement in removing the complex details of the Convention on this matter, so that the Council is in a position to adopt reasonable regulations regarding the payment formula that do not impede investment or distort the market. We also ensured that these sums would go first to defray the administrative costs of the Seabed Authority, and that the distribution of any surplus is subject to regulations approved by the Council. Regulations regarding both the payment formula and the distribution of these funds will be subject to an American veto on the Council, whether or not American companies are the source of the funds.

Mr. Chairman, no major industrial state ratified the Law of the Sea Convention prior to the adoption of the 1994 Agreement. Following its adoption their governments initiated the steps necessary to become party. Today every neighbor of the United States, every other permanent member of the U.N. Security Council, and every other major industrial state in the world is among the 145 parties to the Convention. The issue is no longer whether there will be a Seabed Authority in which the overwhelming majority of countries from all regions are members. That exists. The issue is whether the United States will assume the privileged seat expressly reserved for it.

This has three important implications.

- The system is regarded as workable by other industrial states that share many of our interests as consumers and potential seabed producers of hard minerals.
- We need to assume our guaranteed seat on the governing Council of the Seabed Authority, and the decisive voting power that goes with it, as soon as possible to ensure that the system evolves in ways satisfactory to the United States. This includes the use of our voting power and our special rights under Article 142 to protect our environmental and economic interests as a coastal state whose continental shelf abuts the international seabed area in three oceans.
- It is unlikely that major sources of private capital with interests in many different parts of the world would be particularly comfortable making substantial new investments in deep seabed mining carried out in defiance of the Convention. A variety of factors may influence any business judgment in this re-

[11] Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AJIL 687 (1994) (appended to this statement).

gard; one is that Article 137 prohibits the parties to the Convention from recognizing any rights to deep seabed minerals not in accordance with Convention and the 1994 Implementing Agreement.

In other words, the critics are largely either addressing texts that no longer exist or assuming a political, economic and legal context that no longer exits. That said, I should note that I do agree with their claim that the Law of the Sea Convention entails history's biggest voluntary transfer of wealth. But not in the sense that the critics mean. That transfer of wealth is to coastal states, and the United States is first among them. When the Law of the Sea negotiations began, we had a 3-mile territorial sea, a 12-mile fishing zone, and a continental shelf of uncertain extent beyond the point where the waters reach a depth of 200-meters. By the time those negotiations ended, the Convention accorded us:

- a territorial sea of up to 12 miles,
- the largest 200-mile exclusive economic zone in the world in which we control all living and nonliving resources and have important rights to control pollution,
- an oil-rich continental shelf extending at least to 200-miles and beyond that to the outer edge of the continental margin,
- a ban on high seas fishing for salmon of American origin, and much more.

Few coastal states in the world enjoy rights as rich and extensive as we acquire just off the coast of Alaska.

NAVIGATION AND NATIONAL SECURITY

One of the major achievements of the Law of the Sea Convention is that many of its provisions regarding navigation are copied from the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1958 Convention on the High Seas. The United States ratified the 1958 conventions many years ago, although many other states did not.

For example, the following rules in the Law of the Sea Convention are all copied from the 1958 Territorial Sea Convention: the sovereignty of the coastal state extends to the territorial sea; there is a right of innocent passage in the territorial sea; passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state; submarines are required to navigate on the surface in order to enjoy the right of innocent passage.[12]

For many years, there was a serious difference of opinion as to what "innocence" meant under the 1958 formulation. This cast a shadow over our ability to rely on the right of innocent passage in foreign territorial seas. Paragraph 2 of Article 19 specifically responds to our concerns about this ambiguity by making clear that the question of innocence relates only to the exhaustive list of acts set forth in that paragraph and only if those acts are committed while the ship is in the territorial sea. The list benefits us by providing clarity and eliminating broader interpretations of what is not innocent. It strains credulity for critics to imply that an "act aimed at collecting information to the prejudice of the defence or security of the coastal State" or any other act listed in paragraph 2 of Article 19 would be regarded as innocent by coastal states in the absence of such a list.

President Reagan twice declared that the United States respects the rules regarding innocent passage contained in the Law of the Sea Convention, once in his 1983 oceans policy statement,[13] again in 1988 when he implemented the right set forth in the Convention to extend the territorial sea to 12 miles.[14] All of President Reagan's successors have respected these declarations.

Critics seem to overlook the fact that Articles 17 to 32 of the Convention address only the right of innocent passage.[15] The preamble makes clear what would be true in any event: "matters not regulated by this Convention continue to be governed by the rules and principles of general international law." Suffice it to say that the matters not regulated by the Convention include the right of self-defense, the international law of armed conflict, and the complex (and for understandable reasons,

[12] Articles 2, 17, 19(1), and 20 of the Law of the Sea Convention correspond respectively to Articles 1, 14(1), 14(4), and 14(6) of the Territorial Sea Convention.

[13] See Note 5, *supra*, and accompanying text.

[14] President Reagan declared that "the ships of all countries enjoy the right of innocent passage" in the U.S. territorial sea "[i]n accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea." Proclamation on the Territorial Sea of the United States, Dec. 27, 1988, 24 Weekly Comp Pres. Docs. 1661 (1988). The Proclamation also specifically recognizes the right of transit passage in straits. Id.

[15] Those articles do not, for example, affect the more liberal rights of transit passage of straits and archipelagic sea lanes passage under Parts III & IV. Unlike innocent passage, transit passage of straits and archipelagic sea lanes passage include both overflight and submerged navigation.

rarely discussed) questions regarding the practice of states with regard to covert intelligence activities in each others' territory.

Mr. Chairman, becoming party to the Convention will facilitate the prosecution of the war on terrorism in general, and the implementation of the President's proliferation security initiative in particular. President Bush has emphasized that we cannot wait for the terrorists and their weapons to reach us. What is, or should be, clear from this is that we must exercise our global navigation and overflight rights and freedoms at sea anywhere in the world in order to reach our operational destinations. Not every government of the numerous countries past whose coasts our forces must travel to reach their destinations would necessarily wish to associate itself with every one of our operations. When we become party to the Convention, those governments will have an easier time explaining their acquiescence in our activities to domestic or foreign critics on the grounds of their treaty obligations to the United States, and we will have an easier time persuading them to do so without the need to expend our political or economic capital.

Those who have expressed concerns in this respect seem to overlook the fact that the rules of high seas law set forth in the Law of the Sea Convention are copied from the 1958 High Seas Convention. Similarly, they overlook the fact that the rules of the Law of the Sea Convention regarding navigation and overflight and other high seas freedoms were expressly embraced by President Reagan in his 1983 statement on oceans policy, and constitute the bedrock of the legal foundation for our operations at sea around the world. The Administration has made it clear that it is able to and intends to carry out the proliferation security initiative in a manner consistent with high seas law as set forth in the Law of the Sea Convention, and that doing so is in our interests.

Mr. Chairman, the 200-mile limit of the exclusive economic zone embraces virtually all of the semi-enclosed seas of the world, including the Caribbean Sea, the Mediterranean Sea, the Red Sea, the Persian Gulf, the South China Sea, and the East China Sea. It is evident that our high seas navigation and other rights in those seas are critical if our forces are to be able to reach their destinations and perform their missions. Perhaps most importantly for the successful prosecution of the war on terrorism and implementation of the proliferation security initiative, the Law of the Sea Convention provides that high seas law and high seas freedoms with respect to navigation, overflight, and related military activities apply within the 200-mile exclusive economic zone.

A crucial point that some critics miss is that coastal states are tempted to think of their exclusive economic zones as belonging to them. It is unrealistic to assume that the application of high seas law and high seas freedoms within the 200-mile exclusive economic zone, in the hard-won terms set forth in the Law of the Sea Convention, would commend itself to coastal states around the world outside the context of a comprehensive and universal Law of the Sea Convention designed to include the Unites States.

One of our most important objectives in seeking a universally ratified Law of the Sea Convention is to put a stop to the erosion of high seas freedoms in coastal areas that characterized the development of customary international law in the twentieth century. There is no reason to believe this erosion will not continue in the absence of a treaty restraint. In my opinion, the most plausible way to block the gradual erosion of high seas freedoms in the exclusive economic zone, and its eventual transformation into something much more like a territorial sea, is a widely ratified Law of the Sea Convention to which the United States is party, and with respect to which the voice and practice of the United States are prominent authoritative evidence of what the Convention means.

For operational planners, the essential question is not what we think our rights are, but what foreign governments think. We need the greatest possible influence over the perception of foreign governments regarding the source, legitimacy, and content of their obligations to respect our high seas freedoms, especially in their exclusive economic zones. We achieve that best by becoming party to the Convention. The alternatives are likely to be both less effective and more costly.

PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

Mr. Chairman, I must reiterate before this Committee in particular: "The Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."[16] Former Secretary of State Warren Christopher

[16] Note 2, *supra*, at 496.

made the same appraisal in his Letter of Submittal of the Convention.[17] 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.

Thanks in no small measure to the work of this Committee, our environmental laws are among the strongest in the world. They are fully consistent with our rights and obligations under the Convention. The Legal Adviser of the Department of State, William H. Taft, IV, in a letter of March 1, 2004 to the Chairman of the Senate Foreign Relations Committee, expressly stated that "the United States does not need to enact new legislation to supplement or modify existing U.S. law . . . related to protection of the marine environment . . . . 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."

It has nevertheless been suggested that the Convention may require a revision of the Endangered Species Act. That is not so. Article 194 of the Convention requires the parties to take measures to control pollution of the marine environment. We have done so. Paragraph 5 of Article 194 is a statement of the obvious: it specifies that among the objects of such pollution control measures is the protection and preservation of rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. Our existing laws satisfy this obligation. I need only add that Article 194 does not specify any particular pollution control standards.

Mr. Chairman, you and your colleagues on the Committee are well aware of the complexities involved in arriving at an effective, efficient and balanced approach to environmental protection that reasonably accommodates and furthers both our environmental and other interests. When it comes to the oceans, these complexities are multiplied many times because they implicate the interests and priorities of many different countries. Permit me to cite an example.

The Law of the Sea Convention accords every coastal country, including the United States, exclusive sovereign rights with respect to the exploration and exploitation of the continental shelf in an area vastly expanded beyond the limits specified in the 1958 Convention on the Continental Shelf, to which the United States is party. The Law of the Sea Convention specifies that the rights of the coastal state with respect to the continental shelf include the power to set environmental conditions for oil and gas development, for oil rigs and all other economic installations and structures, for pipelines, and for dumping.

While these powers give us a great deal of control over our interests in both environmental protection and the productive use of our continental shelf, in themselves they are insufficient to protect the full range of either our environmental interests or our energy and other interests. To protect those interests, we need to influence the laws and practices of foreign countries. It is for this reason that the Convention establishes a floor of generally accepted international standards that every coastal state must apply. Among the American interests that this protects are the following:

• Our neighbors have the same exclusive rights over the continental shelf off their coasts as we have off ours. Pollution from their activities can easily affect our waters, our resources, and our shores. This became abundantly clear a number of years ago when a pollution incident on the Mexican continental shelf gave rise to extensive public concerns in Texas and other Gulf states that our waters and coastline would be polluted. As a party to the Convention, we will have increased credibility and leverage to protect ourselves from such incidents in a way that avoids any appearance that we are bullying our neighbors.

• While every coastal state has the right to impose higher standards on its continental shelf activities, and ours are among the strongest in the world, the oil and gas industry is a global enterprise that can achieve economic efficiencies from uniform global standards regarding equipment and operations. Those efficiencies can of course help to keep down the cost of energy and free up additional capital for investment. As a party to the Convention, we will have increased credibility and le-

[17] See Senate Treaty Doc. 103–39, p. V, VII–VII (1994).

verage to promote stronger and more efficient international standards and their general acceptance.

• We live in an era of instant global news. A serious pollution catastrophe on the continental shelf anywhere in the world is likely to be reported, and its consequences televised, throughout the globe. This can stimulate public demands in many countries for new restrictions on continental shelf development. To the extent that this means that we all continue to learn from each others' mistakes, this is of course a good thing. But to the extent that public excitement can lead to hasty and ill-considered actions either in the United States or in other countries, the economic consequences can be adverse, and the result may be an unnecessary increase in the price of energy. As a party to the Convention, we will have increased credibility and leverage to ensure the emergence and enforcement of international standards that reduce the likelihood of such events.

• Our interest in the health of the oceans throughout the world is no mere abstraction. They comprise over two-thirds of our world, and are essential to our well-being and the overall ecological balance of the planet. Marine living resources from the far reaches of the globe supply us and the rest of the world with food, with sources of recreation, with valuable scientific knowledge, and with the promise of new and more effective medicines. We have neither an environmental nor an economic interest in a race to the bottom in pollution regulation in other parts of the world that destroys marine life. As a party to the Convention, we will have increased credibility and leverage to exercise the kind of balanced global leadership in protecting the oceans that is incumbent upon the leading maritime power in the world and that the American people expect.

This is but one example of the benefits of the approach taken by the Convention to environmental protection. There are many others. The provisions that successfully accommodate the interests of states with respect to freedoms and rights of navigation and their interests with respect to prevention of pollution are obviously of great importance. The maintenance over time of a reasonable balance responsive to both navigation and environmental interests would unquestionably be advanced by U.S. participation in the Convention.

Mr. Chairman, the Law of the Sea Convention is a powerful and successful environmental treaty precisely because it seeks to achieve a reasonable balance between environmental and other interests. For many years, in the law of the sea negotiations and in other fora, the United States has tried to make clear that environmental treaties must be carefully framed to produce a reasonable accommodation of diverse interests. Some people have characterized this as opposition to environmental protection. Some of the extreme rhetoric used abroad has been particularly damaging to our reputation in important allied countries. The Senate now has a signal opportunity to set the record straight. Its approval of the Convention and the Implementing Agreement would suggest that there is every reason to ensure that the multilateral 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 international protection of the environment.

CONCLUSION

Mr. Chairman, it is of particular importance that many of the 145 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 careful 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 additional 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 modification of Part XI of the Convention in the 1994 Implementing Agreement to accommodate the objectives articulated by President Reagan.

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.

THE FUTURE OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

After fifteen years of continuous, intense and difficult negotiations among the nations of the world, the United Nations Convention on the Law of the Sea was adopted in 1982.[1] The overwhelming majority of states signed it and over sixty have ratified it.[2] It will enter into force on November 16, 1994.

Now the world must decide whether or not the Convention will be widely ratified, that is, whether objections to Part XI will be accommodated and the Convention will enjoy both widespread and representative participation. This option will not last indefinitely.

In recent years, the laws and policies of many governments have been based on the assumption that in time the Convention would be widely ratified. Its entry into force puts that assumption to the test. If over time the assumption appears to be increasingly questionable, its influence as a restraining force on the laws and actions of governments may weaken. As states yield to the temptation to adopt measures inconsistent with the Convention, their willingness and political ability to ratify it will decline, and we will have lost a unique opportunity to reap its benefits.

The most significant impediments to ratification of the Convention by industrial states are legitimate objections to the deep seabed mining regime set forth in Part XI and related annexes. Serious negotiations to overcome those objections are now bearing fruit. New texts have been drafted that streamline and reduce the cost of the regime and institutions, increase the influence of industrial states over decisions, and replace controversial provisions, such as those dealing with finan-

[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983) [hereinafter LOS Convention].

[2] Most of the first 60 states to ratify are in Africa, Asia and Latin America, including large countries such as Brazil, Egypt, Indonesia and Mexico.

cial obligations, production limitations and transfer of technology, with market-oriented approaches. Recognizing that widespread ratification of the Convention would be encouraged by avoiding implementation of the objectionable provisions of Part XI when the Convention enters into force, the new texts facilitate the early implementation of the modified system and allow provisional participation for several years. The success of this effort is undoubtedly crucial to the fate of the Convention.

The political controversy over deep seabed mining has long captured the imagination of people who otherwise may have little interest in the oceans or the law of the sea, or international law for that matter. This has obscured a basic underlying fact. The Law of the Sea Convention deals with a large number of other issues of substantial importance to existing and reasonably foreseeable economic, environmental and security interests of states.

Misperceptions persist notwithstanding consistent efforts to set the record straight.[3] The need to deal with these misperceptions, at a time when the future of the Convention hangs in the balance, inspires the authors to state views regarding its significance that are informed by their participation in its negotiation and related matters.[4] Policy, not originality, is the object.

One sometimes wonders whether many of its critics have read the Convention. Some interested in economics and political economy opine about the acceptability of the Convention as if deep seabed mining were its sole object, and the ideology of the deep seabed mining regime an overriding priority. Elaborate theories about the conduct and utility of multilateral negotiations are derived from the failure of Part XI to bridge alternative perceptions in a generally acceptable manner. Many critics utter nary a word about important interests in energy, food, trade and communications, the environment or other matters successfully dealt with by the Convention.

Attempts to treat the Convention as a partisan issue in the United States ignore not only the facts about the Convention but its negotiating history as well. United States policy for a new convention on the law of the sea was first determined by President Nixon, taking into account a study commissioned by Congress, and was maintained in its essentials thereafter. Specific negotiating positions evolved in the course of the Nixon, Ford and Carter administrations in response to the views of other countries, as well as interested members of Congress, congressional staff

[3] Notable among these efforts is the work of the Panel on the Law of Ocean Uses, chaired by Professor Louis Henkin, whose papers include *United States Interests in the Law of the Sea Convention*, 88 AJIL 167 (1994); *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). Individual panel members and others have also written extensively on the issues involved.

[4] John R. Stevenson was Legal Adviser of the U.S. Department of State from 1969 to 1972 and Ambassador and Special Representative of the President to the Third UN Conference on the Law of the Sea from 1973 to 1975. He has served as President and Honorary President of The American Society of International Law, and as a partner, and later Chairman and Senior Partner, of Sullivan & Cromwell. Bernard H. Oxman served as attorney-adviser and Assistant Legal Adviser of the U.S. Department of State from 1969 to 1977, was a member and later vice chairman of the U.S. delegation throughout the negotiation of the Law of the Sea Convention from 1969 to 1982, chaired the English Language Group of the Conference Drafting Committee, and now directs the Ocean and Coastal Law Program of the University of Miami School of Law.

and the public. The Bush and Clinton administrations continued President Reagan's policy of respecting the Convention while maintaining objections to Part XI. Serious international efforts to find means to deal with the objections of industrialized states to Part XI were initiated by the UN Secretary-General during the Bush administration. Ill-informed attempts to portray interest in a successful Convention as some sort of left-wing conspiracy are also belied by the fact that most leaders of the U.S. delegation to the Law of the Sea Conference were Republicans.

Apart from a relatively narrow community of experts, few observers seem aware that President Reagan, while rejecting the deep seabed mining regime, embraced the remainder of the Convention dealing with traditional law of the sea issues and declared it to be the basis of United States policy.[5] Indeed, careful scrutiny of his statements suggests that he was prepared to use force if necessary to defend certain rights guaranteed by a Convention that some of his supporters dismissed as utterly without virtue.

Even pragmatic business leaders could be misled by the misperception that the Convention is principally about deep seabed mining. Far more significant are substantive and dispute settlement provisions of the Convention that enhance the stability of expectations in the business of transporting oil and gas by sea, as well as extracting oil and gas from the continental shelf. The Convention is also important to the stability of expectations of investment bankers, insurance companies and others who underwrite and support shipping, offshore exploration and drilling, fishing and many other activities at sea. It would be a disservice to their stockholders for such businesses to formulate their views on ratification of the Convention on the basis of essentially speculative investments in consortia to recover deep seabed manganese nodules.

The same may be said of the duties of environmental leaders to their constituents. Some may have been misled into believing that this is a treaty about deep seabed mining that incidentally deals with some arcane issues of pollution from ships. Too few step back to observe that this is a strong, innovative and comprehensive global environmental treaty governing over two-thirds of the planet. With their support, it could be accepted as a binding treaty by the overwhelming majority of states. If ever there was an opportunity to demonstrate that environmental consciousness has fundamentally transformed international law, this is it.

The Convention lays down basic rules for the governance and protection of all of the sea, including the airspace above and the seabed and subsoil below. The deep seabeds are likely to remain the least used area addressed by the Convention. As defined in the Convention, the international seabed area (commonly referred to as the "deep seabeds") comprises that part of the seabed and subsoil that remains after formidable coastal appetites were satisfied by subjecting the resources of a 200-mile zone and the continental margin to coastal state jurisdiction. In particular, coastal states were able to ensure that virtually all geological structures associated with significant deposits of oil and gas are likely to be found within coastal state jurisdiction, not in the international seabed area.

Deep seabed mining has yet to occur. While promising sites have been identified by various companies that understandably wish to protect their investments, demand for the metals principally responsible for interest in manganese nodules,

[5] Statement by the President, Mar. 10, 1983, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983), *reprinted in* 22 ILM 464 (1983).

especially nickel and copper, has been depressed in recent years and may be satisfied for some time to come by sources on land. These metals can be stockpiled, and concerns have abated about the climate for remunerative investment in, and stable supply from, mines located in many countries of the world. In addition, hard minerals (whether in the form of nodules, polymetallic crusts or other deposits), geothermal energy and other resources also exist within the vast economic zones and continental shelves off the coasts of the United States and other states.

The provisions of the Convention dealing with activities on the deep seabeds other than mining are helpful. Navigation, telecommunications, scientific research and defense activities are protected. The potential use of the deep seabeds causing the most immediate and widespread environmental concern, namely disposal of wastes, is addressed within the framework of the Ocean Dumping Convention;[6] both existing and future regulations under that treaty are incorporated by reference and strengthened by the substantive and dispute settlement provisions of the Law of the Sea Convention.

The important point is that the deep seabeds are only one part of the oceans and that deep seabed mining is only one interest addressed by the Convention. On the assumption that important objections to Part XI will be overcome by new texts, it is crucial to direct attention to the many other aspects of the Convention that have all too often been ignored or taken for granted, and to identify those benefits that are unlikely to be available at all, or to the same degree, in the absence of widespread ratification.

Stability and Ordered Change

In most cases, the object of the Convention is to establish an agreed allocation of jurisdiction and concomitant duties among states, rather than to regulate activities as such. The rights and obligations of individuals and companies with respect to each other and to the public at large are the end products of the lawful exercise (or delegation) of jurisdiction by the appropriate state. Doubt or controversy about which activities are subject to the jurisdiction of which state impedes the elaboration and enforcement of national as well as international rules and standards governing specific uses of the sea. No right or duty is secure if it rests on an uncertain or contested jurisdictional foundation.

The history of the law of the sea in this century reveals a tendency to assume that a coastal state will benefit by unilaterally extending the monopoly control it enjoys on land to activities off its coast, without considering whether unilateral claims asserted by other states and instability in the law would be consistent with its interests. The Truman Proclamation stimulated (or at least was relied upon to justify) a cascade of claims by coastal states over the high seas that vastly exceeded the rights over the continental shelf claimed by the United States. The first two conferences on the law of the sea in 1958 and 1960 attempted to restore the stability of expectations that law should provide. Despite important accomplishments, however, no lasting accommodation was reached between the interests of states in controlling foreign activities off their own coasts and the interests of states in protecting the freedom to conduct activities off foreign coasts without interference.

[6] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 UST 2403, 1046 UNTS 120.

History taught that war and conquest followed upon attempts to interfere with shipping or naval routes deemed vital by another state with the means to respond. Yet the trend toward claims that purported to expand coastal state control over navigation and overflight accelerated. That trend was manifested in expanding territorial sea claims, restrictive interpretations of the right of innocent passage within the territorial sea, and coastal state assertions of the right to impose unilateral restrictions on navigation beyond the territorial sea.

As a maritime power and trading nation with interests and responsibilities around the world, the United States would inevitably be sensitive to these problems. The cost of bilateral purchase of potentially important navigation rights in all the corners of the globe that U.S. trade or U.S. forces might wish to pass would be prohibitive.[7] A situation was developing in which the United States would have to divert increasing resources, including naval and air forces, to confront foreign claims in order to protect the right to use areas of operational interest and to prevent the accumulation of adverse precedent; at the same time, the platform of principle for such resistance was collapsing as a result of accelerating foreign claims, as well as support for new coastal claims in Congress.

Similar problems confronted other states, including developing countries with limited means to protect the routes linking them to their friends and trading partners, and with less ability to absorb increased costs. Sophisticated observers recognized that nearly every coastal state needed an authoritative basis for reconciling its own long-term coastal and maritime interests and to maintain the integrity of that balance in the face of inevitable pressures to change it unilaterally. The goal was a stable accommodation of coastal and maritime interests both within and between coastal states that would be respected by each state's *classe politique* as a continuing restraint upon its jurisdictional choices.

There are four main reasons why a widely ratified Convention is a better guarantor of this long-term stability than customary international law.

First, governments are more inclined to respect obligations to which formal consent has been given by the highest political authorities. Even if the Convention is now generally declaratory of customary international law, this leaves much room for argument about important details.

Second, without widespread ratification, inevitable "violations" are more easily interpreted as evidence that state practice, the ultimate source of customary law, is not necessarily rooted in the Convention.

Third, the Convention contains compulsory dispute settlement procedures to help restrain unreasonable claims and contribute to a stable legal order. Customary international law imposes no such obligation and few states are under such an obligation to each other.

Fourth, the Convention contains a system for ordered change that strengthens rather than erodes the legitimacy of its basic structure. It is open to formal amendment and encourages supplementary agreements and organizational arrangements with the participation of affected states. Its interpretation will be adapted to changing circumstances by authoritative tribunals. It incorporates by reference future safety and environmental rules, and contains a flexible system of shared competence for regulating navigation in particularly sensitive or dangerous coastal areas.

[7] A reciprocal grant of similar rights off the United States coast would rarely be regarded as adequate "consideration" in such arrangements. Geography alone determines that few foreign states need to navigate past the U.S. coast to reach destinations outside the United States.

The traditional method for adapting the customary international law of the sea to new circumstances and special problems has been unilateral claims of jurisdiction by the coastal state, the very source of instability in the law of the sea in the past.

INTERNATIONAL SECURITY, TRADE AND COMMUNICATIONS

Since the dawn of history, the sea has served humanity as a primary avenue of communication, whether by ship, aircraft or cable.

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.

If governments accorded unquestioned priority to interests in international security, trade and communications, there would be no law of the sea problem with respect to coastal state claims. In earlier centuries when the freedom of the seas reigned supreme, the law of the sea was relatively stable. Decolonization, technological development and environmental sensitivity altered priorities in the twentieth century. It is no longer plausible to insist upon global mobility as the sole interest informing policies regarding coastal state jurisdiction. One cannot have a stable law of the sea that protects navigation and communications unless one finds a way to accommodate coastal state interests in controlling economic development of vast offshore areas and protecting the coastal environment.

The Convention seeks to reconcile the conflicting pressures with a complex allocation of rights and duties. It limits the breadth of the territorial sea to 12 nautical miles, guarantees free transit for all ships and aircraft through straits overlapped by the territorial sea and through archipelagos, and preserves freedom of navigation, overflight, laying of cables and pipelines, and related uses seaward of the territorial sea. At the same time, it gives the coastal state jurisdiction over living and nonliving resources, drilling, marine scientific research, and most installations and structures in an exclusive economic zone extending up to 200 miles from the coast and, on the seabed, beyond 200 miles to the outer edge of the continental margin.[8] It establishes detailed coastal state rights and duties to adopt and enforce antipollution standards in these areas.

The Convention offers three protections from the risk that this system will gradually evolve into the functional equivalent of a 200-mile territorial sea under

[8] It also doubles, to 24 miles from the coast, the breadth of the contiguous zone in which smuggling and immigration laws may be enforced.

discretionary coastal state control, effectively territorializing all of the major seas of the world. First, the rights and duties of coastal states and flag states are carefully enumerated. For example, there are requirements for prompt release on bond of foreign ships arrested for pollution or fisheries violations, and protections for their crews. Second, the regulation of navigation is closely tied to rules adopted or approved by the competent international organization, presumably the International Maritime Organization. Third, both the coastal state and the flag state are subject to compulsory arbitration or adjudication with respect to navigation, overflight and related rights. This includes a rapid system for ordering the release on bond of ships arrested by the coastal state.

These protections are dependent upon or strengthened by widespread ratification of the Convention. Compulsory dispute settlement is especially likely to be the key to ensuring that the complex balance between coastal state jurisdiction and the freedoms of navigation and communication is respected and evolves in an orderly way. It may well be a useful tool for governments in their attempts to restrain their own political processes. It is also an important option for responding peacefully, but effectively, to excessive coastal state claims or interpretations.

PROTECTION OF THE MARINE ENVIRONMENT

The advance in international environmental law effected by the Convention is reflected in the unfettered clarity of the opening article of Part XII: "States have the obligation to protect and preserve the marine environment."[9]

The Convention requires states to ensure that activities under their jurisdiction do not cause environmental damage to other states or result in the spread of pollution beyond their own offshore zones; to minimize to the fullest possible extent the release of harmful substances into the marine environment from land-based sources; to protect rare or fragile ecosystems; to conserve living resources; and to prevent the introduction of alien species into the marine environment where they may cause harm. It also provides for environmental impact assessments of planned activities, environmental monitoring of ongoing activities, and contingency planning for pollution emergencies. States are required to cooperate in establishing global and regional rules and standards for specific sources of pollution.

The environmental obligations placed on states relate to activities subject to their jurisdiction. Taken as a whole, the Convention therefore clarifies not only the nature of the environmental obligations of states, but also the activities and areas that are the object of those obligations. Four factors are particularly important in assessing the significance of this effort to combine the allocation of economic and other rights with the assumption of environmental duties.

First, the environmental regime is incorporated into a binding treaty. While a growing number of global and regional treaties deal with important environmental matters, none purports to impose comprehensive environmental obligations on so many activities in so many places. Other comprehensive global environmental instruments, including those adopted at Stockholm in 1972 and Rio de Janeiro in 1992, have been nonbinding declarations. Enthusiasts may rush to pronounce such instruments declaratory of customary international law, but even they presumably understand that this is not the same thing as an international commit-

[9] LOS Convention, Art. 192. Experienced international negotiators are well aware of the difficulty of achieving agreement to articulate an environmental norm in such direct and unqualified form.

ment accepted as binding by the highest political organs of a state, including its parliament, especially when it comes to making the hard political choices necessary to implement environmental standards.

Second, because it contains other incentives for ratification, the Convention enjoys reasonable prospects of becoming perhaps the most widely ratified environmental treaty. That goal is virtually assured if ratification is forthcoming from states in which environmental objectives are accorded high priority.

Third, in addition to establishing the basic environmental jurisdiction and duties of states, the Convention obliges the parties to adopt and enforce pollution control regulations with respect to particular sources, notably ships,[10] ocean dumping, oil drilling and offshore installations. It provides that these regulations shall at least have the same effect as, or be no less effective than, international rules and standards that emerge from the work of competent international organizations now and in the future, presumably with widespread and representative support. This duty applies to all parties to the Convention, whether or not they are otherwise bound to apply a particular standard.

Lastly, compliance with environmental standards under the Convention is subject to compulsory arbitration or adjudication. While compromissory clauses are not unknown in marine pollution treaties, the coupling of compulsory arbitration and adjudication with environmental obligations under this Convention is an extraordinary advance over past practice.

Every coastal state shares both the communications and environmental interests that require harmonization in the allocation of rights and duties to regulate pollution from ships. Both ships and contaminants move at sea. No coastal state can protect its environmental interests adequately unless it achieves agreement from other states to apply restraints to ships under their control. Similarly, no state can protect its communications interests unless it achieves agreement from many coastal states regarding the appropriate balance between freedom of navigation and coastal state competence to interfere with that freedom for environmental reasons.

The result is one of the most complex efforts at harmonization contained in the Convention. Specific prescriptive and enforcement powers over foreign ships are conferred on coastal states by the Convention but are subject to important limitations and safeguards to protect against coastal state excesses. The entire system is subject to compulsory arbitration or adjudication to help ensure respect for both environmental duties and navigational rights and to safeguard the stability of this complex balance.[11]

Naturally enough, there are those who would have liked the Convention to do more. For example, they might have preferred a more strongly worded duty to enforce international standards to control land-based sources of marine pollution. One difficulty was that delegates to a conference on the law of the sea had

[10] Following the pattern of other marine pollution treaties, the environmental provisions of the Convention do not apply to warships and other government noncommercial ships and aircraft, but each state is required to ensure that its excluded vessels and aircraft act in a manner consistent with those provisions so far as is reasonable and practicable.

[11] Two significant exceptions to compulsory arbitration or adjudication under the Convention are "disputes concerning military activities" and disputes "with regard to the exercise by a coastal State of its sovereign rights or jurisdiction." The latter exception does not apply to coastal state violation of navigation rights and freedoms or specified environmental rules and standards. LOS Convention, Art. 297, para. 1, Art. 298, para. 1(b).

doubts about their competence to deal with activities on land that might cause marine pollution. Delegates to the 1992 Rio Conference, who suffered from no such disability, witnessed the difficulty of getting states to agree to binding rules affecting significant activities on land. Negotiations are continuing in environmental forums where specific land-based sources of marine pollution are being targeted.

The Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time. It is wishful thinking to believe that the Convention will have as much impact if it is not widely ratified. Nonparties may be particularly unwilling to regard themselves as bound by the environmental duties outlined in the Convention if governments and organizations ordinarily sensitive to environmental issues fail to work for widespread ratification. The message inherent in such behavior is likely to drown out protests to the contrary.

Coastal Resources

The alacrity with which coastal states "implemented" the sovereign rights elaborated in the Convention with respect to oil and gas, fisheries, and other natural resources of the economic zone and continental shelf suggests that widespread ratification of the Convention would not make a significant difference with respect to coastal resources. That is not entirely true, even if one has faith that coastal state rights are as safely consolidated by customary international law as by a widely ratified Convention. For example, the economic benefits of exporting such natural resources may well depend on respect by other states for navigational rights and for a balanced allocation of competence to control pollution from ships. Widespread ratification of the Convention is more likely to promote such respect.

Oil and Gas

One of the reasons coastal state jurisdiction over the continental shelf was extended to the edge of the continental margin was to incorporate potential hydrocarbon deposits in the continental rise. Oil and gas development requires substantial site-specific investments. The Convention protects both the coastal state and the investor from future disputes about the location of the seaward limit of coastal state jurisdiction over the continental margin. Limits established by the coastal state on the basis of the recommendations of an international commission of experts to which supporting data have been submitted are final and binding on all parties to the Convention and the International Sea-Bed Authority.

The extension of coastal state jurisdiction over the continental margin, and the consequent exclusion of the hydrocarbon potential of the continental rise from the international seabed area, was balanced by the provision for a modest sharing of revenues from the continental margin beyond 200 miles.[12] This system not only affords benefits to developing countries (including landlocked countries), but creates a global interest in the legitimacy and exercise of coastal state jurisdiction over the continental margin, notwithstanding the disproportionate benefits conferred on certain large and prosperous coastal states.

[12] These provisions are what remain of a more ambitious proposal for revenue sharing by President Nixon in 1970.

Seaward extension of the limits of the continental shelf and expansion of the type of installations subject to coastal state jurisdiction also raised doubts about the rigidity of the 1958 Convention on the Continental Shelf with respect to the size of safety zones around offshore installations and the requirement that installations must be entirely removed once they are no longer in use. Those rules were designed to ensure respect for other uses of the marine environment, both spatially and temporally. If the rules were to be made more flexible, means would have to be found to ensure that interests in other uses and protection of the marine environment were adequately reflected (including interests in the safe and expeditious transport of hydrocarbons by ship). The Convention achieves this by delegating to the competent international organization, presumably the International Maritime Organization, the authority to establish guidelines for deviating from the strict requirements regarding safety zones and removal of installations.

Accidents and pollution in one part of the world may increase resistance to oil and gas development elsewhere. In addition to their environmental interests, both coastal states and investors have a significant economic interest in assuring that every coastal state takes adequate measures to protect against pollution from offshore hydrocarbon development. The Convention accommodates this interest by providing that all coastal states must at a minimum respect international environmental standards established by the competent international organization.

Fisheries

One of the most significant threats to marine life is pollution of the marine environment. That pollution originates in many ways and in many places. No state is in a position to solve the problem alone, even off its own coast. Widespread ratification of the Convention is likely to promote greater protection from pollution. For that reason alone, those concerned about living resources should support ratification.

The biological boundaries respected by most stocks of fish in the wild have little in common with the political boundaries drawn by states. What is required is consistent management of ecosystems and fish stocks throughout their migratory range. No general convention can achieve that. But the Convention at least makes clear that economic zones are not the end of the inquiry, and that sound management is required on the basis of biological characteristics.[15]

Unless management is coordinated, fishing outside a state's zone can prejudice both its conservation measures and the economic preferences accorded its fishermen within the zone. The 1992 Rio Conference called for international negotiations on the matter, which are now under way. The future of the Convention, and the stability of the law of the sea, may depend on the willingness of governments to negotiate constructively in this regard.

General legal rules must be applied to specific regions in any event. In some regions it may be easier to resolve the problem directly by agreement among the states concerned with fishing in that area. Such an agreement was recently nego-

[15] This includes conservation measures that take into account the interdependence of species, optimum utilization, coordination between neighboring coastal states, special rules for species that migrate between fresh water and the open sea, cooperation in managing highly migratory species, and agreement with the coastal state on measures to conserve stocks that migrate between the economic zone and the waters seaward of the zone. Marine mammals are afforded special protection, including exemption from requirements for optimum utilization.

tiated with respect to the so-called doughnut hole that is completely surrounded by the economic zones of Russia and the United States in the Bering Sea.

It should nevertheless be borne in mind that widespread ratification of the Convention could help. The Convention expressly makes the right to fish beyond the economic zone subject to the rights, duties and interests of the coastal state provided for in connection with the economic zone. Fishing beyond the economic zone is subject to compulsory arbitration or adjudication. Tribunals are empowered to prescribe provisional measures "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision." Should resort to Convention procedures fail to yield compliance, there is established doctrine regarding the right of a state to respond to violations of a treaty by another party without challenging the integrity or binding force of the treaty as such.

This approach should be contrasted with the momentous consequences for the future of the Convention and the law of the sea if states that have yet to ratify the Convention were now to make new unilateral claims over the waters beyond the economic zone.[14] They would bear a heavy burden were they to destroy the practical opportunity the world now has to accept an agreed framework governing all the uses of all the oceans.

MARINE SCIENTIFIC RESEARCH

Many coastal states believe they should have jurisdiction over marine scientific research wherever they have jurisdiction over exploration and exploitation of natural resources. Freedom of scientific research is therefore a likely, if not inevitable, victim of extensions of coastal state jurisdiction over resources as a result of either unilateral claims or negotiations. This suggests that, from the perspective of marine scientific research, widespread ratification of the Convention makes little difference. That conclusion is not quite correct.

The Convention contains detailed procedures and criteria for obtaining coastal state consent to conduct scientific research in the economic zone and on the continental shelf, and provides that coastal states shall, in normal circumstances, grant their consent unless the research comes within enumerated exceptions. An "implied consent" rule promotes timely response by coastal states. The Convention also narrows the grounds for withholding consent for scientific research on the continental margin seaward of 200 miles where there is no ongoing resource development activity.

There are a number of other useful provisions. Marine scientific research must be respected in the course of other activities at sea. The Convention encourages publication or dissemination of research results. It confirms the right to conduct scientific research on the high seas beyond the economic zone and in the international seabed area, protects that right with compulsory arbitration or adjudication, and stabilizes the limits of those areas.

[14] Chile recently declared a "*mar presencial*" of uncertain content. The effect of Argentine legislation is also unclear. Canada is under pressure from Newfoundland fishermen to reduce foreign fishing beyond the economic zone, and Prime Minister Chrétien alluded to the possibility of a unilateral claim during his election campaign.

CONCLUSION

All previous efforts in this century to bring the world together in a stable agreement on an international regime for the oceans failed. The UN Convention on the Law of the Sea is the closest we have come. The goal is now within reach.

The Convention was caught in the crossfire of ideological wars that are now behind us. Remarkably, those wars never really affected more than one part of the Convention, namely Part XI. That damage is now being repaired by the negotiation of significant changes designed to accommodate objections to the deep seabed mining regime.

The ideological wars of the past also perpetrated incomplete and ill-informed perceptions about the Convention that impede rational analysis. The authors are confident that at least the large majority of those who make the effort to study the Convention as a whole, and consider the alternatives, will agree that widespread ratification is important and that the opportunity we now enjoy to achieve that goal should not be allowed to pass us by.

For those with a sense of history and perspective, the significance of a widely ratified Convention on the Law of the Sea transcends even the oceans. Since the time of Grotius, the law of the sea has been a significant part of the fabric of modern international law. If we can succeed in strengthening the international law of the sea with a widely ratified Convention, we will strengthen the fabric of international law generally.

One of the weaknesses of international law is that states have been reluctant to accept the jurisdiction of courts and arbitrators in principle. At least with respect to many issues of international law that arise in connection with the oceans, a widely ratified Convention on the Law of the Sea would remedy that weakness in a fundamental way. No comparable treaty with such broad mandatory compromissory clauses has ever been widely ratified. Progressive written articulations of the law by authoritative tribunals are by no means the same thing as self-help rooted in unilateral perceptions of the potential for forcing acquiescence. And it is the latter that has often passed for the law of the sea in this century.

A widely ratified Convention, including new texts that accommodate objections to the deep seabed mining regime, would be a monument to the possibilities of global multilateral diplomacy. Such a success could be particularly important at a time when states are beginning to shape a post–Cold War international order. It would demonstrate that, with time and care, consensus can be achieved on reconciling important security, economic, environmental and other interests; that this consensus can be expressed in reasonably precise norms and rules that narrow the issues and limit disputes; and that parliaments can be persuaded to embrace the result in the common interest.

From the broadest perspective, widespread ratification should be especially significant for governments that attach particular importance to their capacity to influence international affairs by their participation in international negotiations and institutions, and for those of us who prefer a public order in which inclusion and rational dialogue are the foundations of policy.

JOHN R. STEVENSON AND BERNARD H. OXMAN

LAW OF THE SEA FORUM: THE 1994 AGREEMENT ON IMPLEMENTATION OF THE SEABED PROVISIONS OF THE CONVENTION ON THE LAW OF THE SEA

THE 1994 AGREEMENT AND THE CONVENTION

In June 1994, some twelve years after the conclusion of the Third UN Conference on the Law of the Sea, the UN Secretary-General reported to the General Assembly that informal consultations had led to agreements that appeared to have removed the obstacles to general adherence to the 1982 UN Convention on the Law of the Sea.[1]

The history of the Convention since 1982 is widely known. In 1982 President Reagan declared that the United States would not sign the Convention because of objections to Part XI, the proposed regime for deep seabed mining. Most other industrialized states signed but withheld ratification while work proceeded in the Preparatory Commission. Most developing states signed the Convention and the number of ratifications increased slowly.

In July 1990, UN Secretary-General Javier Pérez de Cuéllar initiated informal consultations to attempt to meet the objections of the industrialized states. His successor, Boutros Boutros-Ghali, continued those consultations and saw them to conclusion. A new sense of urgency was introduced into the consultations in 1993 when it became apparent that the Convention would receive the number of ratifications necessary for entry into force before the end of 1994.

As reported by the Secretary-General, the consultations resulted in:

— a draft "Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982"; and

— a draft resolution by which the UN General Assembly would adopt the Agreement and urge states to adhere to it and to the Convention.[2]

The resolution was adopted by the General Assembly at a resumed forty-eighth session on July 28, 1994, by a vote of 121 in favor, none against, and 7 abstentions.[3] The Agreement was opened for signature the next day. Over fifty states have already signed the Agreement, including the United States and virtually all other industrialized states.

THE AGREEMENT, THE CONVENTION AND U.S. POLICY

The 1994 Agreement provides, in Article 2, that it is to be interpreted and applied together with Part XI of the Convention as a single instrument; in the

[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983) [hereinafter LOS Convention].

[2] UN Doc. A/48/950 (1994).

[3] GA Res. 48/263 (July 28, 1994). The new Agreement is annexed to the resolution, and is hereinafter cited as the Agreement. Russia abstained in the vote to adopt the resolution and Agreement on the grounds that the new provisions regarding pioneer investors discriminate in favor of the United States. The same objection to different provisions was proffered to explain the Soviet abstention in the vote in 1982 on adoption of the Convention by the Law of the Sea Conference.

event of inconsistency between them, the Agreement will prevail. It may take some time before states that have not yet ratified the Convention become party to the Convention and the 1994 Agreement.[4] More than sixty states, however, have already ratified the Convention, which enters into force for them on November 16, 1994; it would have been unrealistic to expect that before that date all of them would become party to the new Agreement as well. The Agreement therefore contains liberal terms for its provisional application by all, and affords states several years to become party to both the Agreement and the Convention.[5] With a large number of states, including industrial states, accepting provisional application, one may expect that Part XI will be implemented from the outset in accordance with the new Agreement and with representative participation in decision-making organs.

The purpose of the 1994 Agreement is to enhance the prospects for widespread ratification of the Convention by responding to problems with the deep seabed mining regime in Part XI, particularly those that troubled industrial states, including the United States. The Agreement is designed also to respond to developments in the decade since Part XI was completed, specifically "the growing concern for the global environment," and "political and economic changes, including in particular a growing reliance on market principles."

It may be instructive to consider how the 1994 Agreement responds to the problems identified and the concerns expressed by the United States when it sought, without success, to change Part XI in 1982.

U.S. policy regarding the 1982 Convention, as enunciated by the Reagan administration,[6] may be summarized as follows. "While most provisions of the draft convention are acceptable and consistent with U.S. interests, some major elements of the deep seabed mining regime are not acceptable."[7] The United States "has a strong interest in an effective and fair Law of the Sea treaty which includes a viable seabed mining regime."[8] It was "not seeking to change the basic structure

[4] Article 4 of the Agreement provides:

> 1. After the adoption of this Agreement, any instrument of ratification or formal confirmation of or accession to the Convention shall also represent consent to be bound by this Agreement.
>
> 2. No State or entity may establish its consent to be bound by this Agreement unless it has previously established or establishes at the same time its consent to be bound by the Convention.

Paragraph 5 of the resolution adopting the Agreement contains essentially the same language.

[5] Pursuant to Article 7, pending entry into force of the Agreement, and absent written notification to the contrary by the state concerned, states that either consented to adoption of the Agreement in the General Assembly, or sign or adhere to the Agreement, or consent in writing to its provisional application "shall apply this Agreement provisionally in accordance with their national laws and regulations, with effect from 16 November 1994" or such later date as this obligation is applicable to them. Should the Agreement enter into force before November 16, 1998, provision is made for grace periods extending up to that date for states that have not completed the ratification process. Agreement, annex, sec. 1, para. 12.

[6] The Reagan administration's statements quoted hereinafter appear in the following documents: Statement by the President, *U.S. Policy and the Law of the Sea*, Jan. 29, 1982, DEPT. ST. BULL., Mar. 1982, at 54; White House Fact Sheet [accompanying Presidential Statement], Jan. 29, 1982, *id.* at 54–55; Statement by Ambassador James L. Malone, Special Representative of the President, before the House Merchant Marine and Fisheries Committee, Feb. 23, 1982, *id.*, May 1982, at 61–63; Statement by the President, July 9, 1982, *id.*, Aug. 1982, at 71; Statement by Ambassador James L. Malone, Special Representative of the President, before the House Foreign Affairs Committee, Aug. 12, 1982, *id.*, Oct. 1982, at 48–50.

[7] Statement by the President, Jan. 29, 1982, note 6 *supra*.

[8] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

of the treaty" or "to destroy the system" but "to make it work for the benefit of all nations to enhance, not resist, seabed resource development."[9] If negotiations could fulfill six key objectives with respect to the deep seabed mining regime, the "Administration will support ratification" of the Convention.[10] It was the administration's "judgment that, if the President's objectives as outlined are satisfied, the Senate would approve the Law of the Sea treaty."[11]

The six objectives identified by President Reagan required a deep seabed mining regime that would:

- Not deter development of any deep seabed mineral resources to meet national and world demand;
- Assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international authority, and to promote the economic development of the resources;
- Provide a decisionmaking role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
- Not allow for amendments to come into force without approval of the participating states, including, in our case, the advice and consent of the Senate;
- Not set other undesirable precedents for international organizations; and
- Be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.[12]

How the 1994 Agreement responds to U.S. objections and U.S. requirements may be considered under several headings.

Decision Making

Like many international organizations, the International Sea-Bed Authority established by the Convention will have an Assembly in which all parties are represented, a Council of limited membership, and specialized elected organs also of limited membership.

1982 text: While all specific regulatory powers with regard to deep seabed mining are reposed exclusively or concurrently in the Council, Article 160 gives the Assembly "the power to establish general policies."

Problem: "Policymaking in the seabed authority would be carried out by a one-nation, one-vote assembly."[13]

Response: The 1994 Agreement qualifies the general policy-making powers of the Assembly by requiring the collaboration of the Council. It also provides: "Decisions of the Assembly on any matter for which the Council also has competence or on any administrative, budgetary or financial matter shall be based on the

[9] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.

[10] Statement by the President, Jan. 29, 1982, note 6 *supra*.

[11] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

[12] Statement by the President, Jan. 29, 1982, note 6 *supra*. The White House Fact Sheet accompanying the President's announcement of the six objectives in January 1982, and congressional testimony by the President's special representative later that year, identified the elements in the Part XI regime that related to one or more of those objectives. Note 6 *supra*.

[13] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

recommendations of the Council."[14] The Assembly may either approve the recommendations or return them.[15]

Problem: "The executive council which would make the day-to-day decisions affecting access of U.S. miners to deep seabed minerals would not have permanent or guaranteed representation by the United States."[16]

Response: The new Agreement guarantees a seat on the Council for "the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product."[17] That state is the United States.

1982 text: Consensus on the thirty-six-member Council is required for such matters as proposing treaty amendments; adopting rules, regulations and procedures; and distributing financial benefits and economic adjustment assistance.[18] Other substantive Council decisions require either a two-thirds or three-quarters vote.[19]

Problem: The "United States would not have influence on the council commensurate with its economic and political interests."[20] "The decisionmaking system should provide that, on issues of highest importance to a nation, that nation will have affirmative influence on the outcome. Conversely, nations with major economic interests should be secure in the knowledge that they can prevent decisions adverse to their interests."[21]

Response: The new Agreement establishes "chambers" of states with particular interests.[22] Two four-member chambers of the Council are likely to be effectively controlled by major industrial states, including the United States (which is guaranteed a seat in one of those chambers).[23] The Agreement provides that "decisions on questions of substance, except where the Convention provides for decisions by consensus in the Council, shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers."[24] Any three states in either four-member chamber may therefore block a substantive decision for which consensus is not required.

The Agreement further specifies: "Decisions by the Assembly or the Council having financial or budgetary implications shall be based on the recommendations of the Finance Committee."[25] The United States and other major contributors to the administrative budget are guaranteed seats on the Finance Committee, and the committee functions by consensus.[26]

This approach to voting enables interested states (including the United States) to block undesirable decisions. Because blocking power encourages negotiation of

[14] Agreement, annex, sec. 3, paras. 1, 4.

[15] *Id.*, para. 4. Rules, regulations and procedures adopted by the Council on prospecting, exploration and exploitation and the financial and internal management of the Authority remain in effect provisionally until approved by the Assembly or amended by the Council in light of the Assembly's views. LOS Convention, Art. 162, para. 2(o)(ii).

[16] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

[17] Agreement, annex, sec. 3, para. 15(a).

[18] LOS Convention, Art. 161, para. 8(d). [19] *Id.*, para. 8(b), (c).

[20] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

[21] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

[22] Agreement, annex, sec. 3, paras. 9, 10, 15.

[23] *Id.*, paras. 10, 15(a), (b). Major land-based producers and exporters of relevant minerals, such as Canada and Chile, would be represented in their own four-member chamber. *Id.*, para. 15(c).

[24] *Id.*, para. 5. [25] *Id.*, para. 7.

[26] *Id.*, sec. 9, paras. 3, 8.

decisions desired by and acceptable to the states principally affected, it enhances affirmative as well as negative influence.

Production Limitation

Problem: "The United States believes that its interests . . . will best be served by developing the resources of the deep seabed as market conditions warrant. We have a consumer-oriented philosophy. The draft treaty, in our judgment, reflects a protectionist bias which would deter the development of deep seabed mineral resources."[27] Specifically, the "treaty would impose artificial limitations on seabed mineral production"[28] and "would permit discretionary and discriminatory decisions by the Authority if there is competition for limited production allocations."[29] The production ceiling is undesirable as a matter of principle and precedent,[30] and the process for allocating production authorizations is a significant source of uncertainty and discriminatory treatment impeding guaranteed access to minerals by qualified miners.[31]

Response: The new Agreement specifies that the provisions regarding the production ceiling, production limitations, participation in commodity agreements, production authorizations and selection among applicants "shall not apply."[32] In their place, the Agreement incorporates the market-oriented GATT restrictions on subsidies.[33] It prohibits "discrimination between minerals derived from the [deep seabeds] and from other sources,"[34] and specifies that the rates of payments by miners to the Authority "shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing on them a competitive disadvantage."[35]

Technology Transfer

Problem: "Private deep seabed miners would be subject to a mandatory requirement for the transfer of technology to the Enterprise and to developing countries."[36] This provision was considered burdensome, prejudicial to intellectual property rights, and objectionable as a matter of principle and precedent.[37]

Response: The new Agreement declares that the provisions on mandatory transfer of technology "shall not apply."[38] It substitutes a general duty of cooperation by sponsoring states to facilitate the acquisition of deep seabed mining technology, "consistent with the effective protection of intellectual property rights," if the Enterprise (the operating arm of the Sea-Bed Authority) or developing countries are unable to obtain such technology on the open market or through joint-venture arrangements.[39]

[27] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.
[28] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.
[29] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.
[30] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.
[31] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.
[32] Agreement, annex, sec. 6, para. 7.
[33] *Id.*, paras. 1(b), (c), 3.
[34] *Id.*, para. 1(d).
[35] Agreement, annex, sec. 8, para. 1(b).
[36] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.
[37] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.
[38] Agreement, annex, sec. 5, para. 2.
[39] *Id.*, para. 1(b).

Access

Problem: "The draft treaty provides no assurance that qualified private applicants sponsored by the U.S. Government will be awarded contracts. It is our strong view that all qualified applicants should be granted contracts and that the decision whether to grant a contract should be tied exclusively to the question of whether an applicant has satisfied objective qualification standards."[40]

Response: The new Agreement eliminates the provisions for choice among qualified applicants.[41] Access will be on a first-come, first-served basis. The qualification standards for mining applicants are to be set forth in rules, regulations and procedures adopted by the Council by consensus and "shall relate to the financial and technical capabilities of the applicant and his performance under any previous contracts."[42] If the applicant is qualified; if the application fee is paid; if procedural and environmental requirements are met; if the area applied for is not the subject of a prior contract or application; and if the sponsoring state would not thereby exceed maximum limits specified in the Convention, "the Authority shall approve" the application.[43] Its failure to do so will be subject to arbitration or adjudication.[44]

The new Agreement contains special voting rules that facilitate a decision to approve an application to explore or exploit minerals. In the Legal and Technical Commission, only a simple majority is required for recommending approval.[45] When that recommendation reaches the Council, the application is deemed approved unless disapproved within a prescribed period (normally sixty days) by the same vote required for substantive decisions.[46] Thus, any three industrial states in a four-member chamber may prevent disapproval.

The new Agreement accords important "grandfather" rights to the U.S. consortia that already have made investments under the U.S. Deep Seabed Hard Mineral Resources Act.[47] They are deemed to have met the necessary financial and technical qualifications if the U.S. Government, as the sponsoring state, certifies that they have made the necessary expenditures.[48] They are also entitled to arrangements "similar to and no less favourable than" those accorded investors of other countries that registered as pioneers with the Preparatory Commission prior to entry into force of the Convention.[49]

Problem: U.S. objectives "would not be satisfied if minerals other than manganese nodules could be developed only after a decision was taken to promulgate rules and regulations to allow the exploitation of such minerals."[50]

Response: The new Agreement requires the Council of the Authority to adopt necessary rules, regulations and procedures within two years of a request by a state whose national intends to apply for the right to exploit a mine site.[51] This

[40] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

[41] Agreement, annex, sec. 6, para. 7.

[42] LOS Convention, Art. 161, para. 8(d), Art. 162, para. 2(o)(ii); Ann. III, Art. 4, paras. 1, 2, Art. 17, para. 1(b)(xiv).

[43] LOS Convention, Art. 162, para. 2(x); Ann. III, Art. 6, paras. 1–4, Art. 10; Agreement, annex, sec. 1, paras. 7, 13.

[44] LOS Convention, Arts. 187, 188, 286–88, 290; Agreement, annex, sec. 3, para. 12.

[45] Agreement, annex, sec. 3, para. 13; *see* LOS Convention, Arts. 163, 165.

[46] Agreement, annex, sec. 3, para. 11(a).

[47] 30 U.S.C. §§1401–1473 (1988 & Supp. IV 1992).

[48] Agreement, annex, sec. 1, para. 6(a)(i). [49] *Id.*, para. 6(a)(iii).

[50] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

[51] Agreement, annex, sec. 1, para. 15(b).

applies to manganese nodules or any other mineral resource. If the Council fails to complete the work on time, it must give provisional approval to an application based on the Convention and the new Agreement, notwithstanding the fact that the rules and regulations have not been adopted.[52]

The Enterprise

Problem: "The treaty would give substantial competitive advantages to a supranational mining company—the Enterprise."[53] It "creates a system of privileges which discriminates against the private side of the parallel system. Rational private companies would, therefore, have little option but to enter joint ventures or other similar ventures either with the operating arm of the Authority, the Enterprise, or with developing countries. Not only would this deny the United States access to deep seabed minerals through its private companies because the private access system would be uncompetitive but, under some scenarios, the Enterprise could establish a monopoly over deep seabed mineral resources."[54]

Response: The new Agreement provides: "The obligations applicable to contractors [private miners] shall apply to the Enterprise."[55] It requires the Enterprise to conduct its initial operations through joint ventures "that accord with sound commercial principles," and delays the independent functioning of the Enterprise until the Council decides that those criteria have been met.[56] The Agreement does not exclude the Enterprise either from the principle that mining "shall take place in accordance with sound commercial principles" or from its prohibitions on subsidies.[57] It specifies that the "obligation of States Parties to fund one mine site of the Enterprise . . . shall not apply and States Parties shall be under no obligation to finance any of the operations in any mine site of the Enterprise or under its joint-venture arrangements."[58] The Agreement also eliminates mandatory transfer of technology to the Enterprise and the potentially discriminatory system for issuing production authorizations.[59]

The Agreement makes clear that a private miner may contribute the requisite "reserved area" to the Enterprise at the time the miner receives its own exclusive exploration rights to a specific area (thus minimizing its risk and investment).[60] That miner has "the right of first refusal to enter into a joint-venture arrangement with the Enterprise for exploration and exploitation of" the reserved area, and has priority rights to the reserved area if the Enterprise itself does not apply for exploration or exploitation rights to the reserved area within a specified period.[61]

Finance

Problem: "The treaty would impose large financial burdens on industrialized countries whose nationals are engaged in deep seabed mining and financial terms and conditions which would significantly increase the costs of mineral production."[62]

[52] *Id.*, para. 15(c).
[53] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.
[54] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.
[55] Agreement, annex, sec. 2, para. 4.
[56] *Id.*, para. 2.
[57] Agreement, annex, sec. 2, para. 4, sec. 6, paras. 1(a)–(c), 3.
[58] *Id.*, sec. 2, para. 3.
[59] *See* notes 32, 38 *supra*.
[60] Agreement, annex, sec. 1, para. 10.
[61] *Id.*, sec. 2, para. 5.
[62] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

Response: The new Agreement halves the application fee for either exploration or exploitation to $250,000 (subject to refund to the extent the fee exceeds the actual costs of processing an application), and eliminates the detailed financial obligations of miners set forth in the 1982 text, including the million-dollar annual fee.[63] Financial details would be supplied, when needed, by rules, regulations and procedures adopted by the Council by consensus, on the basis of general criteria that, for example, would link the rates to those prevailing for mining on land, and prohibit discrimination or rate increases for existing contracts.[64]

With respect to state parties, in addition to eliminating any requirement that states contribute funds to finance the Enterprise or provide economic adjustment assistance to developing countries,[65] the new Agreement provides for streamlining and phasing in the organs and functions of the Authority as needed, and for minimizing costs and meetings.[66] Budgets and assessments for administrative expenses are subject to consensus procedures in the Finance Committee and approval by both the Council and the Assembly.[67]

Regulatory Burdens

Problem: "The new international organization would have discretion to interfere unreasonably with the conduct of mining operations, and it could impose potentially burdensome regulations on an infant industry."[68]

Response: The substantive changes set forth in the new Agreement, including the elimination of production limitations, production authorizations and forced transfer of technology, and the relaxation of diligence requirements, substantially narrow the area of potential abuse.[69] The new procedural provisions, including voting arrangements in the Council and the Finance Committee, and restrictions on the Assembly, decrease the risk of unreasonable regulatory decisions.[70] As indicated in its Preamble and in the General Assembly resolution adopting it, the new Agreement is the product of a marked shift, throughout the world, from statist and interventionist economic philosophies toward more market-oriented policies. Taken together, the new provisions and new attitudes give reason to expect the system to operate in accordance with the provisions of the Convention and the Agreement guaranteeing the miner exclusive rights to a mine site, security of tenure, stability of expectations and title to minerals extracted, and according the miner and its sponsoring state extensive judicial and arbitral remedies to protect those rights.[71]

What cannot be supplied in advance by any blueprint for a deep seabed mining regime is the measure of confidence born of experience with a system in operation.

[63] Agreement, annex, sec. 8, paras. 2, 3; LOS Convention, Ann. III, Art. 13, para. 2.

[64] Agreement, annex, sec. 3, para. 7, sec. 8, para. 1, sec. 9, paras. 7, 8; LOS Convention, Art. 161, para. 8(d), Art. 162, para. 2(o)(ii).

[65] Agreement, annex, sec. 2, para. 3, sec. 7, para. 1(a); *see* LOS Convention, Art. 173.

[66] Agreement, annex, sec. 1, paras. 2–5, sec. 2, paras. 1–2.

[67] *Id.*, sec. 3, paras. 4, 7, sec. 9, para. 8.

[68] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

[69] Agreement, annex, sec. 1, para. 9; *see* notes 32, 38 *supra*.

[70] *See* notes 14, 15, 17, 22–26 *supra*.

[71] LOS Convention, Art. 153, para. 6, Arts. 187–88; Ann. III, Arts. 1, 10, 16, 18(3), 19(2), 21; Agreement, annex, sec. 1, para. 13.

Distribution of Revenues

1982 text: The Convention authorizes the equitable sharing of surplus revenues from mining, "taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status."[72]

Problem: "The convention would allow funding for national liberation groups, such as the Palestine Liberation Organization and the South West Africa People's Organization."[73]

Response: Political developments in Africa and the Middle East have mitigated this problem. Moreover, distribution to such groups would be a practical impossibility unless the Sea-Bed Authority's revenues from miners and from the Enterprise exceeded both its administrative expenses and its assistance to adversely affected land-based producers, and would be possible then only if the Council decided by consensus to include such groups in the distribution of surplus revenues. A decision on distribution of surplus funds would also be subject, under the new Agreement, to a consensus in the Finance Committee.[74]

Review Conference

Problem: "A review conference would have the power to impose treaty amendments on the United States without its consent."[75]

Response: The new Agreement declares that the provisions in Part XI relating to the review conference "shall not apply."[76] Amendments to the deep seabed mining regime could not be adopted without U.S. consent.[77]

CONCLUSION

The 1994 Agreement substantially accommodates the objections of the United States and other industrial states to the deep seabed mining provisions of the Law of the Sea Convention. The Agreement embraces market-oriented policies and eliminates provisions identified as posing significant problems of principle and precedent, such as those dealing with production limitations, mandatory transfer of technology, and the review conference. It increases the influence of the United States and other industrial states in the Sea-Bed Authority, and reflects their longstanding preference for emphasizing interests, not merely numbers, in the structure and voting arrangements of international organizations. Detail that is objectionable or premature is eliminated or qualified. The Sea-Bed Authority is streamlined and its regulatory discretion curtailed. The role of its operating arm —the Enterprise—is delayed and sharply confined. Deep cuts are made in the financial obligations of states and private companies.

United States accession to the Convention and ratification of the new Agreement will promote widespread adherence by states generally. This will protect not

[72] LOS Convention, Art. 160, para. 2(f)(i), Art. 172, para. 2(o)(i).

[73] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.

[74] LOS Convention, Art. 161, para. 8(d), Art. 173; Agreement, annex, sec. 3, para. 7, sec. 9, paras. 7(f), 8.

[75] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

[76] Agreement, annex, sec. 4.

[77] LOS Convention, Art. 161, para. 8(d), Art. 314, para. 1.

only deep seabed mining but many other important interests in the oceans.[78] In the meantime, provisional application of the Agreement by the United States and by a substantial number of other states will help ensure that Part XI will not be implemented in unmodified form, that the full range of affected interests will be represented during the early stages of organization when important precedents and procedures are established, and that these precedents and procedures will facilitate widespread ratification of the Convention and the Agreement.

BERNARD H. OXMAN*

RESPONSES BY BERNARD H. OXMAN TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1a. Article 2(3) of the Treaty states "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." What is your interpretation of this provision?

Response. This provision is copied from Article 1, paragraph 2, of the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States has long been party. The provision serves mainly as a clarifying reminder; as a legal matter it adds nothing to what trained lawyers would conclude in its absence. It has the same meaning in both Conventions: the sovereignty of the coastal state is qualified in two respects, first as set forth in the text, and second pursuant to other rules of international law. The first qualification relates to rights of passage in foreign territorial seas critical to the global mobility and security and economic interests of the United States; these include innocent passage, transit passage of straits, and archipelagic sea lanes passage. The second qualification relates to rules of customary international law that would apply in any event.

Question 1b. Do you think all parties of this Treaty will interpret this provision the same?

Response. I believe this interpretation of Article 2(3) would be shared by all parties.

Question 1c. How could this Treaty interfere with the United States' sovereign exercise of freedom of the seas and in what ways will that have an adverse effect on national security and the environment?

Response. Article 2(3) does not interfere with the United States' sovereign exercise of freedom of the seas and has no adverse effect on national security and the environment. Quite to the contrary, the provisions to which it refers significantly advance the national security and environmental interests of the United States.

More broadly, the Convention as a whole secures and advances the United States' national security and economic interests in the exercise of the freedom of the seas as well as its interests in protection and preservation of the marine environment off its own shores and around the world. The greatest threat to the long-term security, economic and environmental interests of the United States in the oceans is the misplaced and ill-informed advice of a voluble few who oppose consolidating the rights, influence and leverage of the United States on these matters by becoming party to the Convention.

Question 2. Do you believe it is in the best interest of the United States to vest control of seabed mining operations in countries which lack the necessary technology and capital to conduct such operations themselves?

Response. No, and the Convention as modified by the 1994 Implementing Agreement does no such thing. Quite to the contrary, the regulatory system is controlled by the Council of the Seabed Authority, the Council can adopt regulations only by consensus, and the text guarantees a significant number of seats on the Council for major industrial states, including a permanent seat for the United States.

Article 2 of the 1994 Implementing Agreement states that in the event of any inconsistency between that Agreement and the deep seabed mining provisions of the Convention (Part XI and related Annexes), the provisions of the Agreement shall prevail. As in the case of other industrial states, this rule is unquestionably a condition for our becoming party to the Convention. That is well understood by governments and informed observers around the world. This rule has been respected and applied by the parties to the Convention and the Seabed Authority since the Convention entered into force in November 1994. That consistent practice has not been questioned by the few members of the Authority that have yet to formally ratify the 1994 Agreement.

Question 3. Do you believe that by acceding to the Treaty the United States would gain an adequately effective bargaining position to protect its current and future national policies and interests relating to national defense, seabed mining and environmental protection? Please explain in detail.

Response. Yes. In fact only by acceding to the Convention could the United States secure an adequately effective bargaining position to protect its current and future national policies and interests relating to national defense, seabed mining and environmental protection.

National Defense.—The particular missions and objectives of our armed forces change in response to different challenges and threats. What does not change is the United States interest in global mobility, that is in the capacity, on a routine daily basis, to move its naval, air, and land forces past foreign coasts without the need to expend political, economic or military capital to secure the acquiescence of states

along the route. This depends on the perceptions of other states regarding the rights of foreign ships and aircraft, including American ships and aircraft, off their coasts.

The Convention will shape those perceptions whether or not we are party. The question is influence over the application of the Convention and the future of the Convention. Becoming party to the Convention enhances our ability to influence foreign perceptions of our rights by solidifying them as treaty obligations and strengthening the credibility and authority of our views regarding the interpretation and application of the Convention provisions on which our rights depend in practice whether or not we are party. It also puts us in a much stronger position to avoid a destructive amendment conference that could delegitimate the Convention and the provisions important to our national security, and thus weaken, rather than strengthen, the perception of other coastal states regarding the rights and freedoms we and all states enjoy off foreign coasts. Calling such a conference becomes legally possible this year. If the United States unwisely delays becoming a party and if this delay contributes to a decision by the parties to convene a destructive amendment conference over which the United States voluntarily denied itself adequate control, the burden of the ensuing collapse of the current consensus will be borne by the American taxpayers who will be compelled to buy the foreign acquiescence we can get for free under the Convention, and by the members of our armed forces who will face not only the risks posed by their operational destination, but new risks along the route to that destination.

Seabed Mining.—United States seabed mining interests involve two different areas. The first, and in present economic terms by far the most important, concerns the continental shelf where all offshore oil and gas are likely to be found. The United States has an important energy interest in promoting investment in the continental shelf off our coast as well as foreign coasts. The Convention promotes that interest by according the coastal state control over the continental margin, including a special procedure by which a party to the Convention, if it wishes, can reassure investors by establishing a seaward limit of its continental margin that is final and binding on all parties to the Convention. As a party to the Convention, we would also acquire the right, which we now lack, to nominate an American expert for membership on the Commission on the Limits of the Continental Shelf that has an important role in that process.

The second interest is in an activity that has yet to begin, namely deep seabed mining beyond the limits of the continental shelf for hard minerals that can also be found within the limits of the continental shelf. It is difficult to imagine the United States having a less effective bargaining position to protect its current and future national policies and interests relating to deep seabed mining than it does at present. By contrast, once a party to the Convention, the United States will have a permanent seat on the Council of the Seabed Authority, and thus will wield a permanent veto over the adoption of all regulations. Until the Authority becomes self-supporting (which is unlikely to occur in the foreseeable future), the United States will also wield a veto over budgetary decisions by virtue of its guaranteed seat on the Finance Committee.

Environmental Protection.—By becoming party to the Convention, the United States will in two respects acquire a more effective bargaining position to protect its current and future national policies and interests relating to environmental protection.

The first of these relates to fisheries, and in particular our interest in ensuring adequate conservation of living resources beyond our own exclusive economic zone. The Convention gives us important tools, including the right to invoke compulsory dispute settlement procedures, that will significantly enhance our bargaining leverage in dealing with foreign fishing beyond the exclusive economic zone. Moreover, becoming party to the Convention will enhance our ability to persuade other countries to join us in becoming party to the 1995 Agreement Implementing the Convention with respect to certain fish stocks, which in turn will increase our negotiating and enforcement leverage over foreign fishing.

The second of these relates to pollution. The key here is the maintenance of a reasonable balance that promotes effective environmental protection as well as interests in the economic, military and other uses of the oceans. As a party to the Convention, the United States will be in a far stronger position to promote a reasonable balance of environmental and economic interests in the interpretations and actions of foreign states, and to insist on continuing respect in future agreements and foreign laws for the Convention's exclusion of warships from international and foreign pollution regulations. Approval of the provisions of the draft resolution of advice and consent recommended by the Committee on Foreign Relations would be an important step in enhancing our influence in this regard.

Question 4. What are your thoughts about developing countries having the capabilities to implement international laws relating to issues of our national security as well as regulating the marine environment?

Response. National Security.—Most coastal states are developing countries. Whether or not we are party to the Convention, our naval ships and military aircraft, and oil tankers and other ships carrying vital goods to and from our shores, will need to navigate off their coasts in order to reach their destinations. Critical telecommunications cables will need to be laid and maintained off their coasts. The reality therefore is that the claims and perceptions of these developing coastal states with respect to control of areas off their coast can and do have a practical impact on our national security interests in global mobility and communications. One of the most important, and successful, goals of the Law of the Sea Convention was to create a legal foundation for our global mobility and communications whose legitimacy was accepted by these countries.

Developing country leaders are not stupid. They know that the United States has political, military or economic interests that would be jeopardized by a confrontation with virtually any developing country. They also know that when we need their consent (for example for overflight rights over land or basing rights) we are usually prepared to pay handsomely for that consent, directly or indirectly. The question is whether we wish every naval mission (most of which do not occur in a crisis) to comprise one mission with one price—the operational goal—or two missions with two prices—the operational goal and the cost of acquiring the acquiescence of the developing coastal states along the way. My experience suggests that whatever the perceived costs of becoming party to the Convention, they are far outweighed by the benefits, and indeed would pale in comparison with the true continuing cost of buying or forcing acquiescence from just one key developing coastal state along one indispensable route.

The absence of any other global maritime power at the present time, coupled with a perception fashionable in some industrial states that trimming the sails of the United States should be a priority foreign policy goal, means that the risk of individual or regional challenges to U.S. global mobility is likely to increase, and that developing coastal states are likely to be goaded to move in this direction. Were the United States, after publicly launching and advancing the Constitutional process for becoming party to the Convention, to fail to follow through, that would further fuel this process.

Becoming party to the Convention is not a guarantee against such developments. But it strengthens our hand in insisting on our treaty rights, and it strengthens our capacity to mobilize public opinion at home and abroad in support of our vigorous routine assertion and exercise of those rights.

Environment.—We have four types of interests in adequate implementation of environmental measures by developing countries. First, adequate protection of the health of the world's oceans requires concerted action by all coastal and maritime states. Second, adequate control by developing coastal states or flag states of activities under their jurisdiction is necessary to prevent pollution of our coasts and waters. Third, lax environmental regulation by developing countries might damage our competitive economic interests and attract jobs away from the United States, or force us to lower our own environmental thresholds. Fourth, an environmental disaster in a foreign country could spur urgent public demands for restrictive legislation in the United States and elsewhere whose economic effects are not fully foreseen.

The Convention's powerful and carefully balanced environmental provisions strengthen our ability to encourage developing countries to take adequate measures to protect the marine environment. One of its most notable and attractive features is that, unlike some other environmental instruments, the Convention applies the same international environmental rules and standards to all countries, developed and developing. It also contains provisions that penalize a flag state that has repeatedly disregarded its obligations to effectively enforce applicable international rules and standards.

Question 5. Can we predict with some degree of certainty whether the International Seabed Authority and its related tribunal will, over time, accrue any more powers than those currently provided to it in the Treaty or which they have already exercised?

Response. Yes, we can. There is no evidence of an accretion of powers beyond those expressly granted or that such a development is likely. The powers of the International Seabed Authority and its related tribunal are highly circumscribed by the Convention and the 1994 Implementing Agreement. A grant of additional powers would require an amendment to the relevant treaty provisions; this could not

occur over the opposition of the United States (once it is a party) or other major industrial states. The implementation of existing powers of the Seabed Authority is subject to effective control by the Council and the Finance Committee of the Authority, whose mandatory industrial state members (including the United States once a party) have the power to block undesirable decisions.

Question 6. Despite the clear requirements in Articles 208 and 210 of the Treaty which specify that related national laws must be "no less effective" than international rules, standards and recommended practices and procedures, the Committee received testimony to the effect that the United States would not be required to change any of its environmental laws to be in compliance with the Treaty. Are you certain that the Treaty could not be used to impose restrictions or requirements on the United States to limit or expand current or future U.S. laws and policies?

Response. The United States has among the strongest environmental laws in the world. That is likely to remain true. The probability that international rules and standards accepted by the overwhelming majority of coastal and maritime states, including most developing countries, would contain stricter requirements in respect of Articles 208 and 210 than those acceptable to the United States and provided for in our laws ranges from exceedingly unlikely to zero. The further probability that a foreign government would find it in its interests to seek to impose such a requirement on the leading global maritime power with the largest exclusive economic zone in the world (the United States), undertake to establish that our own regulations are less effective, and succeed, itself ranges from exceedingly unlikely to zero. The United States has been party to the Convention on the High Seas for many years, and has never encountered any difficulty with a similar provision set forth in Article 10 of that Convention.

Question 7. Article 212 of the Treaty requires States to adopt laws and regulations for pollution from the atmosphere. How would the United States domestic policy need to be changed or altered to comply with the international laws, regulations, and recommended practices to address these concerns? And does this mean that other countries can use this provision to force the United States to regulate $C0_2$?

Response. Article 212 identifies the subject matter for national measures. Its implementation depends entirely on domestic law. It does not require any particular measures, does not require compliance with international rules and standards, and does not require any change in our domestic law and policy with respect to atmospheric pollution in general or CO_2 in particular. I have difficulty imagining how any country with existing air pollution regulations, let alone the United States, could find itself in violation of this essentially hortatory text.

RESPONSES BY BERNARD H. OXMAN TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. Critics of the Law of the Sea have claimed that there is no guarantee in the text of the Convention or in the 1994 Agreement that the United States would, should it become a party, enjoy permanent membership and a veto on the governing body of the International Seabed Authority. You stated in your testimony that under the 1994 implementing agreement, "the United States is automatically guaranteed a seat on the Executive Council" and that because that body takes its decisions by consensus, the United States would enjoy veto power. Would you clarify where in the text of the 1994 Agreement the United States does in fact enjoy a guaranteed seat on the governing council of the ISA and a veto over any decisions with which it disagrees?

Response. Annex, Section 3, paragraph 15(a), of the 1994 Agreement specifies that the Council of the Seabed Authority "shall include . . . the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product." The Convention entered into force on November 16, 1994. There is no doubt that on that date the United States had the largest economy in terms of gross domestic product. There is also no doubt that the purpose of this provision is to accord the United States a permanent seat on the Council.

Annex, Section 3, paragraph 5, of the 1994 Agreement expressly preserves the provisions of the Convention requiring consensus in the Council. Article 161, paragraph 8(d), of the Convention requires consensus for Council decisions on amendments to Part XI and related Annexes, and for Council decisions under Article 162, paragraph 2(o), namely all Council decisions on rules, regulations and procedures of the Authority. Article 161, paragraph 8(e), defines "consensus" as "the absence of any formal objection." Accordingly, by objecting the United States could block any

decision for which consensus is required, namely the adoption of any amendments or the adoption of any rules, regulations, or procedures of the Authority.

In addition, Annex, Section 3, paragraph 7, of the 1994 Agreement provides that all decisions of the Authority having financial or budgetary implications "shall be based on the recommendations of the Finance Committee." Annex, Section 9, paragraph 3, provides that so long as the Authority requires assessed contributions to meet its administrative expenses, "the membership of the Committee shall include representatives of the five largest financial contributors to the administrative budget of the Authority." That of course includes the United States. Annex, Section 9, paragraph 8, requires consensus for substantive decisions of the Committee. Thus the United States could block any budgetary or financial decision.

Question 2. One of the other witnesses at the hearing referred to a November 2001 opinion from the Law of the Sea Tribunal on mixed oxide fuels as an example of "creeping jurisdiction." Do you agree with this assertion? Would you explain the nature of the case, the court's decision, and the reasons why the Tribunal saw fit to exercise its jurisdiction and hear the case?

Response. I do not agree with the assertion. Far from "creeping jurisdiction," the provisional measures order of December 3, 2001 in the MOX Plant Case (*Ireland* v. *United Kingdom*) reveals the considerable circumspection of the Tribunal even with respect to temporary provisional measures that can be changed or revoked at a later stage of the case and in any event expire with the litigation.

The case arose from Ireland's concerns about pollution risks from shipping radioactive materials in the Irish Sea and other activities at a mixed oxide plant in Sellafield, England. Ireland requested the Tribunal to prescribe provisional measures pending the constitution of an arbitral tribunal to hear the case under Annex VII of the Law of the Sea Convention.

Presumably for tactical reasons related to the particular facts and circumstances of these proceedings, the United Kingdom did not invoke before the Tribunal the jurisdictional limitations set forth in Section 3 of Part XV, including paragraph 1 of article 297, which significantly limits jurisdiction over coastal states in environmental and other cases. The United Kingdom's challenge to jurisdiction raised a limited and technical issue under Article 282, namely whether the case should be heard by an arbitral tribunal under Annex VII of the Law of the Sea Convention, or instead by a different arbitral tribunal under the compulsory arbitration provisions of a European treaty concerning environmental protection in the Northeast Atlantic pursuant to which Ireland was also suing the United Kingdom, or possibly by the European Court of Justice under the relevant European Community treaties. The Tribunal made no determination of jurisdiction to try the merits of the case under the Law of the Sea Convention, leaving that issue to the arbitral tribunal to be constituted under Annex VII of the Convention, and limiting itself to deciding only that Ireland had established a prima facie case of jurisdiction for the Annex VII arbitral tribunal.

The Tribunal refused to prescribe any of the provisional measures requested by Ireland, and limited itself to mandating consultations between the parties. Its order was unanimous, including the British judge on the Tribunal. With that order, the Tribunal's involvement ended.

Subsequent to that order, the case went to arbitration under Annex VII of the Law of the Sea Convention. The arbitral tribunal, exhibiting similar caution, refused to order additional provisional measures, and has now suspended proceedings indefinitely pending a decision of the European Court of Justice on whether the dispute will be handled in that Court under European Community law. Meanwhile Ireland lost its case against the United Kingdom in the arbitration under the European treaty concerning environmental protection in the Northeast Atlantic.

Question 3. One of the other witnesses asserted that the environmental provisions of the Convention are inadequate to deal with acts of environmental terrorism. Are your aware of any specific provisions in the 1982 Convention or the 1994 Agreement that would prohibit States from enacting new laws and regulations to deal with acts of environmental terrorism?

Response. There are no provisions in the 1982 Convention or the 1994 Agreement that would prohibit States from enacting new laws and regulations to deal with acts of environmental terrorism. Quite to the contrary, Article 221 expressly declares that nothing in the environmental provisions of the Convention prejudices the right of states to act in the face of a maritime casualty, including an imminent threat of material damage to a vessel or cargo. It should also be noted that environmental terrorism at sea might well be carried out in a way that constitutes piracy, which would result in very broad authority under the Convention to respond anywhere on the high seas. Such acts might also be covered by various anti-terrorism treaties

that are entirely compatible with the Law of the Sea Convention. Moreover, to the extent that the response to such terrorism is regarded as coming within the right of self-defense under the U.N. Charter and international law, the matter would fall entirely outside the Convention.

BENTON AND ASSOCIATES,
Juneau, Alaska, March 19, 2004.

Senator LISA MURKOWSKI,
U.S. Senate,
Washington, DC.

DEAR SENATOR MURKOWSKI: I am writing you today to urge support for ratification of the U.N. Convention on the Law of the Sea (UNCLOS). Ratification is supported by the Bush Administration, as did the Clinton Administration before it. Recently, the Foreign Relations Committee unanimously approved ratification as well. My experience with international fisheries and oceans governance has convinced me that it is in the best interests of the United States to become a party to UNCLOS as soon as possible.

For roughly 14 years I was the State of Alaska's chief negotiator and representative at numerous international negotiations and conferences having to do with oceans policy, governance, and fisheries. Among other duties I was a senior advisor to the U.S. Mission to the U.N. during negotiations leading up to the global ban on high seas driftnets. I was Alaska's lead negotiator for the United States/Soviet and later United States/Russian Intergovernmental Coordinative Committee on oceans and fisheries. I was the senior Alaska negotiator for the successful negotiations leading up to adoption of the North Pacific Anadromous Fish Convention and the Central Bering Sea Pollock Convention to the U. S. Mission to the U.N. during negotiations leading up to the Convention of Highly Migratory Fish Stocks and Straddling Stocks of Fish, a key component for implementation of UNCLOS fisheries regimes. I was also appointed by President Clinton to the U.S. Canada Pacific Salmon Commission and worked hard to secure the 10-year agreement which ended the "salmon wars" between Canada and the United States.

I retired from my position with State government in 2000, and was appointed to the North Pacific Fishery Management Council where I served as Chair until I left the Council in 2003. During my tenure on the Council I continued to be active in international fishery affairs, and advised the Department of State on a number of international issues including the discussions with the Russian Federation regarding the maritime boundary between Alaska and Russia.

Throughout these various negotiations spanning almost 20 years it was apparent that the interests of the United States were best served under provisions of UNCLOS dealing with maritime delimitation, navigation and transit, defense issues, fisheries management, and enforcement. It was through the use of the terms and condition is of UNCLOS that we were able to secure many of the international agreements cited above, agreements which have protected Alaska's interests to the tune of hundreds of millions of dollars to our fishing industry and coastal communities. Ratification will only strengthen the ability of the United States, and Alaska, to defend these interests into the future.

One issue of particular concern, and a very compelling reason to become a Party to the convention, is the prospect of losing some off the important wins which have been made for navigation, the rights of free passage, and maritime delimitation. The UNCLOS comes open for amendment for the first time later this year. If the United States is not a party, then the United States cannot participate in this process and we stand to lose important rights and freedoms for transit, for EEZ and continental shelf resources, and possibly boundary issues as well. The United States has several outstanding maritime boundary delimitations that have not been solved, including boundaries with Canada and Russia that are of the greatest importance to Alaska. For these reasons alone, I would ask you to strongly support ratification of the UNCLOS treaty.

Thank you for your kind attention to this issue. If I can be of any further service, or provide additional information, please feel. free to contact me.

Sincerely,

DAVID BENTON.

CHAMBER OF SHIPPING OF AMERICA,
March 19, 2004.

Hon. JAMES M. INHOFE, *Chairman,*
Senate Environment and Public Works Committee,
U.S. Senate,
Washington, DC.

Hon. JAMES M. JEFFORDS, *Ranking Member,*
Senate Environment and Public Works Committee,
U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN AND RANKING MEMBER: Thank you for holding a hearing on the U.N. Law of the Sea Treaty. The purpose of this letter is to advise that the Chamber of Shipping of America very strongly supports ratification of the United Nations Law of the Sea Convention (UNCLOS) as it is in the best interests of the United States to do so.

The Chamber of Shipping of America represents 22 American companies that own, operate or charter ships used in the domestic and international trades of the United States. We represent all types of ships including container ships, tankers, ocean-going tug/barges vessels, roll-on roll-off ships and bulk ships. We were founded in 1917 to coordinate U.S. shipowner positions at the initial deliberations leading to the Safety of Life at Sea Convention. Today, we represent our members on safety, environmental and security issues addressed domestically and at the international fora including the International Maritime Organization and the International Labor Organization.

UNCLOS is the codification of the traditional law of the sea and protects, inter alia, our rights of innocent passage and freedom of navigation. We are concerned that our status as a non-ratifying party places us in a dangerous position when the treaty comes open for amendment in October of this year. It is simply in our sovereign interest to ensure that we are at the international negotiating table in the strongest possible position. The U.S. should not ignore the potential for treaty amendments that could have large negative impacts on our interests and we have no vote.

I enclose here a copy of testimony I gave before the Senate Foreign Relations Committee on October 21, 2003 wherein I explain some of the potential problem areas where amendments may limit our navigation freedoms. I request that my letter and enclosure be made part of this hearing record. If you or your staff has any questions, please feel free to contact me.

Sincerely,

JOSEPH J. COX,
President.

STATEMENT OF JOSEPH J. COX, PRESIDENT & CEO, CHAMBER OF SHIPPING OF AMERICA, GIVEN BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS ON THE U.N. CONVENTION ON THE LAW OF THE SEA, OCTOBER 21, 2003

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 origination of the process leading to the treaty was occasioned by states exercising sovereignty in waters where the legal basis of that sovereignty was questionable to put it kindly. In recent months, we in the maritime industry 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.

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

WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL,
Honolulu, HI, March 18, 2004.

Hon. DANIEL K. INOUYE,
U.S. Senate,
Washington, DC.

DEAR SENATOR INOUYE: I would like to express the support of Western Pacific Fishery Management Council for the ratification of the United Nations Convention on the Law of the Sea by the United States. This Council, by virtue of its geography, is the most internationally focused of the eight Regional Fishery, Management Councils in the USA, and international fishery management is an integral part of our Pelagic Fishery Management Plan. Thus, the provisions of UNCLOS as they apply to the exploitation of natural resources are of key interest to the Council, quite apart from the important security aspects and key rights of navigation enshrined within the treaty.

Many of the provisions of UNCLOS, and international instruments that have stemmed therefrom, have been incorporated into this Council's management of highly migratory pelagic fish. In the 1980's, even before, the U.N. ban, the Western Pacific Council was aware of the controversy surrounding this gear and banned its use within the EEZ of the US Flag Pacific Islands. This Council was also among those agencies and individuals who supported you and your colleagues in having tuna included within the Magnuson Act, an initiative which recognized the rights of individual countries to manage pelagic fishery resources within their EEZs as outlined within UNCLOS.

More recently, the Western Pacific Council has actively supported the development of an international convention for managing tuna fisheries in the Central and Western Pacific, hosting four out of the seven seminal meetings through which this new management initiative was crafted. This new fishery commission developed by the convention will come into force some time in 2004. This is the first international fishery management arrangement that fully incorporates UNCLOS principles in the articles of the convention, and will assume responsibility for the largest tuna fishery grounds on the globe. Such a development is timely due to the need to limit unconstrained expansion of fishing effort on these important shared economic resources.

As pointed out by your colleagues Senator Lugar and Senator Stevens in recent correspondence with Senate members, the failure to ratify UNCLOS would mean that the U.S. would be unable to participate in the amendment to the Convention and safeguard aspects of concern to this country, including international fishery agreements such as the new fishery commission in the Central and Western Pacific. Naturally this is of paramount concern to this Council, embedded as it is within Micronesia and Polynesia, and with economies reliant to a large degree on ocean resources. The Council therefore hopes that the Senate will recognize the importance of ratifying UNCLOS, both from a strategic and security perspective, and also from our perspective in the US Pacific Islands, where the US voice needs to be heard in the management of shared fishery resources in the Pacific.

Sincerely,

KITTY M. SIMONDS,
Executive Director.

○