S. HRG. 108–796

MILITARY IMPLICATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

APRIL 8, 2004

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MILITARY IMPLICATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

THURSDAY, APRIL 8, 2004

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 11:19 a.m. in room SD–106, Dirksen Senate Office Building, Senator John Warner (chairman) presiding.

Committee members present: Senators Warner, Inhofe, Roberts, Sessions, Ensign, and Levin.

Committee staff member present: Judith A. Ansley, staff director.

Majority staff members present: Thomas L. MacKenzie, professional staff member; Lynn F. Rusten, professional staff member; and Scott W. Stucky, general counsel.

Minority staff members present: Richard D. DeBobes, Democratic staff director; William G.P. Monahan, minority counsel.

Staff assistants present: Sara R. Mareno, Bridget E. Ward, and Nicholas W. West.

Committee members' assistants present: Arch Galloway II, assistant to Senator Sessions; and D'Arcy Grisier, assistant to Senator Ensign.

OPENING STATEMENT OF SENATOR JOHN WARNER, CHAIRMAN

Chairman WARNER. The Senate Armed Services Committee will now resume its hearing with regard to the United Nations Convention on the Law of the Sea (UNCLOS) treaty. We met in closed session this morning, and just concluded that session to come down and resume in open session.

We meet today to receive testimony on the military implications of the UNCLOS. Admiral Vernon E. Clark, Chief of Naval Operations (CNO), and the Honorable William H. Taft, Legal Advisor, Department of State, will testify on behalf of the administration on the first panel of this hearing.

I have had the privilege of working with Mr. Taft for many years. He is a former Deputy Secretary of Defense and former Ambassador to the North Atlantic Treaty Organization (NATO). So you bring not only the portfolio of a State Department advisor, but also one who spent many years in the full spectrum of national defense issues.

The administration witnesses will be followed by Ambassador Jeane J. Kirkpatrick, former U.S. Ambassador to the United Nations and currently a Senior Fellow and Director of Foreign and Defense Policy Studies at the American Enterprise Institute. She will testify on the second panel. We welcome that distinguished public servant.

Testifying on the third panel of outside witnesses, will be Ambassador William Middendorf, former Secretary of the Navy. We are privileged to have him here, a colleague and friend of many years. Professor John Norton Moore, University of Virginia Law School, another colleague of many years of service together; and Rear Admiral William Schachte, Jr., retired. Thank you for appearing on the third panel.

I note that two additional witnesses who were invited by the committee to testify this morning, Mr. Frank Gaffney, President of the Center for Security and Policy, and Doug Bandow, Senior Fellow of the Cato Institute, were unavailable for very good reasons. We are sorry they could not be here, but if they would like to provide written statements for the record, those statements will be admitted.

[The information referred to follows:]

The Law of the Sea Treaty: Inconsistent With American Interests

Testimony Submitted to the Senate Armed Services Committee

April 8, 2004

by Doug Bandow[1]

More than two decades of negotiation culminated in 1982 when the Third United Nations Conference on the Law of the Sea (UNCLOS) approved the Law of the Sea Treaty. The U.S. was not among the 117 nations (and two other delegations) that penned their approval of the treaty. American opposition was not without effect, however: the LOST failed to gain the 60 ratifications necessary to take effect. Even the Soviet Union, which had proudly proclaimed its solidarity with the developing nation lobby pushing the treaty, did not formally bind itself.

What is the LOST?

The genesis of the treaty was President Truman's 1945 proclamation asserting U.S. jurisdiction over America's continental shelf, and similar extensions of national control by other states. The First UNCLOS was opened in 1958; it drafted conventions dealing with resource jurisdiction and fishing. UNCLOS II convened in 1960 to take up unresolved fishing and navigation issues. Soon thereafter the possibility of seabed mining led the United Nations to declare the seabed to be the "common heritage of mankind." A Seabed Committee was established, eventually leading to UNCLOS III, which first met in 1973. Nine years and eleven sessions later a treaty was born.

The LOST, which runs 175 pages and contains 439 articles, covers seabed mining, navigation, fishing, ocean pollution, marine research, and economic zones. Much of the treaty is unobjectionable, or at least unimportant when in error; the navigation sections are a modest plus. But not so Part 11, as the Orwellian provisions governing seabed mining are called. So flawed was this section that it could be fixed only by tearing it up.

The LOST's fundamental premise is that all unowned resources on the ocean's floor belong to the people of the world, meaning the United Nations. The U.N. would assert its control through an International Seabed Authority, ruled by an Assembly, dominated by poorer nations, and a Council (originally on which the then-U.S.S.R. was granted three seats), which would regulate deep seabed mining and redistribute income from the industrialized West to developing countries. The Authority's chief subsidiary

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[1] Doug Bandow is a Senior Fellow at the Cato Institute. While serving as a Special Assistant to President Ronald Reagan, he was a Deputy Representative to the Third United Nations Conference on the Law of the Sea. The Cato Institute receives no government funds.

would be the Enterprise, to mine the seabed, with the coerced assistance of Western mining concerns, on behalf of the Authority.

Any extensive international regulatory system would likely inhibit development, depress productivity, increase costs, and discourage innovation, thereby wasting much of the benefit to be gained from mining the oceans. But the byzantine regime created by the LOST is almost unique in its perversity. Unfortunately, the amendments made in 1994, which I discuss below, do not change the essential character of the treaty.

For instance, as originally written, the treaty was explicitly intended to restrict, not promote, mineral development. Among the treaty's objectives were "rational management," "just and stable prices," "orderly and safe development," and "the protection of developing countries from the adverse effects" of minerals production. The LOST explicitly limited mineral production, authorizing commodity agreements (rather like OPEC). Further, the treaty placed a moratorium on the mining of other resources, such as sulphides, until the Authority adopted rules and regulations--which could be never.

The process governing mining reflected this anti-production bias. A firm had to survey two sites and turn one over *gratis* to the Enterprise even before applying for a permit, in competition with the favored Enterprise and developing states. The Authority could deny an application if the firm would violate the treaty's antidensity and antimonopoly provisions, aimed at U.S. operators. And the Authority's decisions in this area were to be set by the Legal and Technical Commission, the membership of which could be stacked, and the 36-member Council, which would be dominated by developing states, making access for American firms dependent upon the whims of countries that might oppose seabed mining for economic or political reasons.

Who Would Want to Bid?

Indeed, it is not clear that a firm would have wanted to bid even if it thought it could win approval. The convention required that private entrepreneurs transfer their mining technology to the Authority, for use by the Enterprise and developing states. The term technology was so ill-defined that the Authority might be able to claim engineering and technical skills as well as equipment, yet the treaty imposes no effective penalties for improper disclosure or misuse of transferred technology. Miners would also have to pay their overseer, the Authority, and competitor, the Enterprise: $500,000 to apply, $1 million annually, plus a royalty fee. The sponsoring country would be responsible if a firm failed to pay; moreover, the industrialized West would have to provide interest-free loans and loan guarantees, for which Western taxpayers would be liable in the event of a default, to the U.N.'s mining operation.

All told, the Enterprise would enjoy free mine site surveys, transferred technology, and Western subsidies. The Enterprise also, naturally, would be exempt from Authority taxes and royalty

payments. Also favored are developing states and 105 "land-locked and geographically disadvantaged" countries.

Even this attenuated right to mine the seabed could have been dropped at the Review Conference to be held to assess the LOST 15 years after the commencement of commercial operations if three-fourths of the member states so decided. The mere possibility of Third World states effectively confiscating potentially enormous investments made over more than a decade would have discouraged potential private entrepreneurs. That, in turn, would have given the well-pampered Enterprise and likely state-subsidized firms of developing states a further advantage.

Admittedly, such practical objections might seem of little import since the promise of seabed mining is far less bright today than it was when UNCLOS convened, but operations might still become economically feasible later this century, especially as technological innovation makes the mining process less expensive. But even if no manganese nodules are ever likely to be lifted commercially from the ocean's floor, the LOST remains unacceptable because of its coercive, collectivist underpinnings.

The New International Economic Order

UNCLOS III was held in a different era, a time when communism reigned throughout much of the world, Third World states were proclaiming socialism to offer the true path to progress and prosperity, and international organizations were promoting the "New International Economic Order," or NIEO, to engineer massive wealth redistribution from the industrialized to the underdeveloped states. Indeed, much of the LOST, particularly regarding seabed mining, was dictated by the so-called Group of 77, the developing states' lobby.

These nations saw the LOST as the leading edge of a campaign that included treaties covering Antarctica and outer space, expanded bilateral and multilateral aid programs, and a veritable gallery of UN alphabet-soup agencies--CTC, ILO, UNCTAD, WHO, and WIPO. Commented former Maltan U.N. Ambassador Arvid Pardo, who coined the phrase, "common heritage of mankind," American acceptance of the sea treaty "however qualified, reluctant, or defective, would validate the global democratic approach to decision making."

Economic reality eventually hit many poorer states. Developing states began to adopt market reforms and the NIEO disappeared from international discourse, along with any mention of the LOST.

Although American ratification of the LOST would not be enough to resurrect the NIEO, it would nevertheless enshrine into international law some very ugly precedents. One is that the nation states (not peoples) of the world collectively own "all the unclaimed wealth of this earth," in the words of former Malaysian prime minister Mahathir Min Mohamad. Granting ownership and control to petty autocracies with no relationship to the resource and nor any ability to contribute to their development makes neither moral nor practical sense. The LOST raises to the status of international law self-indulgent claims

of ownership to be secured through an oligarchy of international bureaucrats, diplomats, and lawyers. And the treaty's specific provisions, mandating global redistribution of resources, creating a monopolistic public mining entity, restricting competition, and requiring the transfer of technology, reflect the sort of statist panaceas that were discredited by the historical wave that swept away Soviet-style communism and lesser socialist variants around the globe.

Countervailing Benefits?

Some observers acknowledged the treaty's failings, but nevertheless contended that it had more than enough positive benefits to warrant signing. However, gains in other areas are limited at best. Many of the non-seabed provisions are marginally beneficial, while a number are somewhat harmful. Sections governing fishing and maritime research, for instance, make few changes in current law; the boundary-setting process strips some resources away from the U.S.; the pollution provisions restrict America's ability to control some emission sources; and the U.S. might eventually have to share oil revenues from development of the outer-continental shelf. The treaty's authorization of 200-mile exclusive economic zones (EEZs) merely reflects what has become customary international law.

Perceived as far more important are the navigation provisions. A number of officials at both the Departments of State and Defense have argued that the document is vital to guarantee American naval rights. Yet Washington's refusal to sign the LOST left critics predicting chaos and combat on the high seas two decades ago--since then we have witnessed not one incident as a result of America's failure to join the LOST.

Nor is the treaty unambiguously favorable to transit rights. The document introduces some new limitations on navigation involving the EEZs, territorial seas, and water surrounding archipelagic states. At other times the LOST's language is ambiguous--regarding transit rights for submerged submarines, for instance--limiting the value of the treaty guarantee. International law analyst Gary Knight even argues that "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." In short, there is only modest theoretical advantage in this area for which to trade away the mining provisions.

Moreover, any LOST legal protections offer little by way of real practical gain. Few nations are likely to interfere with commercial shipping because they have far more to gain economically from allowing unrestricted passage. Where countries perceive their vital national interests to be at stake--Great Britain in World War I and Iran and Iraq during their war throughout the 1980s--they are not likely to allow juridical niceties to stop them from interdicting or destroying international commerce. Even unambiguous rights under international law did not protect American vessels and aircraft

when North Korea seized the USS Pueblo and China held the EP-3 surveillance plane. Most coastal nations will make policy based on perceived national interest more than abstract legal norms.

Indeed, LOST membership has not prevented Brazil, China, India, Malaysia, North Korea, Pakistan, and others from making ocean claims deemed excessive by some. In testimony last October Adm. Mullen warned that the benefits he believed to derive from treaty ratification did not "suggest that countries' attempts to restrict navigation will cease once the United States becomes a party to the Law of the Sea Convention."

As for military transit, with or without the LOST, America needs to concentrate on maintaining good relations with the handful of strategically-placed countries. The prowess of the U.S. Navy, not the LOST, will remain the ultimate guarantor of America's ability to roam the seas. Of course, even with friendly states Washington would prefer not "to have to use muscle to exercise our rights," observed former LOST negotiator Elliot Richardson. But the treaty is likely to matter only where countries have neither the incentive nor the ability to interfere with U.S. shipping. Moreover, in a world in which the U.S.S.R. has disappeared, the Red Navy is rusting in port, China has yet to develop a blue water navy, and Third World conflicts no longer threaten America through their connection to the Cold War, Washington is rarely going to have to send its fleet where it is not wanted.

Another concern is the impact of LOST on the President's Proliferation Security Initiative. Although treaty advocates suggest that the LOST would provide an additional forum through which to advance the PSI, it seems more likely that adherence to LOST would constrain Washington's ability to intercept weapons shipments which are problematic, even if legal under international law, including the treaty. After all, any anti-proliferation policy treats nations differently based upon a subjective assessment of the stability and intention of a particular regime. The LOST makes no such distinctions. At best, the treaty is ambiguous regarding the seizure of WMD shipments. Adopting such ambiguity probably does not strengthen Washington's position.

Further, treaty advocates contend that whatever the faults of LOST, only participation in the treaty can prevent future damaging interpretations, amendments, and tribunal decisions. However, there is no guarantee that interpretations under the LOST would not impinge upon U.S. military activities. In his Senate testimony last fall, State Department legal adviser William H. Taft IV noted the importance of conditioning acceptance "upon the understanding that each Party has the exclusive right to determine which of its activities are 'military activities' and that such determination is not subject to review." Whether other members will respect that claim is not so certain. Adm. Michael G. Mullen, the Vice Chief of Naval Operations, acknowledges the possibility that a LOST tribunal

could assert jurisdiction and rule adversely, impacting "operational planning and activities, and our security."

Moreover, American friends and allies, both in Asia and Europe, have an incentive to protect American navigational freedom. So long as the U.S. maintains good relations with them--admittedly a more difficult undertaking because of strains in the aftermath of the war in Iraq--it should be able to defend its interests indirectly through surrogates. If the nations which most benefit from American navigational freedom are unwilling to aid the U.S. while Washington is outside the LOST, they are unlikely to prove any more steadfast if Washington is inside the LOST.

Collectivism or Chaos?

The final argument on behalf of the LOST is that no matter how unfavorable it may be for international mining, it is better than nothing. Without some security of tenure to deep sea mining sites, it is said, companies will not invest the millions necessary to begin operations. Certainly firms will not take the potentially enormous risks of such a new venture if they might face conflicting claims under a competing treaty and regulatory regime.

However, most businessmen understand that it makes little difference whether or not, say, Zimbabwe recognizes their right to harvest manganese nodules in the Pacific. Indeed, given the dynamics of seabed mining, it probably doesn't even matter if other *industrialized* nations, with firms capable of mining the ocean floor, recognize one's claim. The seabed's irregular geography and surplus of nodules make "poaching" uneconomical--it would make more sense to develop a new site rather than attempt to overrun someone else's. The dynamics of other resource development vary to some degree, but in general it would have been quite simple to build a simple alternative to the LOST.

In 1980 the U.S. passed unilateral legislation, The Deep Seabed Hard Minerals Act, to provide interim protection for American miners until implementation of the LOST. The Act could have been amended to create a permanent process for recording seabed claims and resolving conflicts. Such legislation could then have been coordinated with that of the other leading industrialized states through a formal treaty. No international bureaucracy was ever necessary.

In the end, a bad treaty is worse than no treaty. Back when the LOST was a major political issue, the American Mining Congress observed:

> While the best of all worlds would be a comprehensive, universally acceptable treaty, a treaty such as the current UNCLOS draft that fails to protect American interests is no basis for investment. We can easily do without the "comprehensive" and "universal," but we cannot do without "acceptable."

A Window that Should Remain Closed

Despite predictions of doom after the U.S. refused to sign the treaty, the world moved America's way. As mineral prices

declined, so too did the prospects of massive mineral harvests from the seabed. Third World states that had begun planning on how to spend the windfall they expected to collect through the UN began to face reality. And as developing countries started experimenting with market economics, they backed away from the collectivist NIEO, of which the LOST had been an integral part. By the early 1990s some Third World diplomats were privately admitting to U.S. officials that the Reagan administration had been right to kill the treaty.

But in Washington bad ideas never die. They simply lie dormant, waiting for a sympathetic bureaucrat or politician to revive them. Moreover, international treaties attract State Department negotiators like lights attract moths. Thus, the Clinton administration decided to "fix" the LOST.

Negotiations followed in 1993 and 1994. After winning a few changes in the treaty's most burdensome provisions, the State Department enthusiastically endorsed the agreement. On July 27, 1994 before the UN General Assembly U.S. Ambassador Madeleine Albright praised the LOST for providing "for the application of free market principles to the development of the deep seabed" and establishing "a lean institution that is both flexible, and efficient. Two days later Washington formally affixed its signature to the convention, which now sits before the Senate for ratification.

Although the revised LOST is not as bad as its predecessor, it would still create a Rube Goldberg system--with International Seabed Authority, Enterprise, Council, Assembly, and more--that is guaranteed to become yet another multilateral boondoggle. Its performance so far has been mixed at best: For instance, the ISA has been on the losing end of fights with the government of Jamaica when the latter turned off the ISA's air conditioning. With no seabed mining in the offing, protecting "the emblem, the official seal and the name" of the ISA, as well as abbreviations of that name through the use of its initial letters," has been a matter of some concern to authority officials.

A fully-functioning ISA is likely not only to waste money, but also to discourage ocean minerals production. Moreover, the treaty would resurrect the redistributionist lobbying campaign once conducted by developing states unwilling to deal with the real causes of their economic failures. Indeed, the LOST would essentially create a another UN with the purpose of transferring wealth from industrialized states to the Third World voting majority.

Of course, treaty proponents all say that the treaty was "fixed." Actually, that's not the case. For instance, the treaty still includes an Authority, Enterprise, Assembly, Council, revenue sharing, international royalties, Western subsidies for the Enterprise, a Council veto for land-based minerals producers, and the like. The original statist framework remains. Even the State Department has acknowledged that the new "Agreement retains the institutional outlines of Part XI."

The Clinton administration did work hard to turn a disastrous accord into a merely bad one. But for all of its emphasis on the individual trees, it left the worst forests standing. In some places it substituted ambiguity for clearly negative provisions. The result is an improvement--and a dramatic testament to the distance that market ideas have traveled since the LOST was opened for signature in 1982. But the ISA remains an unnecessary boondoggle, intended only to hinder seabed development. The Enterprise continues to serve as an economic white elephant. The financial redistribution clauses remain a special interest sop to poor states. And the entire system is likely to end up bloated and politicized, like the UN.

For instance, the treaty retains both the ISA, of undetermined size, and the Enterprise, an international version of the ubiquitous state enterprises that have failed so miserably all over the world. The Authority remains almost comically complicated, with an Assembly and Council, and such subsidiary bodies as the Finance Committee and Legal and Technical Commission, all with their own arcane rules for agendas, memberships, procedures, and votes. The LOST revisions restrict some of the ISA's discretion, but still submerge seabed mining in the bizarre political dynamics of international organizations. Private firms must continue to survey and provide, gratis, a site for the Enterprise for each one they wish to mine. Anti-monopoly and -density provisions would still apply disproportionately to American mining firms.

ISA fees have been lowered, but companies would continue to owe a $250,000 application fee and some level of royalties and profit-sharing. (The "system of payments," intones the compromise text, shall be "fair both to the contractor and to the Authority," whatever that means. Fees "shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals," even though seabed production is more expensive, riskier, and occurs in territory beyond any nation's jurisdiction.)

The revised LOST establishes a new "economic assistance fund" to aid land-based minerals producers. Surplus funds would still be distributed "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," such as the PLO. Theoretically America could block inappropriate payments--at least so long as it was a member of the Finance Committee--but over time the U.S. would come under enormous pressure to be "flexible" and "reasonable."

In fact, redistribution has been an important objective for the ISA during its short life so far. For example, a proposal was made for an African institute of the oceans, as if that was the highest priority for countries suffering from civil war, economic collapse, and social chaos. Voluntary trust funds have been established to aid developing countries, though few people or nations have rushed forward to contribute--forcing the ISA to fill the fund coffers.

Even some of the specific "fixes" look inadequate. Consider the voting system, admittedly a major improvement over that in the original accord. According to the revised treaty, the U.S. would be guaranteed a seat on the Council, though still not a veto. The Council would consist of four chambers, any one of which could block action if a majority of its members voted no. On matters of serious interest the U.S. probably could win the necessary extra two votes in its chamber to form a majority, but not necessarily. The career foreign service officers likely to represent most nations, including America, at the ISA would not want to be forever known as obstructionists. Moreover, this purely negative veto power does not guarantee that the ISA would act when required, to approve rules for mining applications, for instance.

An additional problem occurs because the land-based mineral producers, whose interest is antagonistic to the very idea of seabed mining, and "developing States Parties, representing special interests," such as "geographically disadvantaged" nations, each have their own chamber, and thus a de facto veto over the ISA's operations. Moreover, the qualification standards for miners are to be established by "consensus," essentially unanimity, which gives land-based producers as much influence as the U.S. The possession of a veto provides them with an opportunity to extract potentially expensive concessions--new limits on production, for instance--to let the ISA function. Unfortunately, once the Authority asserts jurisdiction over seabed mining, potential producers would be hurt by a deadlock.

Indeed, production controls, one of the most important controversies in the original text, could recur under the new agreement. The revision does excise most of Article 151 and related provisions, which set a convoluted ceiling on seabed production to protect land-based miners. However, it leaves intact Article 150, which, among other things, states that the ISA is to ensure "the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the area." That wording would seem to authorize the Authority to impose production limits. The U.S. might have to rely on its ability to round up allied votes to block such a proposal in the Council in perpetuity.

Funding remains a problem as well. The U.S., naturally, would be expected to provide the largest share of the ISA's budget, 25 percent to start. How much that would be we don't know; the budget is to be developed through "consensus" by the Finance Committee, on which the U.S. is temporarily guaranteed a seat ("until the Authority has sufficient funds other than assessed contributions to meet its administrative expenses"), and approved by the Assembly and Council. Years ago the U.N. estimated that the ISA could cost between $41 and $53 million annually, on top of initial building costs of $104 and $225

million. The Clinton administration contended that the new agreement provided for "reducing the size and costs of the regime's institutions." How? By adopting a paragraph in the revised text pledging that "all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective."

Similarly, states the new accord, the royalty "system should not be complicated and should not impose major administrative costs on the Authority or on a contractor." These sentiments might be genuine. In fact, so far the Authority has been spending only about $10 million annually. But then, the world's wealthiest nation is not yet a member, and you can't pluck the goose until you have it in hand. Moreover, the revised agreement changed none of the underlying institutional incentives that bias virtually every international organization, most obviously the UN itself, towards extravagance.

In fact, concern over bloated budgets was a major factor in Moscow's initial decision not to endorse the treaty. Russian Ambassador H.E. Ostrovsky explained to the General Assembly that though the revisions were "a step forward," he doubted the new agreement could achieve its goals. Of particular concern was the fact that "general guidelines such as necessity to promote cost-effectiveness can not be seriously regarded as a reliable disincentive." Even before the treaty had even gone into force, Ambassador Ostrovsky pointed to "a trend to establish high paying positions which are not yet required."

Technology Transfer

Finally, there is technology transfer, one of the most odious redistributionist clauses from the original convention. The mandatory requirement has been discarded, replaced by a duty by sponsoring states to facilitate the acquisition of mining technology "if the Enterprise or developing States are unable to obtain" equipment commercially. Yet the Enterprise and developing States would find themselves unable to purchase machinery only if they were unwilling to pay the market price or preserve trade secrets. The new clause might be interpreted to mean that industrialized states, and private miners, whose "cooperation" is to be "ensured" by their respective governments, are therefore responsible for subsidizing the Enterprise's acquisition of technology. Presumably the U.S. and its allies could block such a proposal in the Council, but, again, it is hard to predict the future legislative dynamics and potential log-rolling in an obscure UN body in upcoming years.

Moreover, the amended agreement leaves intact a separate, open-ended mandate for coerced collaboration. The Authority, states Article 144, "shall take measures":

> (b) to promote and encourage the transfer to developing States technology and scientific knowledge so that all States Parties benefit therefrom.

2. To this end the Authority and States Parties shall co-operate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom. In particular they shall initiate and promote:

(a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, *inter alia*, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;

(b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area.

At best this suggests that Western firms would be expected to help equip and train their competition. At worst it could end up authorizing some sort of mandatory system--one close to that originally intended by LOST's framers. Ambiguous and obscure grants of power in the service of a highly politicized organization could turn out to be quite dangerous.

At issue is not just technology useful for seabed mining. Dual use technologies with military applications might also fall under ISA requirements. Peter Leitner, a DOD adviser, points to "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." Acquisition of these and other technologies could substantially enhance the undersea military activities of potential rivals, most notably China, which already has purchased some mining-capable technologies from U.S. concerns.

The treaty is a solution in search of a problem. A good international treaty would be useful, but it is not necessary. And once Washington ratified the treaty, any future renunciation of the LOST, resulting from misuse or misinterpretation of the agreement, might not be considered enough to reestablish Americans' traditional high seas freedoms.

Conclusion

All in all, the LOST remains captive to its collectivist and redistributionist origins. It is a bad agreement, one that cannot be fixed without abandoning its philosophical presupposition that the seabed is the common heritage of the world's politicians and their agents, the Authority and Enterprise. The issue is not just abstract philosophical principle, but very real American interests, including national security. For these reasons, the Senate should reject the treaty.

Chairman WARNER. In today's hearing we will examine the national security implications of the UNCLOS. It is my hope and expectation that this hearing will provide Members an opportunity to explore in depth the concerns with this convention relating to the national security that have been raised by a number of colleagues, some of whom are on this panel, and further, the committee will hear the responses to those concerns from the convention's proponents, primarily in the first panel.

I have a personal longstanding interest in the international agreements that affect U.S. maritime interests, including the para-

mount principle of freedom of navigation. As Under Secretary and Secretary of the Navy for 5 years from 1969 to 1974, I participated in the early international conferences on this subject representing at that time the Secretary of Defense (SECDEF), three secretaries I served under, Secretary Laird and two others. I am particularly interested in the witnesses who will follow.

So I will, at this point, put the balance of my statement in the record.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT BY SENATOR JOHN WARNER

The committee meets today to receive testimony on the military implications of the UNCLOS. Admiral Vernon E. Clark, USN, Chief of Naval Operations and the Honorable William H. Taft IV, Legal Adviser, Department of State, will testify on behalf of the administration on the first panel of this hearing.

Ambassador Jeane J. Kirkpatrick, former U.S. Ambassador to the United Nations and currently a Senior Fellow and Director of Foreign and Defense Policy Studies at the American Enterprise Institute, will testify on the second panel.

Testifying on a third panel of outside witnesses will be Ambassador William Middendorf II, former Secretary of the Navy; Professor John Norton Moore, University of Virginia School of Law; and Rear Admiral William L. Schachte, Jr., USN (Ret.). Thank you all for appearing before us this morning.

I note that two additional witnesses who were invited by the committee to testify this morning—Frank Gaffney, President of the Center for Security Policy and Doug Bandow, Senior Fellow at the CATO Institute—were unavailable. If they would like to submit written testimony, those statements will be made a part of the record of this hearing.

The Senate Armed Services Committee traditionally conducts oversight hearings on the military implications of treaties that could affect the national security. Today's hearing continues that tradition.

During these past few months when the Senate has been actively considering the convention, a debate has arisen regarding whether accession to the convention is in the U.S. national interest. This convention has implications for U.S. interests across a wide spectrum of issues—national security, commercial, economic, environmental—to name a few.

In today's hearing, we will examine the national security implications of the UNCLOS. It is my hope and expectation that this hearing will provide Members an opportunity to explore in depth the concerns with this convention related to national security that have been raised by critics, and to hear the responses to those concerns from the convention's proponents, first and foremost, the administration's witnesses.

I have a strong and longstanding interest in international agreements that affect U.S. maritime interests, including the paramount principle of freedom of navigation. As Under Secretary and Secretary of the Navy, I participated in the development of U.S. policy concerning the negotiation of this convention, and served as the U.S. Negotiator for the U.S.-Soviet Incidents at Sea Agreement of 1972. I will be particularly interested in the views of our witnesses on the impact of this convention on U.S. military—primarily Navy—operations, and on how the convention might affect our ability to preserve our freedom of navigation around the world.

Senior administration representatives have conveyed their strong support for this convention. In a letter I received yesterday, Chairman of the Joint Chiefs of Staff General Myers stated: "The convention remains a top national security priority. In today's fast changing world, it ensures the ability of the U.S. Armed Forces to operate freely across the vast expanse of the world's oceans under the authority of widely recognized and accepted international law. It supports efforts in the war on terrorism by providing much-needed stability and operational maneuver space, codifying essential navigational and overflight freedoms." According to General Myers, "The rules under which U.S. forces have operated for over 40 years to board and search ships or to conduct intelligence activities will not be affected." I will place his letter in its entirety in the record of this hearing.

The view that the UNCLOS will advance the interests of the United States as a global maritime power and will preserve and advance the right of the U.S. military to use the world's oceans to meet national security requirements has been the view not only of the current administration, but also of the preceding three administrations, including the Reagan administration.

That said, I take seriously the concerns that have been raised by those who do not support this convention. I think it important for members to fully consider all views as the Senate proceeds with its consideration of this treaty. That is why I look forward to a serious examination, in this hearing, of the impact the convention would have on military operations.

We have asked our witnesses to provide their testimony on a number of key questions, including:

- Will the convention advance the interests of the United States as a global maritime power and preserve and advance the right of the United States to use the world's oceans to meet U.S. national security requirements?
- Will the convention preserve freedom of navigation for the U.S. Armed Forces?
- Could the convention impede critical U.S. military or military intelligence activities?
- What are the convention's implications, if any, for the Administration's Proliferation Security Initiative?
- Will military and military intelligence activities be excepted from the convention's dispute settlement mechanisms as a matter of U.S. policy?

We had an opportunity earlier this morning to address some of these issues in closed session. To the extent permissible, I would ask our witnesses to discuss these matters in the open hearing as well, since important questions have been raised as to whether the convention would prohibit or adversely impact the conduct of certain activities critical to the U.S. national security.

We welcome our witnesses this morning and look forward to their testimony.

Senator Levin.

Chairman WARNER. Senator Levin, do you have an opening statement?

STATEMENT OF SENATOR CARL LEVIN

Senator LEVIN. I do. Thank you very much, Mr. Chairman. I first want to join you in welcoming Admiral Clark and Mr. Taft here today. I look forward to hearing their views and the views of our other witnesses on the security implications of the 1982 UNCLOS.

I want to first commend you, Mr. Chairman, for deciding to hold this hearing so that the concerns about the implications of the UNCLOS on our security can be addressed. I know that Senator Warner has made every effort to ensure that the national security views of both supporters and critics of the convention are represented here this morning.

As far as the convention's central provisions are concerned, those relating to freedom of navigation and overflight and other traditional uses of the oceans, our military forces have operated in accordance with these provisions for over 21 years. President Reagan's 1983 Oceans Policy Statement established the U.S. policy, which is still in effect today, that the U.S. would accept and act consistent with these central provisions of the convention.

Today our Armed Forces are being asked to meet operational challenges that demand a higher level of mobility than at any time in recent history. Operation Enduring Freedom (OEF) in Afghanistan, Operation Iraqi Freedom (OIF), as well as other deployments, create operational requirements from our shores. In addition, the Department of Defense's global posture review involving the restructuring of the deployment of U.S. forces around the globe over the coming months and years is likely to add to our military's need for mobility.

Admiral Clark, I look forward to receiving your assessment of whether U.S. accession to this convention will advance the ability of our Armed Forces to meet operational challenges, including the

war on terrorism, in the years ahead. I am also interested in hearing today about any concerns that the Navy might have should the United States become a party to the convention.

Concerns have also been raised by some that accession by us to the convention would have negative implications for another front in the war on terrorism, the U.S.-led Proliferation Security Initiative (PSI). That initiative seeks to build international cooperation in interdicting the flow of weapons of mass destruction, their delivery systems, and related materials worldwide, whether by sea, in the air, or on land. I expect that in the course of today's hearing our witnesses, in particular Mr. Taft, will clarify what effect, if any, our becoming party to the convention would have on the ability of the United States and its PSI partners to conduct operations consistent with the PSI Statement of Interdiction Principles which was agreed to in September of last year.

I also understand that concerns have been raised that some parties to the convention might seek to use the convention's provisions on settlement of disputes between states parties to limit or interfere with U.S. military activities. I invite our witnesses to address these concerns, to explain what protections are available to limit the jurisdiction of the convention's dispute settlement mechanism, in particular the ability of a party to opt out of those dispute settlement procedures with regard to military activities and other specified categories of disputes. Finally, I want to emphasize how important I believe it is that the President seize this opportunity to demonstrate leadership in the development of the law of the sea. If we do not accede to this convention, which is already in force for so many other nations, we are out in the cold, voiceless in the implementation and possible modification of the convention. Too often, I believe, in the past the administration has missed opportunities to advance our interests through multilateral cooperation. In supporting the UNCLOS, the United States has the chance to advance U.S. national security interests, to assume a prominent role in implementing the convention commensurate with our status as the world's largest maritime power, and to enhance our ability to work with other states to influence the direction of maritime law for the future.

I join you also, Mr. Chairman, in welcoming not just our two witnesses on this panel, but the additional witnesses who will appear on our subsequent panels. We appreciate very much their willingness to come before us this morning.

Chairman WARNER. Thank you very much, Senator Levin.

As I mentioned, within our own ranks here on the committee there is a variance of viewpoints and I would like now to recognize our distinguished colleague, Mr. Inhofe, for purposes of making an opening statement.

Senator INHOFE. It will be very brief, Mr. Chairman.

We had a hearing before the committee that I chair, the Environment and Public Works Committee, and we got into a lot of these issues that really should be discussed before this committee, and that is why I appreciate very much your having this hearing. However, there are other issues and ramifications, such as environmental ramifications, to this proposed treaty that we were able to talk about.

I think, Mr. Chairman, you said that Doug Bandow's statement is going to be a part of the record. I have just been given that statement. He makes some excellent points and I think it is a good idea to have that as a part of it.

I think this is very significant. I think there is a diverse feeling as to what we are giving up, the fact that we are giving up some of our sovereignty, that the treaty covers between two-thirds and three-fourths of the entire Earth's surface, that a multinational operation would be gaining these powers, and for each power they gain in my opinion, my narrow view perhaps, that is some degree of sovereignty that we are giving up.

I am concerned about the open-ended compulsory arbitration procedures. It is my understanding we had a choice of some three, including international court or tribunals, and this is the one that is being proposed by the administration. However, I am concerned that we are dealing with 145 states or countries and we do not know which ones they will choose.

The revenue and technology sharing is something that is a deep concern to me and we want to proceed to talk about those. Does the resolution declaration really protect us in the treaty? Should we amend the text?

Then something that Senator Levin just said about the opt-out idea, I have some thoughts on that and some questions I wanted to ask our witnesses.

So I do have concerns and I am hoping that these three panels will answer the concerns that I have as well as other members of this committee. Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator. I think that under your leadership of the Committee on Environment and Public Works, of which I am privileged to be a member, that record was of equal importance to what we will be compiling here today. So we will have had three committees of the Senate thus far review this matter, and I do not know whether the distinguished chairman of the Intelligence Committee has under review a possible additional hearing.

I recognize the chairman of the Intelligence Committee.

Senator ROBERTS. Mr. Chairman, thank you for holding this hearing, and I thank my colleagues for their comments and I thank the witnesses.

I am not sure as to whether or not we will have a hearing in the Intelligence Committee, but I think after listening to the closed testimony and the concern of some of my colleagues, that that would be well in order. I do not mean to be obstructionist by any means, and I think that that could be done in an expedited fashion.

I know that there has been considerable commentary by the witnesses and the supporters of the treaty that we are able to basically eliminate military activities from the reach of the treaty and that we define intelligence-gathering as military activity and so our activities would not be hindered. As a matter of fact, some of the witnesses said that they would be helped by the treaty.

However, in taking a hard look at this—and I am not an attorney and I am certainly not an international attorney—it seems to me that the tribunal has very explicit rights in its text and I worry about that, more especially with the way things are in the world today and the global war against terrorism.

The other thing that I am concerned about is whether it serves the Senate's treaty-making interest. We do not even create a single reporting requirement by the executive branch to the appropriators or the authorizers, only a duty of consultation with regard to the Senate Foreign Relations Committee. I have eminent respect for that committee and the leadership of that committee, but there is no other committee involved, and I am not sure that the resolution would even be binding on the President as drafted.

So there are some things that I am concerned about. I do not know whether the administration would object to taking a look at some of these concerns and possible edits to the resolution as approved by the Senate Foreign Relations Committee.

With that, Mr. Chairman, let me say thank you again for holding the hearing, and I think that there will be a fourth committee involvement. I am not sure we have any witnesses from the Intelligence Community. Obviously, Admiral Clark does speak with great authority in that respect and I understand that. But it would be helpful to me more especially to have people in the Intelligence Community in charge of special activities allay any concerns that I might have, and I think that that view is shared by at least some on the Intelligence Committee.

So I thank you for the opportunity to make these comments and in the interest of time I will yield back.

Chairman WARNER. Thank you very much, Senator. I would only, as a member of your committee—I think you probably should take a very close look at it, because this has significant ramifications as it relates to our national security. I am relying primarily on the assurances by the Chairman of the Joint Chiefs, and I will put into the record at this time his letter strongly endorsing the treaty.

[The information referred to follows:]

CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

7 April 2004

The Honorable John W. Warner
Chairman, Committee on Armed Services
United States Senate
Washington, D.C. 20510-6050

Dear Mr. Chairman,

The testimony of the Chief of Naval Operations, Admiral Vern Clark, to the Senate Armed Services Committee regarding the Law of the Sea Convention (LOSC) reflects the views of the combatant commanders and the Joint Chiefs. We strongly support US accession to LOSC.

The Convention remains a top national security priority. In today's fast changing world, it ensures the ability of the US Armed Forces to operate freely across the vast expanse of the world's oceans under the authority of widely recognized and accepted international law. It supports efforts in the War on Terrorism by providing much-needed stability and operational maneuver space, codifying essential navigational and overflight freedoms.

The rules under which US forces have operated for over 40 years to board and search ships or to conduct intelligence activities will not be affected. The LOSC does not require permission from the United Nations to conduct these searches and leaves US intelligence activities unaffected. Moreover, the Proliferation Security Initiative is designed to be consistent with international law and frameworks, including the LOSC. While the Administration previously raised a concern regarding dispute resolution, that has been satisfactorily addressed by the proposed Resolution on Advice and Consent. Accession will provide continued US leadership in the development and interpretation of the Law of the Sea and ensure changes are compatible with future military initiatives.

I appreciate your continued strong support of the LOSC and the US Armed Forces.

Sincerely,

RICHARD B. MYERS
Chairman
of the Joint Chiefs of Staff

Chairman WARNER. Also a letter signed by all—and I repeat, all—State Department legal advisors, eight of them, going back to the Reagan administration, representing unequivocal support for this treaty.

[The information referred to follows:]

April 7, 2004

The Honorable John W. Warner
Chairman, Committee on Armed Services
United States Senate
Russell Senate Office Building, Room 228
Washington, D.C.

Re: LOS Convention

Dear Mr. Chairman:

The undersigned comprise all the living, former Legal Advisers to the United States Department of State. We served as general counsel to various Secretaries of State in the Administrations of Presidents Carter, Reagan, George H.W. Bush and Clinton. We are unanimous in our view that it is in the best interests of the United States that the Senate, at its earliest opportunity, grant its advice and consent to United States accession to the 1982 United Nations Convention on the Law of the Sea (the "LOS Convention") and to United States ratification of the 1994 Implementing Agreement that modifies Part XI of the LOS Convention (the "1994 Implementing Agreement").

We write at this moment because of certain objections that have been raised, in spite of the support of the Bush Administration and in spite of the unanimous approval of the LOS Convention and the 1994 Implementing Agreement in the Senate Foreign Relations Committee that was accompanied by a proposed resolution of advice and consent. This letter will not recite the many well-known advantages of the LOS Convention to the national security, economic and other interests of the United States, but rather will briefly address what we understand are residual concerns of certain members of the Senate.

First, the Reagan Administration's objection to the LOS Convention, as expressed in 1982 and 1983, was limited to the deep seabed mining regime. The 1994 Implementing Agreement that revised this regime, in our opinion, satisfactorily resolved that objection and has binding legal effect in its modification of the LOS Convention.

Second, President Reagan, while rejecting the deep seabed mining regime as then conceived, pronounced it United States policy in 1983 to abide by the LOS Convention provisions dealing with traditional uses of the oceans. All Administrations since then have, without exception, continued this policy. In order to gain unquestioned international acceptance of this United States policy, it is time, in our view, for the United States to take its place, and to assert its influence and leadership, under a Convention to which there are now 145 States Parties, including all other major industrial and maritime nations.

Third, the LOS Convention does not award any decision-making authority on any issue to the United Nations. The fact that the term "United Nations" appears in the title of the LOS Convention is legally meaningless and is an accident of history. The LOS Convention is a multilateral agreement that governs the legal relations among the States Parties. It creates three bodies, the International Seabed Authority, the Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf. All three are funded and organized by the States Parties to

the LOS Convention and not by the United Nations. Any monies that may ultimately flow to the International Seabed Authority are under the control of the States Parties, not of the United Nations. Because the Finance Committee of the International Seabed Authority, under the terms of the amended LOS Convention, operates by consensus, the United States, once a State Party, will participate in all financial and administrative decisions, which the Authority cannot take over an objection from the United States. In addition, the United States will have a permanent seat on the governing Council of the International Seabed Authority, where consensus is required for the approval of all regulations, including those dealing with financial matters.

Fourth, the United States will not submit to the jurisdiction of the International Tribunal of the Law of the Sea or the International Court of Justice in the settlement of any non-deep seabed mining disputes arising under the LOS Convention. In addition, the United States will opt out of all mandatory dispute settlement procedures with respect to military (which includes intelligence) activities and certain law enforcement and international boundary matters. Furthermore, the United States will make it clear in an understanding attached to its accession that it will be the sole judge as to what constitutes "military activities." Thus, in no way will the LOS Convention award any control over United States military activities to any international bureaucracy or court.

We are pleased to express our unreserved support for prompt affirmative action by the Senate in approving adherence by the United States to this important international Convention.

Respectfully,

Herbert J. Hansell by DRR
Honorable Herbert J. Hansell
Legal Adviser
1977-1979

Roberts B. Owen by DRR
Honorable Roberts B. Owen
Legal Adviser
1979-1981

Davis R. Robinson
Honorable Davis R. Robinson
Legal Adviser
1981-1985

Abraham D. Sofaer by DRR
Honorable Abraham D. Sofaer
Legal Adviser
1985-1990

Edwin D. Williamson by DRR
Honorable Edwin D. Williamson
Legal Adviser
1990-1993

Conrad K. Harper by DRR
Honorable Conrad K. Harper
Legal Adviser
1993-1996

David R. Andrews by DRR
Honorable David R. Andrews
Legal Adviser
1997-2000

Michael J. Matheson by DRR
Honorable Michael J. Matheson
Former Acting Legal Adviser
(on a number of occasions)

P.S. Davis Robinson has signed this letter on behalf of all those listed. Please direct any inquiries to him at (202) 986-8049 or at drrobins@llgm.com.

Chairman WARNER. A letter from the Navy League in support of the convention.

[The information referred to follows:]

NAVY LEAGUE
of the United States

Law of the Sea Convention
April 2004

Dear Senator:

The sea services of our nation must maintain their leading role in shaping global rules and policies that affect our freedom of navigation and maritime mobility, two essential elements of U.S. naval power. That is why it is now time for Congress to ratify the Law of the Sea Convention and thereby strengthen our national security. The Convention codifies access and transit rights for our ships and enhances the nation's prosecution of the global war on terrorism.

Our nation has much to gain and nothing to lose by becoming a party to the Convention, which is a comprehensive international legal framework governing the world's oceans. The United States should now join 145 nations that use the Convention as a means to assure access to the oceans. In November, the Convention will be opened for amendment. As a party to the Convention, the United States would have a major role in shaping changes to come.

The Law of the Sea Convention is a complex document that touches on a wide range of U.S. maritime concerns. Since it was finalized in 1982, a primary U.S. interest in the Convention has been to preserve essential navigational freedoms and thereby enhance the mobility of U.S. naval power. That is why every chief of naval operations (CNO), the Joint Chiefs of Staff and the Department of Defense have consistently and strongly supported U.S. ratification.

Our current CNO, Adm. Vern Clark, said in a March 18 letter to Sen. Richard G. Lugar, R-Ind., chairman of the Senate Committee on Foreign Relations, that accession to the Convention will support "our ability to operate around the globe, anytime, anywhere, allowing the Navy to project power where and when needed."

The Convention guarantees, for example, that ships and aircraft may transit straits that otherwise may have been closed by the territorial claims of nearby states. More than 135 straits are affected, including the Strait of Hormuz, entryway to the Persian Gulf, and the Strait of Malacca, the main sea route between the Indian and Pacific oceans.

In fact, the United States' interest as a global naval power was behind its initial participation in talks on the Convention as the United Nations conducted negotiations from 1973 to 1982. Our policy makers were concerned that transit and access rights of U.S. warships could be restricted by the rising number of claims from other nations over territorial seas, fishing zones and offshore high seas areas. Today, Adm. Clark wants the United States to join because, he said, "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."

Much of our government's initial delay in ratification was linked to objections by many industrialized countries to sections related to deep seabed mining. However, changes to the Convention in 1994 remedied each of the U.S. objections.

Despite its advantages, the Law of the Sea Convention remains controversial because of widespread — and erroneous — beliefs that it would adversely affect U.S. sovereignty, inhibit our intelligence-gathering activities or hamper the U.S. Proliferation Security Initiative (PSI) through which our forces seek to interdict shipments of weapons of mass destruction.

Critics point to the International Tribunal for the Law of the Sea, created to settle disputes, as a threat to U.S. sovereignty. However, parties to the Convention are free to agree on any method of dispute settlement they desire – and the U.S. will not select the Tribunal.

Fears that ratification would diminish our collection of intelligence are linked to a section of the Convention containing a list of activities that would deprive a vessel of the right of innocent passage through territorial seas. These activities include the collection of certain types of information and the requirement that submarines navigate on the surface. However, such activity is not a violation of the Convention. Intelligence-gathering activities are not prohibited nor adversely affected by the Convention.

The Bush Administration's PSI — potentially a major weapon in the global war on terrorism — seeks the support of all nations in international efforts to board and search vessels suspected of transporting weapons of mass destruction. Adm. Michael G. Mullen, vice chief of naval operations, told Lugar's committee that being party to the Convention "would greatly strengthen" the Navy's ability to support the PSI by reinforcing freedom of navigation rights on which the service depends for its operational mobility.

We learned in Iraq that even allies sometimes would block access to key battle areas. Our freedom of navigation cannot be contingent on the approval of nations along global sea lanes. A legal regimen for the world's oceans will help guarantee worldwide mobility for our military.

The Law of the Sea Convention is good for our sea services. It strengthens our country. The time for ratification is at hand.

Sincerely,

Sheila M. McNeill

Sheila M. McNeill
National President

2300 Wilson Boulevard * Arlington, VA 22201 * 703-528-1775 * 703-528-2333 Fax * www.navyleague.org
Navy * Marine Corps * Coast Guard * U.S.-Flag Merchant Marine

Chairman WARNER. Also, Mr. Taft, there is a letter that you forwarded early on to the committee, which I am certain you will cover in your testimony today, but I will put it in the record in any event.

[The information referred to follows:]

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

April 6, 2004

Dear Senator Warner:

During recent briefings of Senate staff by officials from the Department of State, the Department of Defense, and other relevant agencies on the Law of the Sea Convention, the question was raised whether the Convention would prohibit or otherwise adversely affect U.S. intelligence activities. I would like to take this opportunity to respond to that question. I have coordinated this response with the Department of Defense and those other relevant agencies.

U.S. accession to the Convention would support ongoing U.S. military operations, including the continued prosecution of the war on terrorism. The Convention reinforces our military's ability to move – without hindrance and under authority of law – forces, weapons, and materiel to the fight, which is critical to our accomplishing national security objectives. The Convention does not prohibit U.S. intelligence activities; nor would we recognize any restrictions on those activities.

Since President Reagan's 1983 Ocean Policy Statement, the United States has conducted its activities consistent with the non-deep seabed provisions of the Convention. Further, the Convention's "innocent passage" provisions are actually more favorable to U.S. military and navigational interests than those in the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party. Not

The Honorable
John Warner,
Chairman,
Committee on Armed Services,
United States Senate.

only is the Convention's list of non-innocent activities an exhaustive one, but it generally uses objective, rather than subjective, criteria in the listing of activities.

Sincerely,

William H. Taft, IV

cc: Sen. Carl Levin
Sen. Richard G. Lugar
Sen. Joseph R. Biden
Sen. Pat Roberts
Sen. John D. Rockefeller, IV
Sen. James M. Inhofe
Sen. James M. Jeffords
Congressman Porter J. Goss
Congresswoman Jane Harman

Chairman WARNER. Are there other members of the committee who desire to make a brief opening statement?

Senator Sessions.

Senator SESSIONS. Just briefly, Mr. Chairman. Thank you for having the hearing and I hope that Senator Roberts would consider looking more at the intelligence side of this and the implications of it.

The Wall Street Journal certainly is not a nativist institution or organization. They believe in trade and commerce and progress throughout the world. They strongly condemned this treaty, said that it would subject our oceans to an "U.N. bureaucracy," I believe was the word. I know that the Navy has said, contrary to the characterizations, that this is not a highly politicized bureaucracy, nor would it be disposed to act against United States interests. But when these things become intense and there is an interest here, many of the nations that appear on the panels that might be deciding these questions have no interest whatsoever in the actual dispute, but they will use that for leverage or other political reasons.

So I think we ought to take our time here a bit and look at it carefully before we take a lot of our taxpayers' money and send it off to a bureaucracy that I am not sure we can rely on.

Chairman WARNER. Senator Ensign, you participated very actively in the closed session and we thank you for your continued presence, and I hope you press some of the same questions that you did in the closed session because I think there can be some responses in open that would be helpful.

Senator ENSIGN. Thank you, Mr. Chairman.

Just very briefly, the concerns that I want to hear from the witnesses basically has to do with—I realize that we do not have to approve any amendments, but as we have seen, just like with our laws, you do not have to necessarily amend something to change it. Rulings from tribunals, rulings from—we see this within the United Nations. A lot of the rulings go against us. Especially in to-

day's world, those rulings seem to be going against us more and more and more. Subjecting ourselves to another international institution—I think that we need to proceed cautiously and think of all of the ramifications, not only from a military standpoint, which this committee has jurisdiction on, but obviously from a diplomatic standpoint and from an economic standpoint.

So I am looking forward to hearing and engaging in some cross-examination of some of our witnesses. Thank you, Mr. Chairman.

Chairman WARNER. I thank you.

We will now proceed. I just indicate I think in fairness that, having had some experience years back—at that time I was not in favor of the treaty—today I am of an open mind. I should say I am persuaded to support the treaty largely at the moment as a consequence of the testimony of yourself, the Chairman of the Joint Chiefs, and others, because I believe you are going to be able to allay, to my satisfaction, any concerns that I had some years ago.

So with that, I will open up now and invite the distinguished Chief of Naval Operations to address these issues before the committee. You are most welcome, Admiral.

STATEMENT OF ADM. VERNON E. CLARK, USN, CHIEF OF NAVAL OPERATIONS

Admiral CLARK. Thank you, Chairman Warner and Senator Levin and other distinguished members of the committee.

Chairman WARNER. Let me interrupt to say that your entire statement will be admitted to the record, as well as the entire statement of the other panel members.

Admiral CLARK. Thank you very much. I have a much briefer statement to make this morning.

I get to appear before this committee many times, but never on a subject like this, usually talking about the condition and state of the Navy. But every time I do come up here, I talk to you about the fact that our Navy is built to take credible, persistent, combat power to the far corners of the Earth, and then I insert the phrase "the sovereignty of the United States of America, to provide options for our Commander in Chief anywhere, any time, around the world, around the clock," and I always like to add, "without a permission slip."

I just want to say this morning that our ability to operate freely across this vast domain called the world's oceans—and as was said by Senator Inhofe, we are talking about a major piece of the Earth's surface here but to be able to operate there in peace and war is very, very important to us. So I am keenly interested in anything that could call into question our ability to exploit this freedom, not just for our Navy but for the Nation as well.

I am here, Mr. Chairman, to say that I fully support ratification of the UNCLOS because in my mind it first defines and then preserves our navigational freedoms, the freedoms to use international straits and archipelagos, the exclusive economic zones, and the high seas. It also provides the operational maneuver space that I need for my Navy to conduct peaceful operations at sea, but also combat operations. I also believe it is very important because it puts the United States of America where it should be, and that is

in a position of leadership to protect these vital freedoms and to shape the future direction of the treaty.

Now, why else would ratification be important to me? Well, the real issue for me is people. As the CNO, I have the privilege and I am entrusted with the task and responsibility to lead the sons and daughters of America who have chosen to wear the cloth of the Nation. Twenty-four/seven, 365 days a year, our sailors are operating at the tip of the spear. A third of our fleet is forward deployed this morning. Sometimes we must place them in harm's way to do our country's business, and they go willingly.

For many years now, we have remained outside the convention. We have asked our young men and women to conduct freedom of navigation operations. Mr. Taft speaks to them in his written testimony. He speaks to bumping operations in the Black Sea. As a commanding officer, I have had unfortunately the privilege of conducting those kind of operations at too close of quarters.

What that means to me is that these kind of operations, because these are what we are left with when we do not have agreements with other Nations, sometimes put us at great risk when challenging the excessive maritime claims other states may make, to prevent those claims from becoming customary international law.

Mr. Chairman, in my view we need a better venue. We do not need to do that as much as we have had to do it in the past. As the Chief of the Navy, I am looking for every possible guarantee that I can find to ensure our sailors' safety and to keep them from needlessly going into harm's way. That is why I believe we need to join the UNCLOS, so that our people know when they are operating in the defense of this Nation far from our shores that they have the backing and the authority of widely-recognized and accepted law to look to, rather than depending only upon the threat or the use of force or customary international law that can be too easily changed.

Finally, entry into the convention will support in my view our necessary leadership role in maritime matters. We are an island nation. This will position us to initiate and influence future developments in the Law of the Sea. Ratification puts us on the inside of the discussion, when it occurs, to ensure that the Law of the Sea continues to protect our people and our maritime interests, to prevent excessive claims that attempt to restrict our access, and my ability to operate anywhere I need to go operate, and to preserve the critical navigational freedoms and freedom of the seas essential to the national security.

That is right where I think we want to be, in a position of leadership to preserve the key navigation provisions in the convention and, if necessary, shape them for the future.

Now, Mr. Chairman, let me just add that the Navy has been studying this convention for over 25 years. As you indicated, you were part of it. There are those who oppose the convention that suggest that maybe the Navy has not looked at this closely enough. Well, I wonder if they say that in jest. The fact is that every CNO since 1982 has had occasion to look at this very carefully for the reasons that I said, because the stakes are high for our people.

I just want to be on record saying that we would never recommend a treaty that would require us to get a permission slip

from anyone to conduct operations or restrict our intelligence activities around the world, because we know that those kind of freedoms are essential to what we have to do to be successful in our mission.

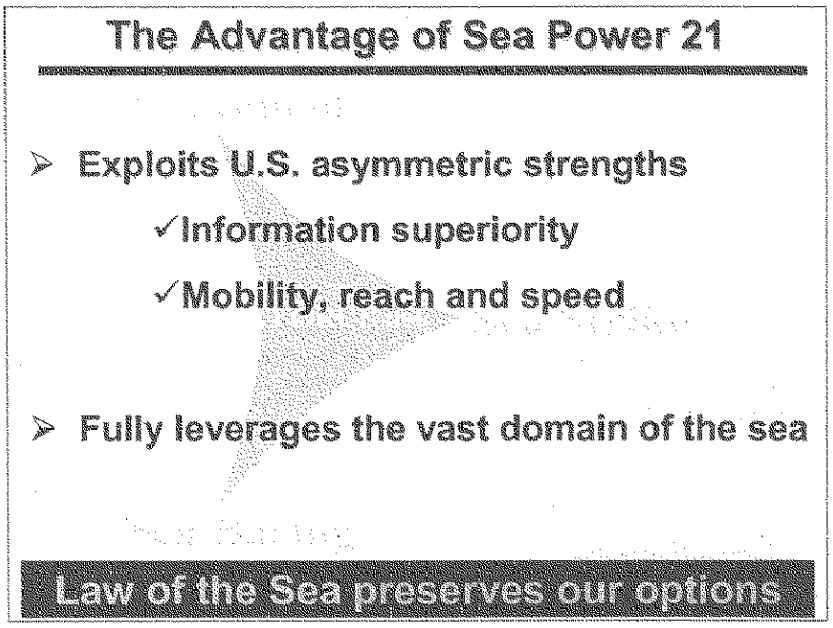
For these reasons, Mr. Chairman, I strongly support the UNCLOS, as many of my predecessors have done, and I look forward to your questions, sir.

[The prepared statement of Admiral Clark follows:]

PREPARED STATEMENT BY ADM. VERNON E. CLARK, USN

Chairman Warner, Senator Levin, members of the committee on Armed Services, good morning. Thank you for the opportunity to testify today in support of the UNCLOS.

I have been before this committee many times to talk to you about your Navy. At nearly every one of these opportunities, I've said that your Navy is built to take persistent, credible combat power to the far corners of the Earth, extending the influence of the United States of America as may be necessary, anywhere and at anytime we choose to do so. It is our ability to operate freely across the vast expanse of the world's oceans that makes this combat power possible.



In my view, the UNCLOS supports our ability to operate in this manner under the authority of widely recognized and accepted law. For that reason, I strongly support the UNCLOS as many of my predecessors did.

I: PROJECTING DECISIVE JOINT POWER ACROSS THE GLOBE

Today's military operations—from OEF to OIF to the global war on terrorism (GWOT)—place a premium on our strategic mobility and operational maneuver. U.S. Forces are forward deployed worldwide to deter threats to our national security and can surge to respond rapidly to protect U.S. interests, either as part of a coalition or, if necessary, acting independently.

In addition to OEF and OIF, our ships and aircraft have been and are deployed overseas to interdict terrorists across the globe. They have also been deployed to the

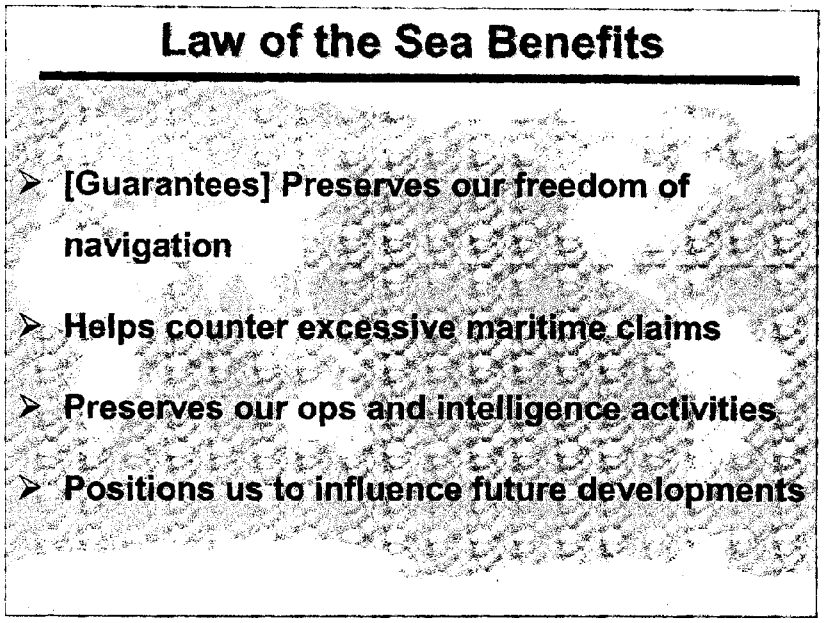
Pacific and Indian Oceans to ensure security in vital sea lines of communication in Southeast Asia, and are conducting operations in the waters off Central and South America to interdict the flow of illicit drug traffic from that region.

We are also laying the groundwork for further implementation of the President's PSI. The international partners assembled as part of the President's initiative are all parties to the UNCLOS. In fact, the PSI is intended to be consistent with international law and frameworks. This includes relevant provisions of the UNCLOS. I am convinced our work with these partners will help disrupt the flow of weapons of mass destruction, their delivery systems, and related materials throughout the world.

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

II: PRESERVING OUR FREEDOMS

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



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

I know this committee is concerned about whether the UNCLOS prohibits our naval operations, including the boarding and search of ships and our maritime intel-

ligence activities. It does not. The convention's rules in this regard do not change the rules the Navy has operated under for over 40 years under the predecessor 1958 treaties to which the United States is a party, governing the territorial sea and high seas. We would not, for example, need permission from the United Nations to board and search ships. Likewise, the convention does not prohibit our intelligence collection activities.

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

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

III: CONCLUSION

Future threats will likely emerge in places and in ways that are not yet fully clear. For these and other undefined future operational challenges, we must be able to take maximum advantage of the established and widely accepted navigational rights the UNCLOS codifies to get us to the fight rapidly.

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

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

Again, I wish to thank the committee for offering me the opportunity to appear before you here today. I support the UNCLOS. I am happy to answer any questions that you may have.

Chairman WARNER. Thank you. I think it would be appropriate, if Mr. Taft will indulge me, at this point to read a paragraph from the Chairman of the Joint Chiefs of Staff which parallels in every respect the testimony of the Chief of Naval Operations. "The Convention remains"—I am reading from General Richard B. Myers' letter dated April 7, 2004, and addressed to me as chairman:

> "The convention remains a top national security policy. In today's fast-changing world, it ensures the ability of the U.S. Armed Forces to operate freely across the vast expanse of the world's oceans under the authority of widely recognized and accepted international law. It supports efforts in the war on terrorism by providing much-needed stability and operational maneuvering space, codifying essential navigational and overflight freedoms."

Mr. Taft.

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

Ambassador TAFT. Thank you, Mr. Chairman, and thank you for inserting my prepared statement in the record. I have a short summary for you.

It is a pleasure to be back testifying before this committee. I enjoy testifying before the Senate Foreign Relations Committee and I did so in connection with its consideration of this treaty last fall, but this is a committee I have testified before often and it is nice to be back.

I would like just to focus here on a very few key issues. As the world's preeminent maritime power, the United States has had a longstanding and consistent interest in achieving international agreement on rules that protect freedom of navigation. It has been the common objective of every successive U.S. administration for the last 30 years to nail down our navigational and other ocean rights through a widely accepted and comprehensive Law of the Sea Treaty (LOST). The convention before you achieves that goal and is strongly in the U.S. national security interest.

When the convention was completed in 1982, the United States embraced its provisions except for Part 11 on deep seabed mining. In 1983, President Reagan announced that the United States accepted and would act in accordance with the convention's balance of interests relating to traditional uses of oceans. He instructed the government to abide by or, as the case may be, enjoy the rights accorded by the provisions of the convention other than those in Part 11.

Part 11, happily, has now been fixed in a legally binding manner and we urge the Senate to give its advice and consent to this convention to allow us to take full advantage of the many benefits that it offers.

Turning specifically to the convention's navigational benefits: Joining the convention will advance the interests of the U.S. military. It preserves and elaborates the rights of the U.S. military to use the world's oceans to meet national security requirements. It achieves this by stabilizing the outer limit of the territorial sea at 12 nautical miles, by setting forth the navigation regime for innocent passage for all ships in the territorial sea of all states, by protecting the right of passage for all ships and aircraft through, under, and over straits used for international navigation as well as archipelagos, and by reaffirming the traditional freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond, including the laying and maintenance of submarine cables and pipelines.

U.S. Armed Forces rely on these navigation and overflight rights daily and their protection is of paramount importance to U.S. national security. We have systematically promoted these critical navigational provisions both diplomatically and operationally as customary international law, and we have been able to enjoy some of these benefits without becoming a party.

The question then naturally arises whether we are just as well off from a national security point of view as a nonparty. We are not. In fact, we run a very real risk as a nonparty of allowing the hard-fought and favorable national security provisions which are in

the convention to be eroded. The choice is therefore not one between on the one hand joining the convention and on the other indefinitely preserving our ability to take advantage of favorable customary international law. Rather, it is whether, in the face of increasing coastal state pressures to constrain freedom of navigation, the United States is in a better position to protect its interests from inside the treaty or outside it. The answer to that question is clear.

Now let me turn to the matter of dispute settlement. As sought by the United States, the convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, providing options both as to the appropriate means for resolution of disputes and as to subject matter.

In terms of forum, a state is able to choose, by written declaration, one or more means for the settlement of disputes under the convention. Under the proposed resolution of advice and consent from the Senate Foreign Relations Committee, the United States will elect arbitration, not the International Court of Justice and not the International Tribunal for the Law of the Sea.

If I could respond to the question that Senator Inhofe asked in his opening statement, our selection of arbitration panels will control in a case where the other party to the dispute might have selected another forum. We will not be in that forum. The treaty provides that our forum that we have selected would be the forum we would be in in that case.

In terms of subject matter, the system allows parties to exclude matters of vital national concern from dispute settlement. Specifically, the convention permits a state, through a declaration, to opt out of dispute settlement procedures with respect to one or more listed categories of disputes, including disputes concerning military activities. Under the proposed resolution of advice and consent, the United States will elect to exclude all optional categories of disputes from the dispute settlement under the convention.

I would note that a concern regarding resolution of disputes concerning military activities has been satisfactorily addressed by the proposed resolution. As I testified before the Foreign Relations Committee, the ability of a party to exclude disputes concerning military activities from dispute settlement has long been a priority matter for the United States. The U.S. negotiators of the convention sought and achieved language that creates a very broad exception, which the United States has consistently viewed as a key element of the package.

This administration reviewed whether the U.S. declaration on dispute settlement should in some way particularly highlight the military activities exception. As a result, the administration recommended and the proposed resolution includes a statement that each 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 therefore, including intelligence activities, would not be subject to dispute settlement under the convention as a matter of law and as a matter of U.S. policy.

The question has also been raised whether the convention, in particular its Articles 19 and 20, prohibits intelligence activities or submerged transit in territorial sea of other states. It does not. It would not have any negative effect on such activities, and we would in no event recognize any attempt to restrict such activities based on this convention.

The convention's provisions on innocent passage are very similar to those in the 1958 convention to which we are already a party. In fact, they are more favorable from a navigational point of view. A ship does not of course enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act in the territorial sea aimed at collecting information to the prejudice of the defense or security of the coastal state.

However, such activities are not prohibited or regulated by the convention, and in this respect the convention makes no change in the situation that has existed for many years and under which all states operate today.

I would also like to address the relationship between the convention and the President's PSI, which Senator Levin mentioned in his opening remarks. I think, as he stated, the PSI is a priority activity involving the United States and several other countries, all of which are parties to the convention.

Joining the convention will not affect our efforts under the PSI to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction. First, PSI activities are carried out consistent with international law today and they are intended to continue to be carried out in that way. Specifically, the PSI requires participating countries to act consistent with relevant international law and frameworks, which includes the law that is reflected in the convention.

Second, the Law of the Sea reflected in the convention is no different from the law already applicable to the United States. The convention's navigation provisions either derive from the 1958 UNCLOS, to which we are a party, or they reflect customary international law which has been accepted by the United States since 1983. As such, joining the convention will not affect the maritime law or policy already applicable to the United States regarding interdiction of weapons of mass destruction.

Third, the convention recognizes many legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction. To give just some examples, there is exclusive port and coastal state jurisdiction in internal waters and national air space and coastal state jurisdiction in the territorial sea and contiguous zone.

When a foreign vessel is operating on the high seas, boarding and searching can take place with the consent of the vessel's flag state. Such consent can be given in advance, such as through an agreement, or in response to a specific request. In this regard, and drawing on our extensive experience with counter-narcotics boarding agreements, the United States has developed PSI boarding agreements which we are negotiating with key flag states and have already concluded with Liberia, which is important in this respect as the second largest ship registry nation in the world.

In certain circumstances boarding and searching of suspect vessels can also take place without the flag state's consent. Further, nothing in the convention impairs the inherent right of individual or collective self-defense, a point that is reaffirmed of course in the proposed resolution of advice and consent.

In short, the rules authorizing PSI maritime interdiction activities would not change as a result of joining the convention, although, as I pointed out earlier, the convention's provisions that enhance our mobility and flexibility to move around the world's oceans will be helpful in this regard.

I would like to turn very briefly, Mr. Chairman, to criticisms of the convention.

Chairman WARNER. I think, Mr. Taft, we have an awful lot of material to go through today.

Ambassador TAFT. I will conclude, Mr. Chairman, just very briefly to say that I have been familiar with the convention for more than 20 years, including as my tenure as General Counsel of DOD in 1982, and since that time I have seen every CNO support the treaty, every Chairman of the Joint Chiefs of Staff; and I am at a loss to see where the danger to our national security has been identified just recently that no one—people have said is there, but no one has been able to see.

So I would submit the rest of my remarks for the record and say that I am glad to take any questions that the Senators may have.

Chairman WARNER. I thank you for that very distinguished dissertation, Mr. Taft. The balance of your remarks will be included in the record.

[The prepared statement of Ambassador Taft follows:]

PREPARED STATEMENT BY HON. WILLIAM H. TAFT IV

Mr. Chairman and members of the committee:

Thank you for the opportunity to testify on the 1982 UNCLOS ("the Convention"), which, with the 1994 Agreement relating to the Implementation of Part XI of the UNCLOS of 10 December 1982 ("the 1994 Agreement"), was reported favorably by the Senate Foreign Relations Committee on March 11, 2004. In my testimony before that committee on October 21, 2003, I discussed the national security, economic, resource, and environmental aspects of the Convention and how they advance U.S. interests. This testimony focuses on the national security aspects of the Convention. It addresses the questions specifically posed by this committee and responds to certain misunderstandings that have arisen concerning the Convention.

BACKGROUND

The achievement of a widely accepted and comprehensive UNCLOS—to which the United States can become a party—has been a consistent objective of successive U.S. administrations for the last 30 years. The United States is already a party to 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, an issue of critical importance to U.S. freedom of navigation. The United States played a prominent role in the negotiating session that culminated in the 1982 Convention, which sets forth a comprehensive framework governing uses of the oceans that is strongly in the U.S. national security interest.

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

Part XI has now been fixed, in a legally binding manner, to address the concerns raised by President Reagan or successive administrations. We also worked closely with the Senate to ensure that the proposed Resolution of Advice and Consent satisfies the concerns and issues identified by the administration, including those relating to U.S. military interests. We 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.

NAVIGATIONAL ASPECTS

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

DISPUTE SETTLEMENT

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, providing options both as to the appropriate means for resolution of disputes and as to subject matter. In terms of forum, a State is able to choose, by written declaration, one or more means for the settlement of disputes 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—rather than the International Court of Justice or the International Tribunal for UNCLOS—is included in the proposed Resolution of Advice and Consent.

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

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

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

INTELLIGENCE ACTIVITIES

The question has been raised whether the Convention (in particular articles 19 and 20) prohibits intelligence activities or submerged transit in the territorial sea

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

PROLIFERATION SECURITY INITIATIVE

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

REASONS TO JOIN

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

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

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

- Becoming a party to the Convention would strengthen our ability to deflect potential proposals that would be inconsistent with U.S. national security interests, including those affecting freedom of navigation.

Beyond those affirmative reasons for joining the Convention, there are downside risks of not acceding to the Convention. U.S. mobility and access have been preserved and enjoyed over the past 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.

CLARIFICATIONS OF CERTAIN MISUNDERSTANDINGS

I would like to clarify certain misunderstandings that have arisen recently regarding the Convention, including national security aspects. I will address them in turn.

President Reagan thought the treaty was irremediably defective.

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

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

- It is not true that our navigational freedoms are not threatened. There are more than 100 illegal, excessive claims affecting vital navigational and overflight rights and freedoms.
- The United States has utilized diplomatic and operational challenges to resist the excessive maritime claims of other countries that interfere with U.S. navigational rights under customary international law as reflected in the Convention. But these operations entail a certain amount of risk—e.g., the Black Sea bumping incident with the former Soviet Union in 1988.
- Being a party to the Convention would significantly enhance our efforts to roll back these claims by, among other things, putting the United States in a far stronger position to assert our rights and affording us additional methods of resolving conflict.

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

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

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

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

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

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

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

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

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

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

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

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

- Each objection has been addressed.
- Among other things, the 1994 Agreement:
  - provides for access by U.S. industry to deep seabed minerals on the basis of non-discriminatory and reasonable terms and conditions;
  - overhauls the decisionmaking rules to accord the United States critical influence, including veto power over the most important future decisions that would affect U.S. interests and, in other cases, requires supermajorities that will enable us to protect our interests by putting together small blocking minorities;
  - restructures the regime to comport with free-market principles, including the elimination of the earlier mandatory technology transfer provisions and all production controls.

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

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

The Convention mandates another tribunal to adjudicate disputes.

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

• The United States would be subject to the Sea-bed Disputes Chamber, should deep seabed mining ever take place under the regime established by the Convention. The proposed Resolution of Advice and Consent makes clear that the 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." The Chamber's authority extends only to disputes involving the mining of minerals from the deep seabed; no other activities, including operations on the surface of the oceans, are subject to it.

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

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

• In fact, the Convention supports the sovereignty and sovereign rights of the United States over extensive maritime territory and natural resources off its coast, including a broad continental shelf that in many areas extends well beyond the 200-nautical mile limit, and would give us additional capacity to defend those claims against others.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

Mr. Chairman, it is in the U.S. interest to join the Convention because of the national security benefits to the United States, even aside from the economic, resource, foreign policy, and environmental benefits. Among other things, U.S. adherence

would promote the stability of the legal regime of the oceans, which is vital to U.S. global mobility and national security. The administration recommends that the Senate give its advice and consent to accession to the Convention and ratification of the Agreement, on the basis of the proposed Resolution of Advice and Consent. Thank you.

Chairman WARNER. Colleagues, in view of the fact we have a number of panels, I am going to recommend that we do a 5-minute round very swiftly here and then proceed to our second panel.

My first question is to the CNO. Mr. Taft covered the PSI agreement. I think it is very important that you likewise be on the record on that subject, and to introduce the subject by way of a question from myself, I am going to refer and quote from a release by Frank Gaffney, March 18, 2004, to pose the question to you. From page 2: "The treaty, however, will also interfere with America's sovereign exercise of freedom of the seas in ways that will have an adverse effect on national security, especially in the post-September 11 world. Incredibly, it would preclude, for example, the President's important new Proliferation Security Initiative. PSI is a multinational arrangement whereby ships on the high seas that are suspected of engaging in the transfer of weapons of mass destruction or related equipment can be intercepted, searched, and, where appropriate, seized. Its value was demonstrated in the recent interception of the nuclear equipment headed to Libya."

"Similarly, the treaty will define intelligence collection in and submerged transit of territorial waters to be incompatible with the treaty's requirements that foreign powers conduct themselves in such seas only with 'peaceful intent.' The last thing we need is for some U.N. court or U.S. lawyers to make it more difficult for us to conduct sensitive counterterrorism operations in the world's littorals." End quote of Mr. Gaffney.

So I pose that as a question because this statement by Mr. Gaffney is a part of today's record and I think there should be a response from the Department of Defense (DOD) and particularly the CNO.

Admiral CLARK. I think there are at least three questions there. Let me just start by saying, with regard to PSI, his claim that PSI will not be authorized if you are a party to the UNCLOS is at odds with the fact that there are 14 partners in PSI and all of them but us are parties to the convention. I think it is based upon a misunderstanding of what PSI is about and how it is executed. But very briefly, we may board a vessel flying a flag that is from our state. We may board a vessel that consents to our boarding. We may board vessels entering our coastal waters, and we may board stateless vessels under the PSI construct. There is nothing at all in the convention that has anything to do with limiting that capability.

With regard to his discussion about conducting intelligence operations while you are passing through straits, we are now into technical definitions of particular activities. What this particular convention does is it vastly broadens the protections that we sought when this treaty was put together.

All we had before was something called "innocent passage." Innocent passage rules require submarines to transit on the surface. We wanted provisions that would authorize transits submerged through straits and that kind of activity. We got it with something

called "transit passage" that is authorized in this convention. That was something that we in the Navy sought because we did not want our submarines to have to be exposed to conduct an innocent passage.

We have made the statement that we can exclude any kind of military activity from compulsory arbitration. In this process we have chosen and the resolution before the Senate says that military activities will be excluded, and that dismisses the other argument that he is making that puts him opposed to the treaty.

Chairman WARNER. In closed session, in response to I think questions from the distinguished Senator from Nevada and myself on the subject of naval activities, you gave a very graphic example of transitting Gibraltar, one of the choke points. We have other choke points: the Straits of Hormuz, and I could go on.

Admiral CLARK. Yes.

Chairman WARNER. There are about five of them in the world that are critical to naval operations. I thought you gave a very graphic example and I wonder if you could share it here in open session.

Admiral CLARK. What I am saying is that the convention gives us new protections that did not exist before, and they are transit passage and rights in archipelagic waters. It also gives us rights in exclusive economic zones, which are at issue in today's world. Fundamentally, this treaty says that we are authorized to be there.

What I was saying about passing through straits, under the old rules before we had this convention, innocent passage was the only thing prescribed in international law. That is the old law. Transit passage now allows us to conduct our operations in the normal mode and that is much better. That is where we want to be.

Chairman WARNER. I understand. Quickly for Mr. Taft, under the terms of the convention, a state is permitted to opt out of the dispute settlement procedures with respect to three categories of disputes: disputes regarding maritime boundaries between neighboring states; disputes concerning military activities and certain law enforcement activities; and disputes with respect to which the United Nations Security Council is exercising the functions assigned to it by the Charter of the United Nations.

Will military activities, including military intelligence activities, be excepted from the convention's dispute settlement mechanism as a matter of U.S. policy? Second, does the administration take the view that each state party has the right to determine whether its activities are military activities and that such determination is not reviewable by other parties to the convention? Third, how as a matter of U.S. policy will U.S. intelligence activities be treated with respect to the convention's dispute settlement mechanisms?

Please respond quickly on each and you can expand that for the record, because I want to hold tightly on time.

Ambassador TAFT. Thank you, Mr. Chairman. Yes, as a matter of policy we have taken, opted out of the dispute resolution system for all of the categories that you mentioned, including specifically military activities.

Chairman WARNER. Now, if you will expand on that for the record.

[The information referred to follows:]

As set forth in declaration 2 in section 2 of the resolution of advice and consent approved by the Senate Foreign Relations Committee, the United States would opt out of dispute resolution with respect to all three permitted categories in article 298(1) of the Convention, namely disputes concerning maritime boundaries, disputes concerning military activities, and disputes in respect of which the Security Council is exercising the functions assigned to it by the U.N. Charter.

Ambassador TAFT. Very good. As to the second question, as to what is a military activity, who decides, the resolution of advice and consent has a declaration in it establishing that that is a self-judging determination, that we will decide that, and that it will, in response to your second question, not be subject to review.

As I testified earlier, the military activities exemption includes intelligence activities. Perhaps I would expand a little bit on both those answers.

Chairman WARNER. We would appreciate that for the record, and I thank you, Mr. Taft.

[The information referred to follows:]

Yes. One of the declarations in the proposed Resolution of Advice and Consent states the U.S. 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."

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

Chairman WARNER. Senator Levin.

Senator LEVIN. Just on that one issue, is there any doubt in either of your minds that when we exclude military activities from the arbitration provision that we are also, because of our own declaration, excluding military intelligence as well?

Admiral CLARK. There is no doubt in my mind.

Ambassador TAFT. We have no doubt, and I think it should be clear certainly as a result of this testimony and other letters that we have written. Thank you.

Senator LEVIN. On the matter of innocent passage, I would like to clarify one issue there. In Mr. Gaffney's brief, I believe, he says that Articles 19 and 20, the first one relating to the meaning of "innocent passage" and the second one, Article 20, relating to submarines and other underwater vehicles, that, "they attempt explicitly to regulate intelligence activities."

First of all, does anything in either of those articles change the current situation relative to innocent passage? Are intelligence activities under current customary——

Admiral CLARK. We do not conduct intelligence activities while we are conducting innocent passage, so it is not applicable.

Senator LEVIN. So this does not change that in any way?

Admiral CLARK. No.

Senator LEVIN. Okay.

Ambassador TAFT. The only change, Senator, I think that should be noted is that the list of activities that deprive a state of the right of innocent passage in this convention is exclusive and that is it. Those are the only things that deprive you of those benefits. They are the same as what are in there now, but in the existing 1958 Convention it is a little bit vaguer.

One of our objectives was to nail it down so that only those things that are specified deprive you of the right of innocent passage. We got that in the convention.

Senator LEVIN. So that was a gain for us?

Ambassador TAFT. That was a gain for us.

Senator LEVIN. That clarity amounts to a restriction on how that term could be used or applied?

Ambassador TAFT. That is right. We now know that only if you are doing those things are you deprived of the benefit of innocent passage, whereas it was a little vaguer in the 1958 Convention.

Senator LEVIN. Mr. Chairman, there was a statement regarding drug interdiction activities that was made by Rear Admiral John Crowley of the Coast Guard before the Foreign Relations Committee. If that October 21, 2003, statement is not already part of the record, I would ask that it be part of the record, including the following statement: "Becoming a party to the convention will enhance our ability to conduct such interdiction operations and refute excessive maritime claims."

He also stated that: "As the lead Federal agency for maritime security, the Coast Guard believes that acceding to the 1982 UNCLOS will benefit the Coast Guard in our efforts to ensure maritime homeland security and ensure that our maritime border is secure as well."

Chairman WARNER. Without objection, it will be submitted.

[The information referred to follows:]

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DEPARTMENT OF HOMELAND SECURITY

UNITED STATES COAST GUARD

STATEMENT OF

REAR ADMIRAL JOHN E. CROWLEY JR.

ON UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS

U. S. SENATE

OCTOBER 21, 2003

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Good Morning Mr. Chairman and distinguished members of the Committee. I am Rear Admiral John E. Crowley, Chief Counsel and Judge Advocate General of the U.S. Coast Guard. It is a pleasure to appear before you today to discuss the United Nations Convention on the Law of the Sea.

I have previously served as the Assistant to the Secretary of Transportation's Representative to the United Nations Law of the Sea Conference in 1979-80, where I acquired an appreciation for the breadth of Law of the Sea issues. I also have served on five cutters, twice as commanding officer. My sea duty has encompassed all of the Coast Guard's Deepwater missions, including service as the Chief Staff Officer of the Joint Task Force responding to the 1994 Haitian and Cuban mass migrations. I have more recently served as the Special Assistant to the Secretary of Homeland Security and the interim Director of the Homeland Security Center. These assignments allow me to provide comments from the operator's point of view as well. Following these remarks, I am prepared to answer any questions you may have concerning the potential effects of this Convention on the U.S. Coast Guard's missions.

Although the 1982 UN Convention on the Law of the Sea (LOS) entered into force in 1994, the U.S. has continued to rely upon customary international law as reflected in the Convention to advance our oceans policy. While reliance upon customary international law has, in fact, served us well for many years, becoming a party to the LOS Convention will enhance our position in maritime affairs. The first UN effort at codifying the Law of the Sea took place in 1958, when the first UN Conference on the Law of the Sea concluded four separate conventions dealing with the Law of the Sea. These four conventions represented, in the main, codifications of customary international law at the time. However, it must be remembered that at the time, pollution of the world's oceans was not considered an important issue; fish stocks were thought to be inexhaustible, and the need for maritime domain awareness was not present. Beginning in the 1960's, the world, in general, and the oceans, in particular, began experiencing significant change in such areas as pollution standards and fisheries management. This led to the Third United Nations Conference on the Law of the Sea (UNCLOS III), which developed the 1982 UN Convention on the Law of the Sea. With 143 states party to the 1982 UN Convention on the Law of the Sea, the Convention will play a central role in resolving such issues in the future. It will also serve as a foundation upon which future oceans agreements will be based. For these reasons, it is particularly important for the United States to become a party to the Convention.

On November 16, 1994, the LOS Convention entered into force. That event represented a milestone in the United States' efforts to achieve a widely ratified, comprehensive law of the sea treaty that protects and promotes a wide range of U.S. ocean interests, many of which affect the U.S. Coast Guard. Because of our law enforcement and national security missions, the Coast Guard has long been a proponent of achieving a comprehensive and stable regime with respect to traditional uses of

the oceans. The Convention aids our interests by stabilizing the trend towards expansion of national jurisdiction over coastal waters, while furthering our efforts to protect and manage fishery resources and to protect the marine environment. From the Coast Guard perspective, public order of the oceans is best established and maintained by a stable, universally accepted law of the sea treaty reflective of U.S. national interest.

One of the bedrock underpinnings of the Convention was codification of rights and responsibilities of states as port states, flag states and coastal states. During the LOS Convention negotiations, the U.S. aggressively sought both clarification and delimitation of seaward territorial claims by coastal states in order to ensure navigational freedoms while at the same time recognizing the U.S.'s interest as a coastal state with sovereignty to protect its living and non-living marine resources. The result was a limit nations could claim as a territorial sea of no more than 12 nautical miles. Our fishery conservation management interests, as reflected in the Magnuson-Stevens Fishery Conservation Management Act, were instrumental in the international development of the 200 nautical mile Exclusive Economic Zone (EEZ). In the EEZ, all nations enjoy freedoms of navigation, while the coastal state possesses sovereign rights to protect and exploit the living and non-living marine resources. Following the *Amoco Cadiz* and subsequent vessel oil spill incidents, marine pollution was also addressed in the 1982 UN Convention on the Law of the Sea with provisions that have been described as a far-reaching environmental accord. The Convention struck the appropriate balance of competing claims, so that all nations could engage in high seas freedoms, including non-resource related law enforcement in other nation's EEZ waters, and the coastal state enjoyed the right to protect its marine environment, including damage from oil spills by vessels, fisheries conservation and enforcement of domestic laws designed to conserve and protect the living marine resources in their EEZ. The Convention also recognized a port state regime adequate to ensure their interests were protected when vessels voluntarily entered their ports or places subject to their jurisdiction.

The Coast Guard and other U.S. military forces already rely heavily on the elemental navigation freedoms codified in the Law of the Sea Convention. These protections allow the use of the world's oceans to meet changing national security requirements. The Convention limits a nation's territorial sea to no more than 12 nautical miles, beyond which all nations enjoy a high seas navigation regime that includes the freedom to engage in law enforcement activities. The Convention codifies the right to operate freely beyond a nation's territorial sea and protects this right by limiting excessive maritime claims that often have the effect of creating maritime safe havens for drug traffickers and other criminals. In fiscal year 2003, the Coast Guard maritime interdiction operations occurring on international waters resulted in the seizure of over 135,000 pounds of cocaine, 56 vessels, and 207 arrests. In keeping with our aggressive international crime control strategy, most of these seizures took place on distant maritime transit routes far from our shores. However, during bi-lateral negotiations, several nations have, in the past, questioned our authority to contest certain of their excessive maritime claims simply because we have yet to ratify the treaty. Becoming a party to the Convention will enhance our ability to conduct such interdiction operations and to refute excessive maritime claims. Rather than only basing our law enforcement operations on customary international law, the United States should become a conspicuous and leading party to the treaty that codifies these important navigational rights.

The Convention also contains provisions that enhance our ability to interdict foreign flagged vessels off our own coasts. The Convention codifies a coastal nation's right to establish a contiguous zone not to exceed 24 nautical miles where it may enforce its customs, immigration, fiscal, and sanitary

laws. Adoption by the U.S. of an expanded contiguous zone has doubled the area where we can exercise these increased authorities. The benefits of the contiguous zone against traffickers surreptitiously shipping their illicit products to U.S. shores are clear.

Article 108 of the Convention requires international cooperation in the suppression of the transport of illegal drugs. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) is a fine example of this. The United States has been at the forefront. We have aggressively pursued bilateral agreements with many nations that border drug transit zones as well as States with large registries to facilitate the effective interdiction of vessels suspected of transporting illegal drugs and the eventual prosecution of the drug traffickers. During discussions with these nations, we emphasize the Convention's call for cooperation and premise each agreement on concepts codified within the Convention; becoming a party to the Convention will improve our position during these negotiations.

The Convention contains numerous provisions that advance the economic interests of the United States as a coastal state. By codifying the 200-nautical mile EEZ, the Convention confirms U.S. exclusive jurisdiction over all the living and non-living resources in the zone. Experts agree that the problems associated with the management of fish stocks will continue as a contentious issue for states that rely on fishing to feed their population. The Convention provides a legal baseline that sanctions the actions of regional fishing organizations to deal with such conservation issues. Indeed, the Convention imposes responsibilities on the coastal states to manage their fishery resources responsibly, and provides the best structural framework for resolving conflicts between competing users. The Convention's provisions regarding the exclusive economic zone are fully in accord with our fisheries policies and interest. Similarly, the Convention makes provision for a wider continental shelf. This is important to our oil and gas interests because they need the certainty of established continental shelf boundaries before they begin exploration.

The Convention is also an environmental accord that provides a comprehensive framework for the prevention, reduction, and control of maritime pollution. The Coast Guard conducts a wide-ranging port state control program to purge our waters of substandard ships and is assisting other nations in doing the same. This initiative will be enhanced through the consistent application of the Convention's broad enforcement mechanisms. Additionally, the Convention carefully balances the rights of coastal states to adopt certain measures to protect the marine environment adjacent to their shores and the general right of a flag state to set and enforce standards and requirements concerning the operation of its vessels. Becoming a party to the Law of the Sea Convention will strengthen the international credibility of the U.S. and our efforts to guide the development of internationally accepted vessel standards, thereby improving marine safety and protection of the marine environment.

The Convention calls for international cooperation among states in preserving the world's high seas fisheries. This provision on cooperation supports the UN ban on high seas drift net fishing.

As the lead Federal agency for maritime security, the Coast Guard believes that acceding to the 1982 UN Convention on the Law of the Sea will benefit the Coast Guard in our efforts to ensure maritime homeland security, and ensure that our maritime borders are secure, as well. In that regard, in the Maritime Transportation Security Act, the Congress found that, "it is in the best interests of the United States to implement new international instruments that establish [the IMO International Ship and Port Facility Security Code and amend SOLAS to include maritime security as well as safety among its provisions]."

The Convention recognizes that various UN subsidiary bodies may serve as competent international organizations for the further Conventional development of the law of the sea. IMO has always been the recognized competent international organization for maritime safety and marine environmental protection. It has now assumed a similar role in port facility and vessel security. Acceding to the Convention will enhance Coast Guard efforts to work in the international community through the International Maritime Organization, the International Labor Organization and other UN subsidiary bodies to improve our security measures and to project our maritime domain awareness, consistent with the Convention's balance of states' rights to the uses of the oceans. Specifically, we are working now at IMO to build upon the successes achieved by the United States in that body at the December 2002 diplomatic conference. As you know, that diplomatic conference resulted in the landmark amendments to the SOLAS Convention for vessel and port facility security contained in Chapter XI and the International Ship and Port Facility Security Code. We have on-going efforts in respect of Conference Resolution 10 to enhance our maritime domain awareness through Long Range Tracking of vessels bound for our ports and waters. These negotiations are taking place in the context of the overwhelming number of nations at IMO being parties to the Law of the Sea Convention. Because of this fact, the Law of the Sea Convention provides the framework for the discussions and agreements. Although we have enjoyed success in the international security agreements so far, those negotiations have not always been easy. Further progress will not be as easy to achieve as our past successes. Frankly, the fact that the United States is not a party to the Law of the Sea Convention, when the overwhelming number of our international partners are parties, has occasionally put us in a difficult negotiating position at IMO. It is our judgment that accession to the Convention will put us in a stronger position at the IMO than we currently enjoy.

In the view of the Department of Homeland Security and the Coast Guard, accession to the LOS Convention helps safeguard United States security and economic interests. The LOS Convention contains provisions that go beyond codifying existing customary international law. The LOS Convention contains both customary international law and the provisions allowing for the progressive development of law. Becoming a party to the Convention will help us preserve the significant concessions we obtained during the negotiations of the Convention in the area of navigational freedoms, and help us in the development of the law of the sea as it evolves.

It is our understanding that the Administration has, however, identified certain serious concerns regarding accession to the Convention, but which we believe can be resolved. Those issues will be addressed by the State Department and the Department of Defense.

Thank you for the opportunity to testify before you today. I will be happy to answer any questions you may have.

Senator LEVIN. Admiral, you made reference to this, I believe, both here and in our closed session, but I would like you to be a little more specific: that there are trends that are negative to us in terms of customary maritime law or that might be negative to us, that we would like to try to stop. We are interested in mobility and accessibility and there are some trends which could restrict our goals in that regard and in other regards.

Could you give us a little more explicit understanding of what you mean by that?

Admiral CLARK. I sure can. Without naming nations, I will tell you, Senator, that we know that there are nations who want to restrict our ability to operate in their exclusive economic zones (EEZ). The convention gives us freedom to operate as a military in the EEZ without restriction. Eighty percent of the world's population happens to live within 200 miles of the coastline in the world we live in today. As Senator Inhofe said, two-thirds of the world constitutes my maneuver space, the world's oceans.

If we had such restrictions near the coastal region, it would very negatively impact our ability to conduct operations, and we have had nations tell us that they want to restrict our operations.

Senator LEVIN. My final question would be this: that I understand that this November would be the first time since the convention's entry into force that states parties will be able to propose and adopt amendments. How important will U.S. accession to the convention this year be to our ability to influence the development of maritime law in that respect or other respects?

Admiral CLARK. It is my view, Senator, that our absence hurts our ability to lead, and that if we are not there we cannot lead. So it is my view that we need to be there so that we can represent the principles and the values regarding the free use of the sea that happen to be imperative for our future.

Senator LEVIN. Is it true that amendments will be available and possible this year?

Admiral CLARK. That is my understanding, yes, sir.

Senator LEVIN. For the first time?

Admiral CLARK. That is my understanding, yes, sir.

Ambassador TAFT. That is correct, Senator.

Senator LEVIN. Thank you.

Chairman WARNER. Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman. We have talked a lot, Mr. Chairman, about the military operations being excluded and I know that this is done, I guess by declaration; was it not?

Ambassador TAFT. That is right.

Admiral CLARK. Yes, sir.

Senator INHOFE. Let us just say that there is a dispute and that the Chinese are claiming that a U.S. vessel that is in some waters, it was mapping the coast for commercial purposes, and we were to say no, we were doing it for military purposes. How would they resolve this? Let us say they want to go to an arbitrator on this. What if the arbitrator should decide that the Chinese are right? What would happen? Or would it be subject to arbitration?

Ambassador TAFT. It would not be subject to arbitration. We have opted out for military activities and our determination that this involved military activities would be not subject to review.

Senator INHOFE. Would it be your understanding then that the Chinese would say, oh, you say it is not commercial, therefore you might be right, and just not do anything? Is there any other avenue that they could take in this particular case that I pose?

Ambassador TAFT. There are many avenues, and in fact the convention and the Charter of the United Nations and just normal diplomatic activity suggests that long before one went into a dispute resolution mode, even if it were available, that there should be diplomatic discussions, that there should be all efforts to resolve the issue and talk about it and try to fix it up.

Senator INHOFE. So the international community through these would be drawn in to helping with interpretations at some point?

Ambassador TAFT. No, no, not the international community. These would be bilateral discussions between us and the Chinese. We would have discussions with them or other states to try to resolve an issue, that is all.

Senator INHOFE. Okay. Ambassador Taft, Senator Warner talked about the opting out of the treaty. Your answer I believe was we could at any point opt out of the treaty? Or is that not correct?

Ambassador TAFT. We were discussing, I think, opting out of the arbitration—sorry, the dispute settlement provisions. We have, in the Senate resolution, said that we will opt out of those.

Senator INHOFE. But could we not opt out of the treaty?

Ambassador TAFT. It is always open to a party and in this particular treaty it provides that there is an opportunity to withdraw from the treaty. We are talking now, of course, obviously about getting into it.

Senator INHOFE. No, I understand that. But during the hearing that I held, one of the witnesses said: "We could always have the option of opting out of the treaty." I just wanted to know, is that option always there?

Ambassador TAFT. Yes, it is. It is provided for——

Senator INHOFE. Can you think of circumstances under which that would happen, without taking any time?

Ambassador TAFT. I think if we determined that the treaty was not in our interest at some point—and we do have in our resolutions of advice and consent and agreed, there will be reviews of how the treaty is operating.

Senator INHOFE. So if it was determined the treaty was not in our interest, we——

Ambassador TAFT. It is open to us to withdraw from it.

Senator INHOFE. What would happen in such case if you had someone who is—because you know, the oil and exploration industry is supporting this treaty. They feel they can get into this area outside the 200 nautical miles for that purpose. Now, what would happen if they were able to be successfully venturing, getting investors in and drilling and exploring, and in the middle of that operation, and then all of a sudden we opt out of treaty? Where would they be?

Ambassador TAFT. I think that they would be sitting there with whatever their contract rights would be, and if I were they I would write my contract so that I would be able to continue.

Senator INHOFE. Except that according to their testimony they are only going to be there because of this treaty; they cannot do it otherwise. They would—I would suggest that they would be left out in the cold.

Ambassador TAFT. No, I think that they would be there and they would have their contract rights would survive that situation. If I were the company, I would certainly write the contract that way.

Senator INHOFE. We have been talking a lot about the sea here. What about the air over the sea? Is this going to affect some of our ability to do what we are doing currently in terms of aircraft?

Admiral CLARK. Senator, I am glad you asked the question. Fundamentally, the provisions also do in fact apply to the air and that freedom to operate in the EEZ is critical to us.

Senator INHOFE. Under Article 39 it says "Duties of ships and aircraft during transit passage." I think someone who is looking at this with a concern for sovereignty, a concern—I think it goes far beyond just the sea. I would have to ask about space policy later on.

My time has expired, but I would like to have you answer that question for the record, specifically how it affects the air—we have been talking about the sea—the air or potential space policies.

Ambassador TAFT. We will provide that, Senator.

[The information referred to follows:]

The Convention does not apply to outer space, which is governed principally by the U.N. Outer Space Treaty, to which the United States is a party. With respect to airspace, the Convention reflects either rules set forth in the 1958 UNCLOS, to which the United States is a party, or customary international law accepted by the United States. The Convention's provisions affirm that the sovereignty of a coastal state extends to the airspace over its land territory, internal waters, and territorial sea. International airspace begins at the outer limit of the territorial sea. There is no right of innocent passage for aircraft as there is for ships. However, all aircraft, including military and other state aircraft, enjoy the right of transit passage over straits used for international navigation and the right of archipelagic sea lanes passage over certain archipelagic waters. Beyond the territorial sea, all aircraft enjoy high seas freedoms of overflight and other internationally lawful uses of the sea related to that freedom, including those associated with the operation of aircraft. Other treaties, including the 1944 Chicago Convention, regulate aircraft operations.

Chairman WARNER. Let us take the time to answer that for the record briefly.

Senator INHOFE. All right, that is fine.

Chairman WARNER. The question is before the panel.

Senator INHOFE. The chairman said you can go ahead and answer.

Ambassador TAFT. I think that the general answer is that the air space in straits and territorial sea and the EEZ is in the same basis as the surface.

Senator INHOFE. Thank you very much.

Admiral CLARK. The other rights, the rights that we spoke to in the EEZ and transit passage and innocent passage, apply.

Senator INHOFE. Thank you.

Admiral CLARK. We need those rights.

Chairman WARNER. Senator Ensign.

Senator ENSIGN. Thank you, Mr. Chairman. Just a quick statement. One of the things that troubles me about this whole treaty is that people that I respect a great deal have virtually opposite opinions on the interpretation of this treaty, and I think that is the way it is sometimes, a lot of times, with legal matters, because we are not dealing with absolute facts, we are dealing with interpretations, and international law especially is such a highly complex issue, that what may look one way to one person can look a completely different way to another person, which leads me to grave concerns. What does it mean down the line?

In other words, we may look at it now one way, but down the line, and then we are party to it, and even though we can opt out of things, the chances of doing that, as we know, are very slim.

I realize that we have said that on military things we are not subject, we have decided on the dispute resolution that those matters would not be subject. The reason I ask that, especially as chairman of the Readiness and Management Support Subcommittee, I have this concern, Admiral Clark, on the low-frequency sonar. The way that the international community is going, maybe the international environmental movement can have a tremendous influence sometimes on some of these international bodies and decides that down the line that sonar is one of those things that

should be outlawed, that the low-frequency sonar should be outlawed, which would be a great detriment to defending our coastline.

The question really is, though, to Mr. Taft: Who decides which of these disputes? Is it Department of State or DOD?

Ambassador TAFT. Senator, on that we like to think that we always reach agreement with our colleagues in the DOD.

Senator ENSIGN. We know that that does not happen all the time. We all know that, and there is great disagreement between Defense and Department of State many, many times. That is why I want to know who has authority.

Ambassador TAFT. The authority would be ultimately in the President.

Senator ENSIGN. The President's hands, right.

Ambassador TAFT. But the DOD would, I think, have the dominant aspect, dominant place in giving him advice as to this was a military activity, and they do military activities, they know what they are.

Senator ENSIGN. Mr. Taft, Ireland brought a complaint against Great Britain recently at the United Nations Tribunal on the Law of the Sea involving a land-based nuclear power plant in Britain. This case, I guess this was completely land-based. As the case is going forward, I guess it raises some points on how far does this, not just the open waterways, but this was clearly not part of the sea.

How far could this treaty affect the United States? Are we talking about the Mississippi River? Are we talking about the Great Lakes? Are we talking about our seaports? How far? Or waters that feed into the Mississippi? How far exactly could one of these tribunals rule that the jurisdiction of the treaty covers?

Ambassador TAFT. I think the treaty covers basically the three phases: the territorial sea and contiguous zone that is outside the land for 12 and 24 when you take the contiguous sea; then out to 200 miles for the exclusive economic zone; and then there are the high seas. It also governs the deep seabed, which of course no one has sovereignty to, but it regulates the way in which the deep seabed can be taken advantage of and provides means whereby companies can do mining there.

Those are the areas that the treaty covers, not internal waters.

Senator ENSIGN. I know my time has expired, but I think this is an important point because, why was this even then taken up?

Ambassador TAFT. As I understand it, the claim of Ireland in that case was that the effluent from the proposed nuclear power plant was affecting the fishing activities in the Irish Sea, and that is their claim. The tribunal—to which, incidentally, we would not be party to; we have not opted for that particular forum, would not opt for that forum. But they will decide that. The United Kingdom I should say takes a very strong position that the Irish claim is without merit.

Senator ENSIGN. But I think it illustrates the point that there are concerns that the creeping jurisdiction—I mean, we are seeing that with all the international courts and the way the international court is starting to work with this organization even. That is where some of us have concerns, is that it is the creeping jurisdiction.

I mean, this is clearly a land-based issue that they are trying to go after based on the effluent, potential effluent to the sea. But this is clearly land-based on Great Britain's land.

Ambassador TAFT. This is the position, I believe, that the United Kingdom is taking. The tribunal is examining it. If it is indeed land-based, having no effect in the sea, then they will throw it out.

Chairman WARNER. Gentlemen, I will have to ask any further dialogue on this be provided for the record.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman. Jurisdiction, Mr. Taft, is a big deal. You have occasionally some rogue judge in the United States invalidating wars and military decisions and Congressional actions, but ultimately most judges understand jurisdiction and if they try to exceed their jurisdiction they fail.

But I am concerned that a court of this nature does not have the heritage and the clarity of understanding of the jurisdiction question as Senator Ensign just raised, and that can cause trouble in the future. Do you dispute that?

Ambassador TAFT. I do not think that we have heard from the court at all on this subject.

Senator SESSIONS. They found they had jurisdiction, did they not?

Ambassador TAFT. They found they had jurisdiction to decide the case, but they have not decided the case. They will decide in the case whether this has something to do with the sea. That is the claim of the Republic of Ireland.

Senator SESSIONS. Surely you understand that once they assert they have jurisdiction they have the power to decide either way they want to.

Ambassador TAFT. No, sir. They have the power to decide correctly.

Senator SESSIONS. But that is a dangerous concept, if we're going to assume all courts decide correctly.

Ambassador TAFT. I do not see that—they have a dispute, the United Kingdom and Ireland. Both of them have agreed that they will be subject to the jurisdiction of this court. That is their agreement. We have not proposed that we would take that approach and we will not take that approach if we become a party.

But if they want to settle this matter as between themselves in this court, I do not see why we should be objecting. We are not going to go that route. We are going to go to an arbitration panel. But I do not see that it really is an objection to the treaty that two parties who are willing to have their dispute settled by this tribunal are before that tribunal. That is the way they have agreed to do it. We are not going to do that.

Senator SESSIONS. How will the arbitration work? I think that is a positive step, but tell me how it works?

Ambassador TAFT. The way in which—what we have selected is that if we are in a dispute that we would prefer to, and it is provided for in the treaty, go before an arbitration panel, which would be set up in the normal way of arbitration panels, where we designate an arbitrator, they do, and there is a third fellow.

Senator SESSIONS. Who selects the third?

Ambassador TAFT. As a rule, that is designated, and I am not sure. I have to provide that. Whether it is the parties——

Senator SESSIONS. Well, it would be the Law of the Sea——

Ambassador TAFT. I am not sure whether it is the parties' representatives or from a panel. I will have to check that for you, Senator.

[The information referred to follows:]

Article 3 of Annex VII of the Convention governs the constitution of Annex VII arbitral tribunals. It provides that, unless the parties to the dispute agree otherwise, a tribunal will consist of five members. The party instituting the proceedings appoints one member, who may be its national. The other party appoints one member, who maybe its national. The other three members are to be appointed by agreement between the parties. They are to be nationals of third states, unless the parties agree otherwise. If the parties to the dispute are unable to reach agreement on the three members to be jointly appointed, they may select a person or third state to make the appointments. As a last resort, the President of the International Tribunal, in consultation with the parties to the dispute, is to make the appointments from the list of arbitrators nominated by the Parties to the Convention, all of whom are required to be persons experienced in maritime affairs and enjoying the highest reputation for fairness, competence, and integrity.

Annex 3 of Annex VIII governs the constitution of Annex VIII "special" arbitral tribunals. (Such arbitration is referred to as "special" because of the particular expertise that panelists are to have for the listed categories of disputes. The United States would select special arbitration for the categories of disputes for which it is available, e.g., marine scientific research.) The procedure for the selection of arbitrators is slightly different from the procedure for Annex VII arbitration. For these panels, each party to the dispute appoints two members, one of whom may be its national. (The ability to appoint two panelists instead of one was considered important for highly technical disputes, where parties might wish to appoint one legal and one technical expert.) The parties by agreement appoint a fifth person to be President of the special arbitral tribunal. If they are unable to agree on the fifth appointment, they may select a person of third state to make the appointment. As a last resort, the Secretary General of the United Nations, in consultation with the parties to the dispute, is to make the appointment from the list of experts nominated by the Parties to the Convention, all of whom are required to be persons whose competence in the legal, scientific, or technical aspects of their fields is generally recognized and who enjoy the highest reputation for fairness and integrity.

Senator SESSIONS. That would be, of course, very important because that would be—the third person decides the arbitration normally.

Ambassador TAFT. In my experience they do have a strong vote, but I have also seen your own arbitrator can have a great influence on it. We would have that arbitrator——

Senator SESSIONS. Will you get me in writing your understanding of that? Would the arbitrators be bound by the decisions of the Law of the Sea Court in making decisions on these issues?

Ambassador TAFT. They would be, I think, referring back to the sources of law, whether it is the convention itself. That would be the main one, and outside of that I suppose they would look to the laws of the states involved, our law and other states.

Senator SESSIONS. Would you not expect they would look to the decisions of the Law of the Sea Court?

Ambassador TAFT. They might look to those.

Senator SESSIONS. Can you say they would not see that as the primary source of any interpretation of Law of the Sea issues?

Ambassador TAFT. I think that they would look at that, but they also have their own mind.

Senator SESSIONS. Mr. Taft, is it not clear that they are going to follow the Law of the Sea Court decisions most likely?

Ambassador TAFT. I do not know in the particular case what the situation would be, whether there are—but it could be. That might very well be to our advantage. We might argue that they should.

Senator SESSIONS. On the PSI, let us see if I can get it correct on this. I appreciate your explanation of that and I think I have it. The question when the President has sought people to join against proliferation, join PSI with us, has not been whether or not you are a member of the LOST; it is are you willing to help us by agreeing to go beyond what you might otherwise be willing to do to help us stop ships and interdict that?

In effect, some people have been reluctant to sign onto PSI. Only 14 have, I believe. Some nations have been reluctant, citing it goes beyond the Law of the Sea; is that not true?

Admiral CLARK. Frankly, I have not researched all of the positions of other nations. My staff tells me there are a number of organizations that want to become part of this. But I think what has been misinterpreted is the potential linkages between PSI and the Law of the Sea and the whole set of authorities.

The point is that I outlined the authorities and this convention does not have anything to do with what, in effect, are agreements between nations that they are going to take on this activity——

Senator SESSIONS. I agree with you on that.

Admiral CLARK.—agreements to search a vessel, agreements to board.

Senator SESSIONS. I agree with you, Admiral Clark, on that. But I do think that as a practical matter we are hearing some complaints that, we signed the Law of the Sea and you are asking us to do more.

Admiral CLARK. If you would, may I provide a response to that for the record? I would be happy to.

Senator SESSIONS. Thank you.

[The information referred to follows:]

I am aware of no country taking the position that it cannot join PSI because it conflicts with the UNCLOS. PSI is entirely consistent with international law, including that contained in the UNCLOS. Some countries have expressed concern that PSI may be inconsistent with the UNCLOS. Those concerns reflect a misunderstanding of PSI and do not take into account the fact that PSI's own rules require that PSI activities be consistent with the Convention and international law. Explanations have been provided to help them better understand that the Convention does not prohibit any activities to be undertaken pursuant to PSI.

Ambassador TAFT. It would be one of the easier cases to make to them that they do not have that problem and we would get them on board promptly.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator ENSIGN. Mr. Chairman?

Chairman WARNER. Yes.

Senator ENSIGN. Could I just ask? It will be a very brief question and they could even provide it for the record, and if you want to comment just briefly. It is the follow-up to the British case, the British and Ireland. Pose it this way. Let us say that we had a President of the United States who was against nuclear power, totally opposed to nuclear power. There were power plants operating under a similar condition where, say, Mexico or another country said the effluent from the Mississippi River was going down, affecting their waterways, affecting their fishing.

We had a President who was opposed to nuclear power, says to his State Department: Go ahead and give jurisdiction. In other words, we want to become party to this, because that President wants to see that power plant closed.

Is it not in fact possible to do that, for a president to do that?

Ambassador TAFT. I am not sure I understand the basis of the hypothetical, Senator. The President wants to close a power plant?

Senator ENSIGN. Yes. Let us say, yes. He cannot do it any other way.

Ambassador TAFT. There would be easier ways for him to do that.

Senator ENSIGN. I did not say there were not easier ways. Is it possible for that to happen? I mean, Britain has agreed, Britain has agreed to the tribunal. We could have a President that agreed to that as well.

Ambassador TAFT. We could have——

Senator ENSIGN. So it would affect territory within the United States, is the point I am trying to make.

Ambassador TAFT. But what you are suggesting is that the President would direct the State Department to lose a case that it could actually win? I do not anticipate that.

Senator ENSIGN. Because it may be something that is the President's ideology.

Ambassador TAFT. I would be very sorry to hear that. But we do not——

Senator ENSIGN. Thank you, Mr. Chairman.

Ambassador TAFT. We have many cases out there and the President never directs us to lose them.

Chairman WARNER. If you wish or desire, amplify the record.

We will now proceed to the next panel. I want to thank each of our witnesses.

Admiral CLARK. Thank you, Mr. Chairman.

Chairman WARNER. I hope that you will have someone remaining behind such that you can be fully informed as to the subsequent testimony that this committee is about to receive.

Ambassador TAFT. Thank you, Mr. Chairman.

Chairman WARNER. We will now have the distinguished Jeane J. Kirkpatrick, American Enterprise Institute for Public Policy Research. Among many, many accomplishments, our distinguished witness is former Ambassador to the United Nations and a member of President Ronald Reagan's cabinet. So we welcome you, Madam Ambassador. [Pause.]

Thank you very much for accepting the invitation to appear before this committee. We will put your entire statement in the record, but you can take such time as you desire to address not only your statement, but such other issues you have heard this morning on which you have another perspective.

STATEMENT OF HON. JEANE J. KIRKPATRICK, SENIOR FELLOW AND DIRECTOR OF FOREIGN AND DEFENSE POLICY STUDIES, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH

Ambassador KIRKPATRICK. Thank you, Senator Warner.

Is this functioning now? Can you hear me?

Chairman WARNER. Very clearly. We thank you. There should be a slight red dot appearing there.

Ambassador KIRKPATRICK. There is not one. That is what concerned me. But as long as you can hear me, that is what matters.

I was pleased to accept your invitation and I appreciate your extending it, and I am willing to testify today because I think I have some experience that is relevant to the issue, namely my experience as U.S. Permanent Representative——

Chairman WARNER. Unquestionably, Madam Ambassador, you have a distinguished record.

Ambassador KIRKPATRICK. As Permanent Representative to the United Nations. I would really like very much to require everyone who develops a position on this issue and proposes it seriously to the U.S. Congress and all of the Congressmen and Senators who are going to act on it to spend a term in the United Nations. That is my proposal for reform.

Chairman WARNER. Then you just lost my vote. I am not going to do that.

Ambassador KIRKPATRICK. We have in fact a program which makes a provision for Senators and Congressmen and other influential Americans to spend a session at least in the United Nations. It is a very interesting learning experience because what it teaches you above all is that the United Nations is a political body. It is as political a body as the U.S. Congress, and it is political in all the same ways that the U.S. Congress is political.

Its decisions are made generally speaking on a political basis, which is not to say that the law does not matter. The law matters a lot and many issues are argued on complex legal grounds. But finally they are settled on political grounds.

I did not even know this when I went to the United Nations actually. But I knew, I knew that it was political in the sense that all the states in the world were represented in it, but I did not know that they reached decisions and interacted so regularly on a highly political basis.

I would like to say that I think I had the privilege of serving with a President, Ronald Reagan, who was more sophisticated about these issues than most people, and because he was more sophisticated about them he arrived in the White House and was inaugurated with some real questions about a number of activities in which the U.S. was engaged with the U.N. and in the U.N., including the LOST.

Let me just say that we were all in the Reagan administration, I think we were all aware of the fact that the U.S. Navy and the military and other branches of our government considered that there were real benefits to be derived from U.S. participation in the LOST and that there were undoubted benefits. But the President also thought that we were enjoying most of those benefits through bilateral and regional agreements on a regular basis.

President Reagan stopped the process, which was already very advanced in fact, of U.S. preparations for accession to the treaty, and he did so because he wanted an investigation. He ordered an investigation and he ordered it to begin promptly, and he set some terms which he insisted be met if the United States was going to participate.

These included that the treaty should not deter the development of seabed mining. That was a very major issue at that time, with very good reason, I might say. But that wasn't the only concern. Someone said that the Reagan administration's only concern was the seabed mining. That is not true. The Reagan administration had other concerns. The President himself had other concerns.

I realize that Davis Robinson, who was the State Department's Legal Advisor during the Reagan years, has provided what looks like a very interesting statement, which I intend to read with care and profit I am sure after this hearing, which was distributed this morning, suggesting that all of the legal experts of the State Department, all of the State Department legal advisors have supported some aspects of the treaty. It is not as sweeping as it first implies. But in any case, I do not doubt that.

But there were already many commitments the United States had made concerning—not commitments; verbal commitments, more or less, arguments maybe more than commitments, that the U.S. had made concerning participation in the LOST before Ronald Reagan was inaugurated.

When he was inaugurated, he immediately called a kind of halt to progress on the treaty until there was an investigation. His concerns were not just for seabed mining, although those were important, but they were also with the decision structure. I might say that my principal concerns on this treaty are with the decision structure which is proposed in the treaty.

The President, President Reagan, insisted that the decisionmaking structure if we were to join it should reflect and protect the economic interests and other interests of contributing and participating states, it should reflect the interests of the participating states, all of the interests of all of the states, and not simply the least developed states, which the treaty and the decisionmaking structure had been, like most U.N. bodies in fact, heavily stacked in favor of, biased in favor of, the least developed, less developed countries.

He also was concerned that it should be, and Judge Clark was concerned too, that it should be susceptible to ratification by the U.S. Senate. They felt that there were constitutional issues of some importance.

The President was concerned about whether the U.S. accession to the treaty would encourage the proliferation of Organization of the Petroleum Exporting Countries (OPEC). OPEC was very important during this period, you may recall. It was exercising a lot of power and seeking to extend its power. He was afraid that the LOST would become an instrument for encouraging and assisting in the development of just such cartels to ensure high prices by controlling interests.

Now, as I understand it the revisions, the 1994 revisions, have affected a number of the critical provisions of the LOST involving the LOST mining, the seabed mining, and to just that extent they may have eliminated the concerns with seabed mining, although as I understand it also the status of those 1994 amendments is legally uncertain. I do not know whether Will Taft or John Norton Moore can tell us what the legal status is precisely of those amendments.

I have heard that the revisions actually have an uncertain legal status, a different legal status than the treaty itself. They are not fully incorporated into the treaty, as I understand it. But that is for the lawyers to decide.

What is clearly the case is that the decisionmaking issues in the treaty are still with us, not in quite as extreme a form as they were in 1981. In 1981 it was the heyday of the Cold War. We were either at the apex or the bottom of the Cold War, depending on how you describe it. It was grim, and the power of the Soviet Union in the United Nations was really incredible. That was because they were so much more skillful than we were in organizing supporters. So they had many aspects of U.N. activity sort of wired and they could get decisions as they chose them.

We have never been able to do that, I might say, in the U.N., even when it was just founded. The United States—I will return to that, but I mention now that the United States is not very skillful at U.N. politics. It is all very well for people who—that is why I would like all of you to go spend a session at the U.N. and be given a responsibility to get a resolution passed. The President of the United States and the Secretary of State tried that about a year ago in the Security Council, where they felt and I felt as I listened to them that they had a very strong case on that second resolution for the Iraqi violations of the ceasefire.

But we also heard France threatening its veto. That is part of the politics of the U.N., too. We know what happened. We know that we did not introduce, quite wisely, did not introduce, did not propose, a second resolution.

The first resolution you will recall, which declared Iraq to be in breach of the ceasefire, was unanimously passed. If procedures had been developed reasonably, a second amendment or resolution might have been reasonably, would have been expected to be passed. But it was so clear, since France announced that they would veto if it included a reference to provision for the use of force, that we did not introduce the second resolution.

The Clinton administration, I might say, which was often thought to be more skillful in the U.N. than the Reagan administration or the Bush administration, did not seek a resolution authorizing the use of force in Kosovo. Why? Because it was understood by the critical people who had the powers of decision that such a resolution would almost certainly be vetoed. It would not be passed. It would be vetoed. So we simply turned in Kosovo to the use of force without seeking acquiescence of the Security Council, the resolution of the Security Council.

That simply is an example of not only the fact that the United States is not often as powerful as we wish we were or as influential and effective as we wish we were in the U.N., but that that is a condition that afflicts both parties and affects very important decisions, like whether we are going to use force in Kosovo, go to war in Kosovo.

I thought the Clinton administration was right, by the way, in both the decision on Kosovo and the decision not to take the resolution to the United Nations Security Council, because it would have been vetoed there.

But I want to emphasize that this political body that the United Nations is is not one in which we necessarily get our way. More often than not, we do not get our way in the U.N., and more often than not we do not get our way because there simply are not enough countries that feel that it is to their advantage to vote with the United States in the United Nations.

That was most dramatically clear in the Cold War, of course. There was a vote on the LOST and the Preparatory Committee (PrepCom) issue, whether or not countries who participated in the Law of the Sea PrepCom should be required to pay the expenses for the PrepCom or the assessed expenses. There was a resolution proposing that the expenses for the PrepCom be incorporated in the United Nations' regular budget, which is assessed to members and which it is generally agreed there is a legal obligation to pay on the part of members. The United States State Department has argued strongly through the years that we have a legal obligation to pay assessed expenses.

That resolution, which was proposed at a time during the Reagan administration, at a time that we were still considering the LOST and accession to the LOST passed against us 132 to 4. Now, think—the United States is not only not politically influential in the U.N., we not only do not have power in the U.N.; we do not have power in a big way. I do not think we are getting many votes like 132 to 4. We got a lot of them during the Cold War.

But today most of the countries are not as tightly committed to bloc voting as they had been. But now bloc voting is just like what happens again in Congress. It is voting by party, and voting by party produces in the U.N. often very lopsided kinds of outcomes.

President Reagan simply asserted that we should not accede to the LOST until the decision structure reflected and protected the interests of the participating states and until we were satisfied that it was subject to ratification by the Senate.

The concern about the constitutional issue, the ratification by the Senate, of course dealt with the amendment provisions of the LOST, which I understand are still yet to be tested, have never actually been invoked, but may be soon. Those provide that any amendment passes, automatically passes, with a two-thirds majority. Now, that may sound like a whopping majority, but the fact is the G–77, that is the organization of the less developed states, itself constitutes a two-thirds majority of the total membership of the Assembly.

So you do not need to be concerned about these issues until you come face to face with them. We have not come face to face with them because—not only because we have not been a member of the LOST organization, but because they have not really been functioning long enough or broadly enough for us to get a very clear idea about how they would work.

The automatic two-thirds majority in an organization in which St. Christopher's and Nevis, I usually say, has one vote and the United States has one vote—you understand that all of the votes in the authority are on the basis of one country, one vote, and all of the votes in the LOST, relevant to it, will be on the basis of one country, one vote.

My own position is that we should never join an organization whose governing decisions will be operating on the basis of one country one vote, because we are hopelessly, overwhelmingly overcome even before there is the possibility of a vote even. There is no possibility of our carrying in such a context.

I think it is important that Congress and that this committee investigate carefully what the current status of the amendments procedure is, whether it is still the case that—it may be that John Norton Moore knows the answer to this—a two-thirds majority is adequate to pass any amendment to the LOST, because that would make pretty shallow any kind of Senate ratification. You can ratify one treaty and if it can be revised and amended by a two-thirds majority, a U.N. majority—General Assembly majority is what it comes down to—you will have to start over again any number of times. What you ratify may bear less and less resemblance to what exists.

Actually, President Reagan and Judge Clark had some concerns about this. President Reagan simply announced that in the Reagan administration he would not move on the treaty. He was quite ready to commit the United States to continuing to fulfill all those provisions of the treaty which we were already fulfilling, such as, with respect to the free passage in straits, international straits, and respect for maritime animals and general respect for the law of the sea as it has been traditionally understood and observed.

The President also felt that we should carefully establish our legal obligations and rights before we acceded to the treaty. He was concerned about buying a pig in a poke, if you will, to use the language of my grandmother.

The end of the Cold War has helped, there is no doubt about that. It has helped the U.N. The U.N. is not stacked in quite the way that it was stacked during the Cold War, against the democracies for example. But it is still a very highly political body in which democratic states constitute a minority and are likely to continue to constitute a minority. I served last year as the head of the U.S. delegation to the Human Rights Commission and that was a commission, you may recall, to which the United States was—from which we were barred, we were not elected, 2 years ago. We ran for election and were not elected.

I may say that, of course, I did not mention but everyone understands that the Seabed Authority will elect a council which will function as a sort of executive of the Seabed Authority, elect a 36-member sort of executive council. That will be elected by that same body that voted against us 132 to 4 a few years back, but it will be elected by them.

As originally foreseen, the U.S. did not have a permanent seat on that executive council, and many of the policymaking functions are vested in the executive council, as I understand it, effectively. We now are guaranteed a seat, but that will be one of 36 seats as I understand it.

This has not been—since it has never been implemented, we do not really know how it will work out, but that is the way it is planned now to work out. It would be a lot better to be guaranteed a seat on that 36-person body than not to be guaranteed a seat, be-

cause otherwise we might lose our seat every few years, as we lost our seat on the Human Rights Commission.

By the way, at the same time that the United States was losing its seat on the Human Rights Commission, Cuba, Burma, Zimbabwe, and most of the world's worst human rights abusers were winning seats on the Human Rights Commission. That is another problem for another day, which is worth the consideration of some serious committee of the Congress, let me say, that the Human Rights Commission is today almost half made up of the world's worst human rights abusers. There are members of the Congress who are concerned about this and who have been thinking hard about it. But we have not solved that problem any more than we have solved the problem of how we can assure that we will get elected to it and, let us say, Zimbabwe will not.

We only get elected if our politics are smarter and more energetic than theirs are. But our politics are usually neither smarter nor more energetic than, say, Cuba's. Cuba is always elected to the Human Rights Commission and it is always treated in a most respectful fashion. It can guarantee that it will be treated respectfully much better than any democracy on the commission.

Anyway, my point I think is rather clear, discouragingly clear. My point is that as far as I understand it many of the serious flaws in the LOST which were considered definitive for President Reagan and a majority of his foreign policy team in fact—not the whole administration, but the majority of the foreign policy team—have been improved by the end of the Cold War actually, but they have not been solved; and even those that have been improved have not been improved definitively. They commit us to positions and situations in which we are likely to find ourselves outvoted, if not 132 to 4, then 36 to 7, as we were a couple of times in the Human Rights Commission last year.

They do not—no one should make a decision concerning the U.S. vesting of additional powers in a U.N. body without very carefully studying the composition, the voting history, of that body, and the plan for dealing with the politics of that body, because that is what we will be doing. Whatever the law says, if the law is the U.N. Charter, it will be susceptible to interpretation and reinterpretation on the basis of the political balance of the governing body. That would be the Seabed Authority.

Now, you can say, well—somebody, I think the CNO said, I think it is important for the United States to be present because if we were not present in some important body then we could not lead. The fact is the United States usually cannot lead in U.N. bodies when we are present. From time to time we get a good hearing. That is what the President and the Secretary of State were trying to do when they took the Iraq issue to the Security Council. Sometimes we do not get a good hearing. Those decisions too are made on political grounds, and our values are not necessarily important to most of the political leaders making those decisions.

[The prepared statement of Ambassador Kirkpatrick follows:]

PREPARED STATEMENT BY HON. JEANE J. KIRKPATRICK

Mr. Chairman, thank you for inviting me to testify today on this important issue which I believe has broad and important implications. Some of these implications—especially those concerning deep seabed mining and technology transfer—have been

the most widely discussed. But I believe the Treaty also raises some constitutional and political issues with broad ramifications and implications, and I continue to think it raises security issues as well.

I hold no position in the United States government today and have no responsibilities in relation to the Treaty. However, I had prolonged and serious dealings with the LOST during my years as Ronald Reagan's Permanent Representative to the United Nations and a member of his Cabinet and National Security Council. I might add that I was also a member of his Commission on Space.

I have been a professor of Government at Georgetown University for most of my professional life. I am now a Senior Fellow at the American Enterprise Institute. I have sought to remain abreast of developments concerning the United Nations. Last year I served as head of the U.S. delegation to the United Nations Human Rights Commission.

Those of us concerned with foreign affairs in the Reagan administration became deeply involved in the LOST which had been under discussion since 1958 and had nearly been completed by the time Ronald Reagan was inaugurated in January 1981. It is accurate to say that the Reagan administration believed that the issues raised by the Treaty were basic and important and that both the political and economic stakes were high. I will share some of our experiences and perspectives because I believe they are also relevant today.

The Treaty begins from the assumption that the seabed and its wealth are part of the "common heritage of mankind" and its benefits should be shared by all, protected against exploitation by any country or group, and administered by the United Nations. In 1968, Resolution 2467 was passed and vested jurisdiction over the Treaty in the "Standing Committee on the Peaceful Uses of the Seabed and the Ocean floor Beyond the Limits of National Jurisdiction." In 1970, the General Assembly voted by an overwhelming majority to convene a conference on the LOST. Negotiations took shape when all parties agreed to the notion of a "common heritage," although disagreements soon emerged between developed and developing countries on technology, sovereignty, and the extent and kind of regulation that should and could be imposed on seabed mining.

Negotiations continued for more than a decade—during which the Treaty came to be viewed as the cornerstone of the New International Economic Order (NIEO) and of the associated efforts to use U.N. regulatory power as an instrument for restructuring international economic relations and redistributing wealth and power. The General Assembly is the institution through which the NIEO operates. It operates on the principle of one country, one vote.

During the decade that the LOST took shape, the basic assumptions of the NIEO concerning the obligations of the "north" to the "south" gained wider acceptance and expanded their influence and scope. The regulatory functions of the U.N. grew and the resistance of the industrialized countries was eroded. Then Secretary of State Henry Kissinger had laid out conditions for U.S. participation in the proposed technology transfer—guaranteeing U.S. representation on its governing body and limiting production controls—but these conditions were ignored and eventually dropped by the American government itself.

By the time Ronald Reagan took office, the LOST was very nearly completed and a final session was scheduled to begin on March 9, 1981, to be completed by the end of the summer. These plans were interrupted when the Reagan administration announced before the session opened that it intended to conduct a full-fledged review of U.S. policy with regard to the LOST and would not be ready to reach its final conclusions by the scheduled time.

The announcement produced both relief and consternation. It should have come as no surprise. The LOST was, and I believe, is disadvantageous to American industry—especially in their participation in seabed mining—and to American interests generally. It should have been no surprise that a pro-business government interested in restoring American power would oppose the Treaty.

Viewed from the perspective of U.S. interests and Reagan administration principles, it was a bad bargain. However, the LOST promised some things that Americans wanted very much: a commitment to freedom of navigation, territorial limits set at 12 miles, establishment of economic zones of 200 miles, and protection of navigation rights of all through international straits. The U.S. also regarded as positive the certain international agreements protecting marine mammals and migratory species. These protections were especially welcome at a time when a good many countries were arbitrarily extending their territorial claims over straits and vital sea lanes. But the Reagan administration believed that the cost was too high, especially since most of these benefits had been or could be achieved through bilateral agreements or through existing organizations such as the Intergovernmental Marine Consultative Organization of the U.N. Environment Program (UNEP).

The LOST establishes a sweeping claim of jurisdiction over the seabed and all its mineral wealth. It creates an ISA in which it vests control of two thirds of the Earth's surface. Under the LOST the power of the Seabed Authority would be vested in an Assembly made up of all participating states and an Executive Council of 36 members elected by the Assembly to represent investors, consumers, exporters of affected minerals, developing states, and all the geographical areas of the world. The formula for representation guaranteed that the industrialized "producer" countries would be a permanent minority. They would have a majority of obligations. Most importantly, votes of the Assembly would be on the basis of one vote/one country, with a two-thirds majority binding on all parties.

A company desiring to get a contract for seabed exploration would be required to identify two promising sites, one of which would be claimed by the Authority to mine itself or to otherwise dispose of, the other of which may be given to the company. The company would be required to provide its technology to the Authority, which would also be provided to members with the capital necessary for mining. Special taxes would be imposed and special care would be taken to protect existing producers of minerals against competition from minerals available in sea. Worst of all, there was no guarantee that qualified applicants ready to meet these requirements would be granted permission for mining.

Certain consequences of the LOST seemed wholly predictable:

- It vested control over seabed mining in countries that do not possess the necessary technology.
- Its governing structure guaranteed a permanent majority to the less developed countries of the G–77.
- It burdened companies who would be interested in mining with unusual costs and obligations and provided various permanent advantages to their competition. Private companies would bear the expense of developing technology, of prospecting, of paying taxes. The authority would bear none of these. Moreover, the private company would be required to sell its technology to buyers and at prices determined by the authority. The duration and extent of the mining rights would be determined by the authority.
- These regulatory powers would protect markets and prices from the competition of seabed mining.

From the Reagan administration's point of view, the most disturbing aspect of the LOST was the structure of decision making. We felt the U.S. role in decisions should reflect our political and economic interests in the Treaty and our contributions to U.N. operations. The G–77 was determined to treat all nations alike, and the U.S. as one nation among 180. We were not guaranteed a seat on the 36 member executive council. All questions could be decided by a two-thirds majority vote in the Assembly. Any aspect of the Treaty adopted by consensus could be amended by a simple two-thirds vote. Thus, the G–77 which constitutes two-thirds of the members could change any aspect of a meticulously negotiated convention.

President Reagan outlined six concerns which needed to be addressed to make the Treaty acceptable to the U.S.: the most important of these were that the Treaty should not deter development of seabed mining; that its decision making structure should reflect and protect economic interests and contributions of participating states; and that it should be susceptible to ratification by the U.S. Senate.

OPEC had stimulated a broad desire for cartelizing other needed mineral products. The LOS Treaty would become an instrument for assisting in the development of such cartels to insure high prices by controlling supplies.

The G–77 was unwilling to accommodate basic American concerns. Bangladesh's representative Imam UL–Hak spoke for the Group of 77 of which he was chairman. He reproached the Reagan administration for delaying proceedings asserting that "the U.S. is overly preoccupied with the extension of the Assembly's power." The G–77, he underscored, "has consistently rejected the concept of veto, weighted voting, or voting by chambers." He chided the U.S. for seeking unequal power. He utterly ignored the unequal contribution the U.S. would make because of its advanced technology. In short, Ul-Hak explicitly rejected each of the Reagan administration's concerns. No concessions would be made. Basically, the G–77's position was that the U.S. could take it or leave it. There were a good many influential Americans who thought we should take it.

But not at top levels of the Reagan administration. An Interagency Senior Advisory Group on the LOST was convened in which most departments were represented, including State, Defense, Commerce, Transportation, Central Intelligence Agency (CIA), National Security Council (NSC), Treasury, Energy, Office of Management and Budget (OMB), Interior, and White House staff. Their conclusions were reported in a memorandum of March 4, 1981:

1. The LOST was unacceptable;
2. Both the Treaty and the U.S. delegation must be closely examined;
3. An immediate review must be undertaken;
4. The existing delegation must not preempt the administration's options.

To this end the decision was made to issue written instructions to the delegation, other nations were to be informed of the review, a new Ambassador to LOST should be appointed, and to insure fidelity to the administration's orientations, it was recommended that consideration be given to replacing several high ranking members of the U.S. delegation.

The administration did not really want to "dash the hopes of mankind," which they were often accused of. But on the other hand, it did not want to make it impossible for humans to utilize the minerals of the ocean floor. It didn't want to discourage the development of technology for seabed mining. It didn't want to encourage the development of new cartels. It didn't want to agree to revolutionary doctrines of property. The notion that the oceans or space are the "common heritage of mankind" was—and is—a dramatic departure from traditional Western conceptions of private property. Most members at upper levels of the Reagan administration were reluctant to put our foot on that slippery slope. But there were a good many Republicans as well as Democrats who thought it important for the U.S. to continue to participate in negotiations.

An influential bipartisan group urged full support and constructive participation in the LOST Conference. They argued that the Treaty would serve U.S. foreign policy interests, promote the rule of law, friendly relations among states, and the peaceful settlement of disputes. Today, their heirs still believe the treaty will guarantee these benefits.

No American commentator denied that the provisions concerning seabed mining were prejudicial to industrial nations, but they believed we should go along anyway. Many of the strongest proponents of the LOST believed that new global institutions were needed to deal with the global interdependence which they thought characterized the contemporary world. They would have preferred guaranteed U.S. representation on LOST governing bodies and some sort of veto, such as that possessed by the five permanent members of the Security Council or a rule of consensus which gave all an effective veto power. But they thought we should settle for the treaty as it was.

The Reagan administration also saw serious constitutional questions. How could the constitutional requirement that treaties be ratified by the Senate be met if the contents of the agreement could be altered by a two-thirds vote of the members? This provision for easy amendment by an Assembly majority made the Treaty an open ended commitment. Henceforth, the United States would be bound by what two-thirds of the Assembly said we should be bound by. That is, we would be bound by decisions of the G–77, a prospect that could not but appall anyone who had taken a good look at decisions and policies endorsed by the G–77 in those years.

Decisions were made by consensus inside the G–77, but the G–77 rejected application of the same principle for decision making in the LOS Assembly. The operation of the rule of consensus inside the G–77 guaranteed that the interests and needs of individual G–77 members would be taken into account, but there would be no parallel institutional arrangement to take account of the interests of developed nations.

In the view of the Reagan administration, U.S. concerns rested on experience and taxable interests. The Treaty proponents' case rested on hopes—that the LOST would enhance international peace by advancing international cooperation and a sense of obligation that we should do what a majority of nations asked of us. Among Democrats, liberal Republicans, and within the Department of State, these feelings were strong enough to delay a U.S. decision on the LOST for nearly 2 years. Then the U.S. decided not to participate in the PrepCom conference. That decision not to participate in the PrepCom conference confronted us with another decision of importance for U.S. policy vis-a-vis the U.N. system. The General Assembly voted 132 to 4 on a resolution that judged the costs of the LOST PrepCom as falling under the general U.N. budget.

This confronted the U.S. with another, immediate decision.

To pay or not to pay the assessed share of the expenses of the PrepCom conference in which the U.S. would not be participating? As usual, the issue was more complex than it seemed. At the heart was the question of U.S. financial obligations under the U.N. Charter and international law. Is the U.S. required to pay all charges assessed by the U.N.? Is failure to do so a violation of international law?

Some opinions outside and inside the State Department held that failure to pay the assessed portion of the budget constituted a violation of our obligations under the U.N. charter and therefore would be illegal. A bipartisan majority of Congress,

however, had passed a law which the President had signed on authorizing withholding a U.S. contribution to any expenditure whose principle purpose was to aid and abet the Palestine Liberation Organization (PLO) and Southwest Africa People's Organization (SWAPO), which regularly claimed the right to pursue their political goals by force. Some believed we were legally bound to do whatever a U.N. body decided. However that interpretation was not the only one.

The International Court of Justice in the Certain Expenses Case, however, had held that an assessed expense was not automatically valid. To create collective obligation to pay, the expense must be legitimate. Legitimate expenses were those necessary to the implementation of the fundamental principles of the U.N. Charter. Only essential activities tied to the U.N. Charter's fundamental purposes created an obligation. The grounds cited by the State Department's legal advisor in 1982 for withholding U.S. contributions to the PrepCom was the relation of the LOST PrepCom to the U.N. Charter. The PrepCom was not created by the General Assembly or the Security Council and was not answerable to the U.N. It was "established by a treaty regime separate from the U.N. Charter." Therefore, he concluded, "a good case can be made that the LOST PrepCom expenses are expenses of a different entity, not lawful expenses of the U.N. within the meaning of the Charter and thus not properly assessable against non-consenting members. That was a relief.

The fact that the expenses of the LOST PrepCom were so readily increased under the U.N. program budget—and by that vote of 132 to 4—illustrated the realism of the U.S. concern about our relative isolation in the U.N., and also about a new trend in the U.N. policy toward defining extraordinary expenses into the U.N.'s core budget. This redefinition is an easy solution to the problem of financing activities for which it is difficult to secure voluntary contributions, and as usually, entails little or no cost to the majority voting to add on expenses.

The decision of the U.S. not to participate in the LOST seems to me even better today than when it was made. There has been time to observe the decline of OPEC and the benefits of that decline, time to experience the cavalier fashion in which the G–77 is ready to impose obligatory burdens on developed countries, and there has been an opportunity to see that when the U.S. declines to go along with a scheme that is incompatible with American interests but beloved by the global establishment, the sky does not fall.

The LOST was the first of a number of issues in which the Reagan administration's convictions and electoral commitments contradicted the orientations of the liberal establishment that is dominant in much of our society. It has proved more difficult to affect the objectives of American policy than reported in standard descriptions of policy making in a democracy.

Of course, important events affecting the Treaty have occurred in the years following the Reagan administration and modifications of the Treaty have taken place. But the modifications have not been major. The Treaty is fundamentally the same. On October 7, 1999, President Clinton transmitted to the U.S. Senate the 1982 UNCLOS and the 1994 Agreement relating implementation of Part XI of the Convention. On November 16, 1994, the treaty entered into force but without accession by the United States.

The most important modifications of the Treaty dealt with seabed mining. They specifically assert that the provisions dealing with mandatory technology transfer "shall not apply." These mandatory provisions are replaced by a set of general principles on technology transfer. Modifications also eliminate some of the competitive advantages of the Enterprise, and the terms on which it becomes operative. These amendments are obviously desirable, but they do not address the basic structure or consequences of the Treaty.

I have read much of the discussion of the Treaty and I regret to say that I remain concerned that its ratification will diminish our capacity for self government, including, ultimately, our capacity for self defense.

Chairman WARNER. I think that point is very clear.

Ambassador KIRKPATRICK. I hope so.

Chairman WARNER. Would you have the opportunity to take a few questions?

Ambassador KIRKPATRICK. I would be happy to.

Chairman WARNER. Fine.

Would you like to lead off, Senator?

Senator INHOFE. First of all, Madam Ambassador, thank you so much. You have been a hero of mine for a long, long time and I appreciate it so much.

I think you have really come through loud and clear. I took the opportunity to read your statement before you came in and you have really covered a lot of things that I was not sure you would be able to cover. I think the main thing is that the U.N. is a political body and that is so important for people here to understand. The interests that they have in the membership of any of these sub-groups do not always coincide with our interests.

Ambassador KIRKPATRICK. To put it mildly.

Senator INHOFE. Let me just mention, it is my understanding under the LOST the International Seabed Authority will require high-resolution sonar images and graphics in order to stake a claim on part of the continental shelf beyond the 200 nautical miles. Now, we are talking about the oil industry is now behind this because they feel they are going to be able to do something they cannot do today, and you heard me say the concern that I would have for them if they made this investment and all of a sudden there is an opt-out.

Ambassador KIRKPATRICK. Right.

Senator INHOFE. But these images that they take, in order to stake a claim they have to do these things. This is not optional. This is required. They contain critical information about the coastline of the United States, such as potential submarine routine schemes, and assist in locating potential locations for underwater sensors used for the monitoring of the movements of our commercial and military ships.

Any country that is a party to this has total access to all that information. Does that concern you, that we would be exposed to countries who would use that for their purposes and yet we would be required to share that information with them? I might add, it is not something government could stop because this is the private sector doing it.

Ambassador KIRKPATRICK. Right. Senator Inhofe, that concerns me very much. It really concerns me very much, just like there are aspects of proposals concerning space that concern me a lot, too.

Senator INHOFE. Then that is the other thing I was going to mention. You heard me ask the previous panel the question, and I can read it right here: Ships and aircraft while exercising the right of transit, and so forth. Yet no one is talking about that. I think the response I had—and I do not say this critically—by Mr. Taft was: It is an opportunity, it is something that we can use. But to me it goes beyond just the Law of the Sea. It is the law of space, it is the law of the air.

Does that concern you, the ambiguity of this?

Ambassador KIRKPATRICK. Absolutely, and it concerns me, I was really quite surprised when I looked in more detail than I had at the amendments and revisions that have been made to the treaty. I was surprised that they were as few, as limited as they are. I thought that the treaty had been more significantly altered from its 1982 status.

Senator INHOFE. In the 1994 round?

Ambassador KIRKPATRICK. Right, right, right. Before I looked at the 1994 revisions. I realize that, while those revisions I think are welcome and desirable, they are—most of the treaty is just as it was. I can assure you that the treaty may not be getting much at-

tention as it passes, makes its way through the Senate today. This committee and one other as I understand it have held serious hearings on it. But the treaty got a great deal of attention in the first Reagan administration and the President and Caspar Weinberger, whom you should perhaps try to call here in the committee, had deep reservations about it. We all did, as a matter of fact, and Judge Clark did, and we felt that there were commitments involved in the treaty, in accession to the treaty, which would be profoundly adverse to the United States's interests in fact, profoundly so, because of our perpetually weak political position in the U.N.

Senator INHOFE. Mr. Chairman, I really believe that Ambassador Kirkpatrick has just been an excellent witness, and I have no further questions.

Chairman WARNER. I share those views. I would like to ask one question. I think you made a point very strongly, and I go back to the letter signed by all of the legal advisors of the Department of State. You made reference to the Honorable Davis R. Robinson.

Ambassador KIRKPATRICK. I just barely scanned it. I just got it while I was sitting here.

Chairman WARNER. Well, that is all right. Then you note that Abraham Sofaer—you remember him——

Ambassador KIRKPATRICK. Right.

Chairman WARNER. I was here all during that period and dealt extensively with those two distinguished gentlemen. But I think your point comes to the following sentence in this letter: "In addition, the United States will have a permanent seat on the governing council of the ISA, where consensus is required for the approval of all regulations, including those dealing with financial matters."

Now, that is one of the areas in which you feel that we just will not have sufficient votes, I suppose?

Ambassador KIRKPATRICK. That is probably the biggest single revision, reform if you will, of the seabed mining provisions as I understand it from the 1982 treaty. It is so sweeping that I find it hard to believe that they mean it, frankly. But maybe they do.

That is another aspect of U.N. operations. They use language in a much more sweeping way. I testified against several U.N. treaties before Senator Biden's committee and he said to me one day on one occasion that he thought I really just opposed U.N. treaties. The fact is I do tend to oppose U.N. treaties, for very good reasons, one reason being that the United States when we sign a treaty we take it seriously and we seriously try to implement all the commitments that we make in signing the treaty, but a very, very, very large portion of countries signing U.N. treaties just do not view treaties that way.

I always think of Iraq sitting on the governing body of the International Atomic Energy Agency (IAEA) during the first Gulf War as an example of the seriousness of U.N. treaties. That is what I have to say.

Chairman WARNER. I thank you, Madam Ambassador. I join my distinguished colleague in expressing profound respect for your many, many accomplishments and your contribution today on this important issue. So we will proceed to our third panel at this time, and I thank you very much.

Ambassador KIRKPATRICK. Thank you.

Chairman WARNER. We will have the Honorable J. William Middendorf II, former Secretary of the United States Navy; Professor John Norton Moore, University of Virginia Law School; and Rear Admiral William J. Schachte, former Judge Advocate Corps, United States Navy. [Pause.]

Secretary Middendorf, I have waited 26 years for this moment. We were in the Navy secretariat together. We worked together. You stepped up to become the Under Secretary and then when I moved on to run for the Senate you stepped into the Secretary's office, and you handled yourself with great distinction, and I just cherish the long memories that we had together in those tumultuous and difficult days of the closing years of the war in Vietnam.

I thank you for your long and public distinguished career, distinguished career in public office, and for your willingness to appear here today.

I think I could say the same of you, John Norton Moore. We have known each other about the same period of time. How many years have you devoted yourself to the law regarding the oceans?

Mr. MOORE. About 3 decades, Senator.

Chairman WARNER. About 3 decades.

Admiral, I expect we crossed paths somewhere, although you were——

Admiral SCHACHTE. Yes, sir, we have.

Chairman WARNER.—wise to stay out of my path in those days. [Laughter.]

Admiral SCHACHTE. It was difficult, sir, yes. I have spent about 20 years in international legal and LOST matters, sir.

Chairman WARNER. Gentlemen, thank you for coming today and thank you for exercising your patience while we have gone through these two panels, important testimony from both panels. Now we will open up, Mr. Secretary, with your views.

STATEMENT OF HON. WILLIAM J. MIDDENDORF II, FORMER SECRETARY OF THE NAVY

Ambassador MIDDENDORF. Thank you so much, Secretary—I call you "Secretary" because I look back 30 years ago and you were our most distinguished Secretary——

Chairman WARNER. Oh, no, no, no.

Ambassador MIDDENDORF.—and did a fantastic job. I think you have been a little understated today because, as I recall, you traveled to Moscow and negotiated with the Soviet Union at a critical moment in the Cold War——

Chairman WARNER. That is true.

Ambassador MIDDENDORF.—the LOST.

Chairman WARNER. The Incidents at Sea Agreement.

Ambassador MIDDENDORF. You were one of our great secretaries.

Chairman WARNER. Thank you.

Ambassador MIDDENDORF. It is a pleasure to be here.

Chairman WARNER. You likewise, my good friend. We will put all of your statements into the record.

Ambassador MIDDENDORF. Put that one in, anyway.

Chairman WARNER. In the hope you can summarize and leave some time for some questions.

Ambassador MIDDENDORF. Okay. I did submit a lengthy report for the record. I am going to talk a little more about process. Jeane was so great in talking about the political ramifications of joining up with a political body like the United Nations, where they have certain authority over us with teeth in it.

Mr. Chairman, it is an honor to have the opportunity to testify before this distinguished committee on the matter of Senate advice and consent. I emphasize the word "advice" because too often the Senate sometimes approves, consents to a treaty, but I think that if there ever was a time when advice was needed from the Senate this is it. It is an extremely important power that the Senate has on the question of advice and consent.

I look back for a moment that this treaty—Jeane Kirkpatrick and I both 21 years ago, I think, both testified against this treaty. So I just dusted off my 21-year-old paper, changed the date, in a sense. No, that is not quite true. The ISA rules have been changed and there have been some strengthening advantages here, and the Cold War is over. The U.N. actually is less socialistic, you might say almost semi-communistic, than it was 21 years ago. But it still is full of faults, as Jeane pointed out, and I have a lot of reservations about grade creep and our opportunity from a military point of view to opt out of some of these provisions, and I will cover some of those.

At the moment we operate freely in the customary international mechanisms of this treaty. It has been discussed that there are certain trends among states to restrict our maneuvering space and we should be inside the tent. That is true. It is always an advantage to be inside the tent, I guess, most of the time, but when you are inside the tent as one of 36 and we saw that even having veto power, as we had in the Security Council, it did not necessarily mean that we could have our way with the recent vote in the United Nations. We did not win that. Our veto was not—when France decided to threaten a veto against us on Iraq.

I have four problems with the convention. State sovereignty is number one. The convention establishes open-ended procedures for administering its myriad provisions that could lead to negative outcomes for the U.S. and that are all but impossible for us to predict by simply reading its text. It cedes power to international authorities that are unaccountable and whose behavior individual states cannot control or predict. If the U.S. became a participant in the treaty, it may regret it in the years to come.

Proponents of the treaty acknowledge the far-reaching political and legal ramifications of adherence to the treaty. One of the greatest juridical minds in America, John Norton Moore who sits here with us today—I must say, I go back too so many years in the State of Virginia with this great man. It is just overwhelming what he has done for our country.

But he testified last October before the Senate Foreign Relations Committee that—and this gives me pause and it might give some of us pause. He said: "This is one of the most important law-defining international conventions of the 20th century." Good God. That is quite an assertion.

While wrapped in language promoting the rule of law and international relations, in reality it represents the establishment of the

rule of law over sovereign states more than establishing a rule of law made by them.

There are tremendous advantages that have been given to the Navy, the right of passage and what have you, in this program, but there are also issues of sovereignty that we have to look at.

The second issue concerns the convention's bias in favor of redistributing global economic resources. Now, those terms were written back in the 1970s when socialism was the thing, and let us transfer all of our wealth to everybody else because we are the guilty ones because we have cash money. I recognize that things have changed substantially in the U.N. and in the body politic. We have seen privatization and free enterprise developing throughout Latin America. Sixty percent of all the industrial production of the states down there back in the time when I was Ambassador to the Organization of American States (OAS) were owned by the government, resources owned by the government. Now most of them have privatized and free market principles, Hernando de Soto ideas, have spread throughout Latin America.

We have seen that all over Europe too, although I still feel labor rigidities and there are a whole lot of socialistic programs there that are encumbering them. Africa—I just came back from Kenya. They are making efforts, although small, to privatize and have more freedom. It is a pretty sad situation still. We have seen Asia expand and have free enterprise and a lot more democracy and what have you, in even Vietnam.

So I have to admit that the changes are much more beneficial to our concepts than they were. But specifically, article 140 of the treaty, which I would ask this committee to consider amending, states that "All activities outside the jurisdictional waters of individual states be carried out for the benefit of mankind." That is still in there. That is a horror story. I remember talking to President Reagan about that. Just none of us could take that concept.

"Taking into particular consideration the interests and needs of developing states." That is pure socialism.

It is unclear why the United States should accept a treaty that is so explicitly biased against its interests when it comes to access to resources.

Third, the third point I make, is the convention contains an ill-advised revenue-sharing provision that is applied to income derived from oil and gas outside the EEZ. The U.S. will be forced to pay a contribution to the International Seabed Authority (ISA) created by the treaty based on production, a percent of production. By any reasonable definition, this provision would allow a U.N.-affiliated international authority to impose a tax directly on U.S. economic activity. To my mind there is no other precedent in any treaty we have signed in the world until now.

Proponents of the convention argue that this revenue-sharing is well below royalties they pay elsewhere. I know some of the mining companies say that. But I recall the debate in 1913 that, reading about the debate in 1913, that the income tax—it was represented to the United States Senate, this body, that the income tax would never exceed 1 percent.

Finally, the convention poses a significant risk to national security, and I would like to get into the core of this. Will Taft and

Mark Esper both testified on behalf of the administration before the Senate Foreign Relations Committee last October that the mandatory dispute resolution mechanism could be used by states unsympathetic to the United States to interrupt its military operations, even though such operations are supposed to be exempt from the mechanism.

They pointed this out as a flaw in the treaty. This is because it is unclear by the terms of the treaty what activities would be defined as "military," as we heard today. While the administration believes it would be up to each state party to determine for itself what activities are military, it is uncertain enough about the issue that it is recommending that the United States submit a declaration reserving its right to determine which activities are military—the whole question as to the opt-out provision.

Unfortunately, it is not at all certain that a declaration will suffice to protect vital U.S. national security interests. The whole opt-out question is open to dispute. Other states may choose to accept or ignore the declaration and take action to interdict our ships or planes in the EEZ. We saw this from China a couple years back.

In this context—and we heard Senator Sessions today ask a question—a future administration may accept the jurisdiction of a tribunal and be surprised if precedent-setting decisions go against U.S. interests or, for example as in the Irish dispute, England could accept jurisdiction of a tribunal assuming its cause is very just, and of course it is just, and then suddenly find out, as Jeane Kirkpatrick pointed out, that the United Nations is a political body and they decide to do a number on Britain, and there is a precedent-setting decision made which could, like all court decisions, like the court decision in Massachusetts recently banning—creating the opportunity for civil marriages, I believe it was, or what have you, becomes the law of the land or it becomes a precedent for others.

John Norton Moore could explain better than I can or perhaps rebut this. But it becomes a precedent under which we might be bound in the future, even though we are not members—even though as members of this body.

Furthermore, in the future—and this is another question on the opting out business. In the future the Navy may recommend that the U.S. reject a claim of jurisdiction for a tribunal, but future civilian authorities trying to make a point on nuclear power or what have you, as was pointed out, may recommend that the U.S. reject a claim of jurisdiction for a tribunal—but future authorities both inside and outside the DOD may overrule the Navy.

In other words, it may be that someone may say, well, sure, we have been arrested for, we have been caught for, stopped for drunk driving, but we are not going to take a breathalyzer test. Then someone might say, well, let us take a breathalyzer test, our cause is so just, and they might be surprised if the results go against them, for example, in the future.

It may be that if we think our cause is so just we will take it to court, and we may be surprised at the results in the court. If the court goes against us, and we know that they are political bodies that are not amicable to our cause, in the future it may well be that we will have a precedent there that will bind us forever more.

The rules of the Senate codify the power to advise, not just consent. So I have three recommendations: One, strike article 140, which establishes the philosophical principle in the convention in favor of redistributing resources from developed countries to developing ones;

Two, strike article 82, which establishes the revenue-sharing mechanism for the exploitation of resources in the outer continental shelf;

Three, amend the provisions of part 15 to codify within the treaty what the U.S. hopes to achieve regarding exclusions from dispute settlement procedures through the adoption of a declaration. That is that whole opt-out question that I had.

With revenue capabilities and mandatory dispute settlement mechanisms, all bureaucracies and courts are subject to grade creep. There has never been a case when they did not. The LOST, like the seemingly innocent European Coal and Iron Community in the 1950s, is a modest step towards the creation of an international sovereign authority unchecked by the governed, but it is a significant one. Given that modern states, including the one envisaged as a united Europe under the European Union, are a product of a combination of small steps, the UNCLOS poses a similar danger to U.S. sovereignty.

I remember first of all the Iron and Steel Community started as a small step, a few members of the staff, and they said it would never grow. It was passed. Then Mansoldt, a friend of mine, set up the Common Agricultural Policy, a Dutchman, and the Common Agriculture Policy had teeth in it and it meant a big subsidy for the French and it also had huge subsidy powers, the carrot and the stick approach, and the whole European Economic Union came out of that.

Then step by step—I remember Lord Cofield, sitting down with Lord Cofield when he came down from—Margaret Thatcher threw him out, more or less threw him out of the cabinet up in Britain, and it was supposed to be an afterthought to give him a job down at the European Union, European Economic Community it was called in those days. I was his colleague. I was an Ambassador there at the time, and I sat down with him and we went over those 100 points that he was going to draw up, that would have to be ratified by the various countries unanimously and then that would lead one to the European Union. It gave teeth to the European Union.

Jacques Delors and Lord Cofield pushed it through and made it succeed, and the European Union emerged as an organization with great teeth. France and Germany have become provinces of that union. Now we see today a bureaucracy unparalleled on the world scene.

If you go to the Berlemont today, you will find bureaucrats coming out of your ears, making new regulations on whether you can shoot blackbirds or shoot crows on your English property or the color of labels on cans and what have you. The bureaucracy works night and day.

The people of the United States are depending on the Senate to protect the sovereignty of this state. I think the treaty should be amended. We dodged the bullet on the International Chamber of

Commerce (ICC) recently. I do not see a whole lot of difference here. That was a body that could have given us a great deal of trouble—it had teeth in it. The Kyoto treaties, which Admiral Lohr and Jane Dalton of the Navy were heroes really in blocking and helping do the legal work on the ICC, blocking that.

I think the treaty should be amended or rejected, and this is I think a very significant thing that we should be doing. Thank you, Senator.

[The prepared statement of Ambassador Middendorf follows:]

PREPARED STATEMENT BY HON. WILLIAM J. MIDDENDORF II

Mr. Chairman, it is an honor to have the opportunity to testify before this distinguished committee on the matter of Senate advice and consent to the ratification of the UNCLOS.

Those who founded our Nation recognized the power to make treaties is an extremely important power. In their wisdom, they sought to ensure that treaties would serve the national interest by dividing that power between the executive branch and the Senate. Article II, Section 2, of the Constitution states that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." Further, Article II establishes a two-thirds voting requirement for the approval of treaties by the Senate. Clearly, they intended to place the burden on the proponents of a treaty to demonstrate its value to the United States. The far-reaching provisions of the treaty that is the subject of this hearing amply demonstrate why the Nation's founders divided the treaty-making power. There are compelling reasons why the Senate should take the time and care necessary to review this treaty and understand all its implications.

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

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

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

MYRIAD PROBLEMS

The Convention has a variety of problems. This is not surprising given that the treaty takes up more than 150 pages. What is surprising is that even the proponents of the treaty both inside the administration and outside it have publicly acknowledged a number of the dangers associated with several specific provisions. Prior to any vote by the Senate to consent to the ratification of the Convention, all senators should fully understand the dangers posed by these provisions. They should not, however, stop there. Senators need to take the additional step of understanding each of these provisions in the context of open-ended and in some instances compulsory dispute settlement and other procedures, over which the U.S. will only have limited control and that could produce adverse outcomes that are all but impossible to predict. The following represents four general shortcomings of the Convention:

Problem #1: Loss of Sovereignty

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

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

Proponents of the Convention acknowledge the far-reaching political and legal ramifications of U.S. adherence to the treaty. University of Virginia School of Law Professor John Norton Moore, a supporter of the Convention who testified before the Senate Foreign Relations Committee on October 14, 2003, stated that he sees it as a means for fostering the rule of law in international affairs. In fact, he states that adherence to the Convention is "one of the most important law-defining international conventions of the 20th century."

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

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

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

Problem #2: Unnecessary limitations on the exploitation of resources.

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

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

Problem #3: A step in the direction of international taxing authority.

The Convention contains an ill-advised revenue-sharing provision that is applied to income derived from oil and gas production outside the EEZ. The general bias in the Convention, as I indicated earlier, is in favor of the redistribution of seabed resources. This bias is codified in the area of oil and gas revenues. The U.S. will

be forced to pay a contribution to the ISA created by the treaty based on a percentage of its production in the applicable area beyond the 200-mile limit.

While he asserted the argument against this revenue-sharing provision was unconvincing, State Department Legal Advisor William H. Taft IV acknowledged it was an argument that could be made in the course of October 21, 2003 testimony before the Senate Foreign Relations Committee. Mr. Taft understates the problem. By any reasonable definition, this provision would for the first time allow a U.N.-affiliated international authority to impose a tax directly on the U.S. for economic activity. At least, I am unaware of any precedent for this kind of international taxing authority.

Shoring up the state system, as recommended by former Secretary of State Shultz, means that international institutions should be funded by the voluntary contributions of their member states. The extent to which these international institutions are allowed access to independent streams of revenue is the extent to which they will seek to obtain governing authority at the expense of the state system. While the revenue-sharing provision related to oil and gas production in the Convention is a relatively modest step in this direction, it is still a step in the wrong direction.

Problem #4: Unnecessary Risks to National Security.

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

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

The Senate has the power to advise as well as consent. The four general shortcomings with the Convention that I have described are derived from a longer list of specific shortcomings in a variety of the specific provisions it contains. There are more concerns that I have not detailed here, not the least of which is a simplified treaty amendment process that raises constitutional questions.

In recent years, the Senate has paid more attention to its role in consenting to the ratification of treaties and less to its power to advise the executive on their content. The rules of the Senate codify this power, in part, by allowing Senators to offer substantive amendments to the text of a treaty. If ever there were a case for the Senate to reclaim the full measure of its power to advise, this is it. I believe that senators who conclude there are shortcomings in the substance of this treaty should not hesitate to propose amendments to the text of the Convention if it comes before the full Senate. Clearly, it is preferable to resolve these shortcomings now over letting the Convention come into force for the U.S. and hope they do not prove injurious to U.S. interests.

CONCLUSION

The UNCLOS is a modest step toward the creation of an international sovereign authority unchecked by the governed. Nevertheless, it is a significant one. Given that modern states, including the one envisioned for a united Europe, are the prod-

uct of a combination of just such steps, it is one the United States should not be taking. Further, the treaty contains a number of specific provisions in such areas as regulation, energy, the environment, national security, and constitutional law that are deeply troubling.

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

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

Chairman WARNER. Thank you very much, Mr. Secretary.

Professor Moore.

STATEMENT OF PROFESSOR JOHN NORTON MOORE, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. MOORE. Chairman Warner, my congratulations to you on holding these important hearings. Like Ambassador Middendorf, I go back long enough that I remember some of the wonderful leadership you have provided for U.S. oceans interests. You were head of the delegation that negotiated the Incidents at Sea Agreement that was really a path-breaking one for many countries, done in 1972; and your work as the special representative of the SECDEF in the early negotiations on this treaty that you now have before your committee.

I have felt that throughout your career you have understood and fought for a preeminent United States Navy and American leadership in the world's oceans second to none. So it is a very special pleasure to be here today.

Chairman WARNER. Thank you, Professor. It is very thoughtful of you.

Mr. MOORE. Since you have kindly put my prepared statement in the record, if you do not mind, Mr. Chairman, I think it might be more useful if I rather extemporaneously respond to a number of the concerns that have been raised, things that I regard as misunderstandings about the treaty. But first, before I mention what those might be, let me just say very briefly that I believe the core issue here is just how strongly important this treaty is in the security interest of the United States.

It is particularly fitting to have this hearing before this committee because that is really the fundamental issue of concern in the overall treaty. It is of great importance and enduring importance. I had the great privilege of chairing the 18 member interagency and cabinet group that prepared United States negotiating instructions under Presidents Nixon and Ford. At that time, and it has come down all the way to today, what is really at stake in the LOST is our naval mobility, and this treaty is an extraordinary win for the United States in protecting that naval mobility.

So I thought that the statement of Admiral Clark and the statement of Will Taft were right on point and just superbly done. But I will not go through those points again, Mr. Chairman. I think you have heard that.

Instead, I would like to talk briefly about four misperceptions. The first is the relationship between the 1982 Convention and the

1958 Geneva Conventions that we are already bound by today, that were approved by the United States Senate back in 1958 and are binding on us.

The second is a little about the ISA, which has been raised on a number of occasions. The third is a little bit about dispute settlement, which has come up. The fourth is a little bit about the information-sharing issue that Senator Inhofe has raised.

Let me, however, begin by saying that I have enormous respect for many of those that have a different view. Ambassador Kirkpatrick and Ambassador Middendorf are people that I count among my personal friends and they are among my heroes. They have made an enormous contribution. Jeane has written the best piece on totalitarianism ever done by anyone. Bill's work in relation to the European Community was of enormous importance to the United States and the whole world.

So it is with sadness that I find myself in a very different position and I think, unfortunately, it is because we really are kind of stuck in much of this debate some 10 or 15 years ago in the Reagan administration, where we did have a problem. I was one of those at that time, Mr. Chairman, who wrote a letter to the President of the United States and testified before the Republican National Committee platform hearings that we must have a renegotiation of part 11 of the Treaty.

Reagan courageously accepted that and he indicated a series of things that had to be changed. It took us 12 years to get those changed, but I am delighted to say that we have. Indeed, I think this is perhaps one of the most important points I would make, Mr. Chairman. For precisely the reasons that Bill Middendorf and Jeane Kirkpatrick and indeed the very distinguished members of this committee have raised: is concern for good international agreements and institutions; it is precisely for those reasons that all of us should be strongly in support of this treaty.

Now, let me shift and go to the first of these, which is simply I think something generally left out, and that is many of those dealing with this treaty do not realize that the United States is already bound by a series of four now outdated 1958 Geneva Conventions. Those Conventions are binding on the United States today. The only way you do an assessment of the 1982 Convention is to assess it against those 1958 Conventions, and there are a couple of very important points I think that ought to be understood here.

One is that overwhelmingly we won in the security updates and protecting the security interests, again as you heard from the CNO today. The 1982 Convention is infinitely better in serious security issues, protecting United States naval interests and others in many, many different ways. So to keep in force those that are old and are not very effective for our security interests as opposed to the one that is strikes me as not really in our interest.

Related to that, Mr. Chairman, the 1958 Conventions have no provisions for the United States to be able to denounce the conventions and leave at any point. We cannot do that under the current 1958 Conventions that are outdated, with bad law applying to the United States.

At one fell swoop, by accepting the 1982 Convention we deal with both of those problems. Article 311 of the convention makes it very

clear that the 1982 Convention and all of the security advantages will prevail immediately and set aside all of the 1958 Conventions; and in article 317 we get the ability to give a 1-year simple withdrawal clause. So we are far better off in relation—even for those, unlike me, who are skeptical, we are far better off in relation to the 1982 Convention than we would be under the 1958 Conventions.

Now, Mr. Chairman, to turn to the ISA, I would like to make a number of points, but let me just suggest that in one area that I disagree with my good friend Ambassador Kirkpatrick, and that is in her prepared testimony when she says basically the changes in part 11 are not very great. President Reagan set those changes. The Congress of the United States passed legislation setting those changes. They were great indeed, and I am happy to say we achieved every single one of those in the ultimate renegotiation plus a number of others.

Now let us just go through a few points in relation to that. Number one, there is nothing in the ISA or any other element created by the LOST that is United Nations. There is no unit of the United Nations created. The ISA has no employee of the United Nations. It is not United Nations. It is an independent agency like approximately a hundred that the United States is already a member of.

Second, it has extremely narrow scope. It does not relate to some kind of global mechanism for the control of 70 percent of Planet Earth. It instead deals solely with the issue of the minerals of the deep ocean floor. It does not deal with the question of fisheries in any way. It does not deal with water column issues. It does not deal with navigation. It does not deal with global security. It is a very narrowly limited functional authority.

Third, there is absolutely zero loss of United States sovereignty. In fact, Mr. Chairman, the real risk to United States sovereignty is our sovereign rights in navigational freedom that are being eroded through time. This treaty is a fundamental tool to fight that erosion of our sovereign rights in navigational security around the world.

But the issue of mineral resources of the deep ocean floor has absolutely nothing to do with United States sovereign rights. That is never an area that we have claimed. It is never an area that any nation in the world has suggested that anyone is entitled to claim, and we have opposed any kind of sovereign claims in relation to that area.

The fourth point here is the authority is not a great bureaucracy, and I might add it has been in existence for 10 years and it has not grown in that period of time. We are talking about 37 employees with a total budget of $5 million, considerably less than the Great Lakes Fishery Commission that we happily adhere to with Canada.

In addition to that, this is not the original status kind of solution that, Jeane is absolutely right, was initially negotiated prior to 1982 and appeared at that time before the renegotiation. Rather, not only did it meet all the conditions of Ronald Reagan, rather a free market President who I served and am delighted to say that was his predilection, but it went out of its way to adopt a variety of free market principles: cost effectiveness, commercial terms and

conditions, ending notions of production limitations, et cetera. So what we have really is a fundamental shift toward free market kinds of principles.

In addition to that, if we look to decisionmaking, which I think Jeane had rightly focused on as a very important set of issues in any negotiation, I am delighted to say we won in an extraordinary way that sets precedents for the United States in international organizations that should be powerfully endorsed.

What are those? The United States is the only nation in the world given a permanent guaranteed seat on the council. We cannot be voted on by the assembly as to whether we are going to be there or not. It is a permanent guaranteed seat on the council. That gives us individually permanently a veto over the adoption of all rules and regulations adopted by the authority, over all distribution of revenues going anywhere to any country in the world, over all amendments to be made to the convention.

In addition to that, as long as we are on the finance committee, which will be as long as there is money from any country flowing to the authority, the United States has a complete veto over everything relating to the rules and regulations concerning financial kinds of matters as well.

Now, in addition to that, there is a procedure in the chamber in which we have been given a chamber voting procedure that we have begged for for years in international organizations, very much like the way we have voting in the World Bank and the International Monetary Fund. We have a chamber in which any three members of that chamber can veto absolutely anything else relating to this. Who are the members of the chamber in addition to the United States? They are the nations that we coordinated with in this negotiation to win it, the old group of five and other developed nations. It is the United Kingdom; it is France; it includes Russia today, the Soviet Union then, and a number of other developed nations; Germany today; Italy today.

So this is not an authority in the hands of third world countries. This is an organization setting exactly the kind of precedent that Bill Middendorf and others and I would hope the Senate would strongly endorse. This is the way to go in international negotiation.

Now let us go on to a couple of other points about that. One is in the negotiation we had a setting in which every single demand of the United States of America to renegotiate was met. I would suggest to you it is not useful for us in those settings to then say we are not going to adhere to the treaty when here is what we wanted, set by a number of presidents of both parties, and now it is given to us. What that will do is dramatically undermine our ability to cooperatively deal with other nations, including the great importance of cooperation in the fight against terrorism.

Now, in addition to all that, in relation to the revenue-sharing points, by the way, again there can be not a penny of revenue shared with any nation in the world that does not go through the veto of the United States under this provision. So basically it is something that gives us the opportunity to participate in an aid program, as we already do through the U.S. Agency for International Development (AID), that would go through international

institutions and be useful, but it will only be made with a U.S. veto.

If we do not join, however, Mr. Chairman, we have a very strange setting in which, if revenues are ever generated, we will not be able to control where they go. If they want to decide to have them go to the PLO, for example, they will go to the PLO. So if this Senate wants to have the ability to block funds going to terrorist organizations or the PLO that might be voted in the future, it should join this treaty and exercise and use the veto that we have.

Now, finally, in relation to this second point, let me just indicate that one of the oversight functions of this committee deals with security in relation to mineral resources. In my judgment, and I think there is really virtually no indication of any possibility to the contrary on this, the United States mining industry will totally, permanently be put out of business if we do not go forward with this treaty.

If the United States wants to have access to copper, nickel, cobalt, and manganese from the deep seabed, we must go forward with this treaty. We have already lost two of our mine sites. We had five initially, the best technology in the world. We are about ready to lose it all. Seven different countries have already been given exploratory licenses. We are out because we are not a member, and I regard that as a very significant issue.

[The prepared statement of Professor Moore follows:]

PREPARED STATEMENT BY PROF. JOHN NORTON MOORE

Chairman Warner and honorable members of the Armed Services Committee—Mr. Chairman, you have long been a leader in protecting United States security interests in the oceans. Your service as Under Secretary of the Navy, then as Secretary of the Navy, and currently as chairman of this committee, sets a sterling record of achievement for our Navy and our Nation. You led our country in negotiating the important Incidents at Sea Agreement[1] with the former Soviet Union, signed with you by Admiral Sergei G. Gorshkov, the Commander in Chief of the Soviet Navy. You were of great assistance to me, in my role as an Ambassador and Deputy Special Representative of the President for the LOST Negotiations, in ensuring that those negotiations served United States security interests. Indeed, your earlier service as the Representative of the SECDEF to the LOST Negotiations in Geneva established the framework for the successful convention you now have before this committee.

Senate advice and consent to the 1982 LOST Convention is strongly in the security interests of this great Nation. For that reason, since the treaty was submitted to the Senate a decade ago, every Chairman of the Joint Chiefs of Staff and every CNO since the treaty was submitted to the Senate a decade ago has actively supported United States adherence. Indeed, as the Chairman of the National Security Council Interagency Task Force that developed United States instructions for the negotiations of this treaty under both Presidents Nixon and Ford, I find prompt United States adherence to this convention a compelling security interest. In fact, Mr. Chairman, I believe I can speak for the many superb civilian and military security experts with whom I have worked on this convention in saying that to my knowledge each and every one I have worked with on these issues in more than a quarter of a century believes adherence to this convention serves the security interests of the United States.

The genesis of United States interest in this convention was our powerful interest in maintaining naval and commercial freedom of navigation throughout the world's oceans. During the 1960s and 1970s a growing number of coastal nations were beginning a race to grab ocean space. The implications of this for United States naval and commercial mobility were grave. Every study done by our Government has con-

[1] Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, May 25, 1972.

cluded that protecting naval and commercial mobility is our most important oceans security interest. Yet paradoxically, this was, and is, the national interest most threatened by illegal claims. Accordingly, the Navy and the DOD sought to work with our oceans allies in developing a law of the sea that would constrain these illegal claims. In the negotiation that ensued for more than a decade, the United States was the central player. The result, which you see before you, achieved every security objective of the United States. We obtained a legal regime fully protecting navigational freedom throughout the world's oceans, including transit passage of straits and navigational freedom in the 200 mile exclusive economic zone. Along the way the United States also solidified the largest area of resource jurisdiction in the world with respect to the fishery and oil and gas resources off our coasts. Following a successful renegotiation of Part XI on Deep Seabed Mining, the United States in 1994 secured access to the mineral resources of the deep seabed for our industry, meeting the conditions set by Ronald Reagan, the United States secured access to the mineral resources of the deep seabed for our industry.

My testimony will explore some general reasons why adherence to this convention serves the security interests of America. I will then look at our core security interest in navigational freedom, provide specific examples of how adherence to this convention will serve our security objectives, and finally will respond to some misperceptions about the convention. But first, a few observations in framing consideration of the convention.

I. FRAMING CONSIDERATIONS

The United States is currently a party to the four 1958 Geneva Conventions on the LOST. Thus, consideration of security issues, like other affected oceans issues, should provide comparison with those existing treaties and oceans law currently binding on the United States. The choice is not simply the convention or an absence of any law binding on the United States. Moreover, United States adherence will not affect whether the 1982 Convention, and its subsidiary institutions, such as the ISA, become a reality or not. The convention entered into force approximately 10 years ago and currently has 145 state parties. Every permanent member of the Security Council but the United States is a party but the United States. Every member of NATO but the United States and Denmark are parties. Every major maritime and economic power is a party. This convention is today one of the most widely adhered international conventions in the world, and it's annual meetings of state's parties and other associated institutions have become the centerpiece for negotiations concerning oceans issues. Most assuredly, this central legal framework is not going away. The issue then is not simply whether one agrees or disagrees with the establishment of any part of the convention. Those who oppose the ISA, for example, should understand that it is a fait accompli whatever the United States' action. Indeed, the ISA has been operating for a decade and has already issued seven licenses and developed a mining code.

The issues before the Senate are simply whether United States adherence will serve our national interest, including our security interests, and whether continued abdication of the oceans leadership role of the United States, caused by our non-adherence to this convention, is in our national interest. I believe that the answer to the first question is a resounding yes with an equally resounding no to the second. Remarkably, this is one of the few national security decisions that really does not involve a trade off. All United States security, foreign policy and oceans interests are either positively affected, or not affected at all, by United States adherence. None is harmed by adherence. The greatest beneficiary will be our security interests; particularly our crucial interest in naval and commercial mobility, our ability to move forward with oil and gas development beyond 200 nautical miles, and a new opportunity for a U.S. seabed mining industry to reengage American leadership in deep ocean minerals.

Make no mistake; our prolonged failure to adhere to the LOST Convention is harming the security interests of the United States on an ongoing basis. For example, the United States, without a seat on the Commission on the Continental Shelf, is excluded from participating in the important Russian submission concerning the limits of their continental shelf claim in the Arctic Ocean, an issue of direct interest to the United States, and especially the State of Alaska. Uncle Sam has one arm tied behind his back in the continuing struggle to ensure adherence to the navigational freedoms embodied in the convention. Scofflaws simply argue, when we complain of their transgressions, that as a non-party to the convention we have no rights under it and no standing to raise the illegality of their actions in violation of the convention. The world moved ahead without us with exploration licenses for deep seabed mining being issued to companies from China, France, India, Japan,

Poland, South Korea, and Russia while the United States industry, which once led in technology development, is moribund from our non-adherence.[2] Advice and consent to the convention is not an issue for the next Senate; it is an issue for this Senate.

Mr. Chairman, perhaps it is just personal, but I am also troubled by the voices of some "instant" experts on the convention who don't just disagree, but simply ignore, the considered opinion of the United States Navy and the Joint Chiefs of Staff. Since the beginning of these negotiations the Navy and the Chiefs have clearly told all who would listen that the security stakes are high and real for the United States in adhering to this convention. In our democracy of course we rightly have civilian control of the military, and we rightly cherish free speech, but it is puzzling why some critics simply ignore the considered advice of our men and women in uniform. Engagement on the merits of arguments: Yes. But simply to ignoring the real issues and the deep expertise of those who work these issues on a daily basis: No. Surely, particularly in considering security issues, we owe more to professional military judgment than some of the critics seem willing to acknowledge.

This ought not be a partisan issue. Partisanship ought to stop at the water's edge, and members of our political parties ought to share a commitment to both a coherent foreign policy and the long-term security of this great Nation. That would be true even if this convention were associated with only one administration. But this convention was negotiated on a bipartisan basis under five Presidents of both parties. Principal negotiations took place under the aegis of three Republican Presidents:, Nixon, Ford, and Reagan, and one Democratic President: Carter. Part XI on deep seabed mining was then renegotiated under the aegis of President Clinton, a Democrat, who sought and achieved the conditions for renegotiation laid down by Ronald Reagan. Now the convention has been submitted to the Senate under yet another Republican President, George W. Bush. It should be noted that the principal security components of this convention, including those critical provisions protecting navigational freedom, were negotiated completely under Republican Presidents.

Finally, Mr. Chairman, you may be assured that I do not come before you simply as a cheerleader for any LOST. When it became evident in 1982 that part XI of the convention, as then internationally adopted, did not meet United States' interests in access to seabed minerals and associated precedental issues in the institutional nature of the new ISA, I wrote President Reagan urging that he not adhere until these issues were renegotiated. Even earlier I had testified to that effect in the platform hearings for the 1980 Republican Party Platform. President Reagan stood firm, and while clearly supporting convention provisions other than Part XI, including the substantial American achievements in the security area now being attacked in his name, he set tough conditions for renegotiation of Part XI. While that took 12 years to achieve, it was achieved. That considerable bi-partisan success in American foreign policy is now before you.

II. GENERAL SECURITY CONSIDERATIONS

Some general security considerations include the following:

- The greatest single threat to our oceans interests throughout the history of the Nation has been threats to navigational freedom. But navigational freedom is not protected solely by a strong navy. The first line of defense is a strong legal regime. This Nation achieved that in this convention and it will be tragic if, through continued disengagement, we permit that regime so favorable to our security interests to erode. To an extent not remotely appreciated by those not on the oceans firing line for the United States, this struggle for law is an ongoing process in which we are severely handicapped by not being a party to the convention. This has meant, not just in speculation—but in reality, that the natural role of the United States as the leader in oceans issues has been put on hold. We cannot simply shoot our way in when we have disagreements with our NATO allies; nor is such a response at all realistic in the real-world challenge to navigational freedom from a thousand pinpricks;
- Given the price of gasoline today, surely there is broad agreement that the United States needs to get on with the task of developing the oil and gas of our continental margins beyond 200 miles. Without adherence to the

[2] The economics of deep seabed mining are a major factor in no company, from any nation, having yet proceeded to mine. But U.S. competitors from nations who are parties have at least begun to move forward with exploration licenses, while our industry has abandoned half of our sites and is truly moribund.

convention that is unlikely to happen for years to come. The large investments that must be made to drill in deep water simply will not be made without legal certainty and security of tenure. Further, the United States has a crucial interest in protecting navigational freedom for the oil and gas brought to the United States that is so crucial for our economy. About 44 percent of U.S. maritime commerce concerns petroleum and its products. To put this in further perspective, offshore oil and gas is now the world's largest marine industry, with oil production alone in the range of $300 billion per year. For these and other reasons of relevance to our security interest in oil and gas, and the interests of our oil and gas industry, Paul L. Kelly, speaking on behalf of the American Petroleum Institute, the International Association of Drilling Contractors, and the National Ocean Industries Association, testified before the Senate Foreign Relations Committee and the Senate Environment and Public Works Committee that (the U.S. oil and natural gas industry supports Senate ratification of the convention at the earliest date possible;"[3]

• The opportunity to attach important United States understandings, as have been formulated for the Senate Resolution of Advice and Consent, is a crucial opportunity for the United States finally to get have its official interpretations of the convention on the record. Many countries intent on undermining the security interests of the United States have already provided erroneous statements with no response from the United States. Such a response, from the Nation with the largest oceans interests in the world, is of great importance and it is overdue;

• The United States needs to reengage in deep seabed mining. U.S. firms spent more than $200 million in leading the world in the technology of deep seabed mining and in obtaining four first-generation deep ocean mine sites. Continued United States non-adherence to the convention has not served our industry—rather it has effectively killed our industry. Only one company now retains mine sites, the other companies are now out of the business, and two of the U.S. mine sites simply lie abandoned. This while seven licenses have been issued to competitors from countries that are parties to the treaty. As soon as the United States adheres to the convention, I would urge the Secretary of Commerce to put together an industry working group to see what might be done to remove any domestic legal obstacles preventing our industry from resuming its previous leadership in deep seabed mining. The access to the copper, nickel, cobalt and manganese from these sites is of considerable economic interest to the United States. But today investment will not be made in deep seabed mining without a license from the International Seabed Authority. Thus, it is clear that continued United States non-adherence will be a death knell for our industry;

• For the United States to refuse to adhere to a convention even after the rest of the world met every single one of our demands for changes to the convention for United States adherence will severely impact the ability of the United States to negotiate international agreements. I believe this will have a particularly serious effect on our security interests, many of which depend on mobilizing our allies. Certainly, as a sovereign nation, we have every right to negotiate a treaty and then decide not to ratify, but in this instance, where we specified the changes necessary for United States support that were then agreed to by the rest of the world, even some of our closest friends have difficulty understanding our behavior in not moving forward to date. A failure to ratify at this point will have adverse effects for our foreign relations with even some of our closest allies. We are the world's most powerful military power, but we still need the understanding and support of our friends—and we need to act with consistency and reliability in our foreign policy;

• The United States has an important national interest in a stable and efficient rule of law in the world's oceans. We have achieved that in this convention and only risk losing it by continued non-adherence. Power alone cannot replace law in providing stable expectations and a check on irresponsible unilateral actions; and

[3] See 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. Testimony cited was given, before the United States Senate Committee on Foreign Relations for a hearing on the UNCLOS in, Washington, DC, October 21, 2003, at 7.

• Isolationism is not a strategy for victory against terrorism. The threat is global and our engagement must be global. That inevitably means that we must enhance our ability to influence other nations and to multiply United States actions through cooperative actions worldwide. If our country is viewed as simply turning inward and being unwilling to participate internationally even through despite agreements in which we have clearly served our interests, we will not facilitate such needed assistance from others. United States adherence to the UNCLOS will be carefully monitored by our allies, all of whom have been urging us to move forward, and it will have an impact on the climate in the war on terrorism, as well as other security and foreign policy objectives of the United States. The view that such "soft" considerations are unimportant is profoundly unrealistic. The UNCLOS is low hanging fruit that lets us send a clear message: America will support good international agreements, but it will stand firm against the bad ones. This differentiated message is crucial. If we are viewed as simply opposing all international agreements, no matter how favorable to the United States (as this one truly is), we will have far less ability to multiply our national interests through cooperative actions with others.

III. THE CORE SECURITY THREAT

The core oceans security threat to the United States is the continuing challenge to navigational freedom. That has been true throughout American history, from Jefferson's time until today. The United States fought three wars, the War of 1812, World War I, and World War II, in part because of the challenge to our freedom of the seas. Today, that challenge continues—though the form of the principal threat is that of serious and continuing claims by nations around the world not to recognize our oceans freedoms. These include challenges from NATO allies, and nuclear powers, in settings where we are not about to simply "shoot our way in." They include efforts to subject our Navy to permission or advance notice for transit through the territorial seas. They include efforts to prevent submerged transit of our submarines and overflight of our aircraft through straits. They include efforts to prevent transit of straits used for navigation without the permission of the coastal state. They include efforts to dictate how American ships will be constructed and operated. They include efforts to turn the seas into internal waters with no transit rights whatever. They include a range of incremental and subtle challenges which will frequently fall under the radar screen of our political leaders, or may even cause them to believe that the political trade-off in good relations at that moment with the challenging nation is worth more than the incremental loss in navigational freedom.

Examples of serious security incidents resulting from illegal oceans claims include: the new law of the People's Republic of China (PRC) providing that Chinese civil and military authorities must approve all survey activities within the 200 mile economic zone; the PRC harassment of the Navy's ocean survey ship the USNS *Bowditch* by Chinese military patrol aircraft and ships when the *Bowditch* was 60 miles off the coast; the earlier EP–3 surveillance aircraft harassment; Peruvian challenges to U.S. transport aircraft in the exclusive economic zone, including U.S. crew casualties and a second incident in which two U.S. C–130s had to alter their flight plan around a claimed 650 mile Peruvian "flight information area;" the North Korean 50 mile "security zone" claim; the Iranian excessive base line claims in the Persian/Arabian Gulf; the Libyan "line of death;" and the Brazilian claim to control warship navigation in the economic zone. Through time the effect of this "creeping coastal state jurisdiction" is a devastating reduction in naval mobility. As this committee knows so well, that should be thought of in relation to the rollback of United States land bases around the world. This challenge is all too real—even if appreciated largely by our navy and our oil industry. Examples of current illegal oceans claims include:[4]

- Historic Bay (15) and Baselines (27+)
- Territorial Sea Breadth—13
- Contiguous Zones—19
- Exclusive Economic Zones—32
- Innocent Passage in Territorial Sea—41
- International Straits—16
- Overflight Restrictions—5
- Archipelagic Sea Lanes Passage—4

[4] Data is approximate as of June 22, 2001.

The UNCLOS is a key weapon in this struggle for our oceans' freedom. The United States won through the negotiations the core elements of that freedom. To abandon that win is the legal equivalent of unilateral disarmament for the United States in the struggle for freedom of the seas. The price we will pay through time for any such error in judgment will be high. In essence the critics who would have us abandon a rule of law in the world's oceans may effectively be asking American service men and women someday to pay with their lives for the absence of such a rule of law. This is not mere hyperbole; already disputes about the oceans regime have cost American lives. Thus, an American aircraft in lawful overflight of the high seas was forced down by Peru in asserting an illegal claim over an extended area of the seas. More recently, harassment by Chinese fighters brought down a United States aircraft engaged in lawful activities under the 1982 Convention. At minimum, the economic cost of new naval configurations designed to get around a creeping loss of freedom—possibly with required pay-offs to coastal states—could be considerable.

IV. A FEW SPECIFIC EXAMPLES OF SECURITY ISSUES SUPPORTING UNITED STATES ADHERENCE

A few specific examples, among many, of provisions of the UNCLOS serving United States security interests and supporting accession are:

- For the first time in the history of oceans law, and quite in contrast to the 1958 Conventions to which we are now a party, the 1982 Convention provides full protection for navigation and overflight through international straits. This means that United States submarines can go through straits submerged and without having to reveal their location, that our aircraft can overfly, and that military and commercial vessels can go through without fearing harassment from coastal states. Maintaining the secrecy of our nuclear-powered ballistic missile submarines, as this committee knows so well, is an essential element in the effectiveness of our strategic deterrent;
- The maximum breadth of the territorial sea is restricted to 12 nautical miles, thus blocking the more expansive claims of nations which would interfere with our military and commercial mobility by promulgating territorial seas out to 200 miles;
- The convention provides for full high seas navigational freedom beyond the territorial sea. This includes the EEZ of up to 200 nautical miles, areas of the continental shelf under coastal state control beyond that, and all areas seaward of national jurisdiction. The core trade-off in the convention was a good one for us on both sides of the trade; that is, an extension of coastal state jurisdiction over the fish stocks and oil and gas resources off our coasts in return for full navigational freedom in the areas of extended coastal state resource and economic jurisdiction around the world;
- There is a much improved regime of "innocent passage" in the territorial sea even outside of international straits. Among other important changes the vague regulatory competence of the coastal state, reflected in article 17 of the relevant 1958 Geneva Convention, has been clarified in article 21 of the convention in a balanced fashion accommodating both coastal state concerns and navigational rights. There are now new obligations not to "[i]mpose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage" and not to "[d]iscriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State." As this committee knows, in the past allies of the United States, including Israel, have in the past found their shipping a victim of discrimination, in turn triggering international tensions and conflict;
- The convention contains a new provision mandating cooperation "in the suppression of illicit traffic in narcotic drugs. . .";
- The convention contains new provisions, significant in reducing potential conflicts with other nations and in protecting our citizens, that prohibit other nations from inflicting corporal punishment on American fishermen and merchant seamen, and prohibit or severely limit their imprisonment;
- Article 76 of the convention massively extends the continental shelf resource jurisdiction of the United States to include the oil and gas deposits of the continental margin and provides a workable standard for delimiting United States national jurisdiction, in contrast with the relevant 1958 Convention which does neither. This clear legal regime permitting the United States to get on with development of its oil and gas resources is a substantial security interest of the United States;

• Whenever deep seabed mining does occur, United States adherence and taking its seat on the Council of the ISA will give us the ability to exercise an effective veto over critical issues. This would include the ability to veto the adoption of inappropriate rules and regulations or revenue sharing with the PLO, or similar organizations. Until we accede, the United States will not have this effective veto power; and

• When the United States accedes to the convention we will be eligible to elect a member of the Commission on the Limits of the Continental Shelf which is serving as a check on expansive national continental shelf claims over the oceans in violation of the convention. Already, Russia, taking advantage of the continued absence of the United States in this Commission, has made the first submission to the Commission, a massive claim in the Arctic Ocean of direct interest to the United States.

V. MISPERCEPTIONS

Misperceptions about the convention include the following:

• Myth: The United States is giving up sovereignty to a new international authority that will control the oceans. Nothing could be further from the truth. The United States does not give up an ounce of sovereignty in this convention. Rather, the convention solidifies a truly massive increase in resource and economic jurisdiction of the United States, not only to 200 nautical miles off our coasts, but to a broad continental margin in many areas even beyond that. The new ISA created by this convention, which, as noted, has existed for a decade and will continue to exist regardless of United States actions, deals solely with the mineral resources of the deep seabed beyond national jurisdiction. That is an area in which we not only have no sovereignty but also in which we and the entire world have opposed extension of national sovereignty claims. Moreover, to mine the deep seabed minerals requires security of tenure for the billion dollar plus costs of such an operation. Our industry has emphatically told us that they can not mine under a "fishing approach" in which everyone simply goes out to seize the minerals. The ISA was a necessary specialized agency, of strictly limited jurisdiction, to deal with this need for security of tenure. Quite contrary to the recent testimony of one witness before the Senate Committee on Environment and Public Works, the ISA would not have "the exclusive right to regulate what is done, by whom, when and under what circumstances in subsurface international waters and on the sea-floor."[5] Rather, the ISA is

[5] See "The LOST: Bad for U.S. Sovereignty, the Environment and Other Living Things," the testimony of Frank J. Gaffney, Jr., President, the Center for Security Policy, before the U.S. Senate Committee on Environment and Public Works, 23 March 2004, at 2. Indeed, Mr. Gaffney, who I have known as a friend and colleague in many struggles to protect this country's national security, can be assured that no LOS Representative of the Department of Defense or Joint Chiefs who actively participated in the formulation of U.S. instructions and the negotiation of the convention would have in the remotest accepted such an absurdity—and, if they had, I would have resigned as the Chairman of the NSC Interagency Task Force that developed the instructions.

The testimony of Mr. Gaffney was further misleading in its heading to this section which was titled: "Unwisely Empowering the U.N.", id. at 2; and in its reference to "a new U.N. bureaucracy," id. at 3. While the LOST was negotiated under U.N. auspices, it is not the U.N., nor are any institutions created by it either agencies or instrumentalities of the United Nations. Nor does a functional agency which after 10 years of operation has only 37 employees (none of whom work for the United Nations) qualify as much of a bureaucracy.

It is further noteworthy that Mr. Gaffney, in his reference to "what could be billions of dollars worth of ocean-related commerce," id. at 3, is, at least by implication from his overall testimony, not remotely placing seabed mining in relation to the economic and security interests of the United States. Every careful review by the United States government has placed our security interest in navigation as the most important oceans interest of the United States. A close second is the United States interest in oil and gas development, where, again contrary to the implications of Mr. Gaffney's testimony, the oil and gas sediments off the United States coast, within and beyond 200 miles, are placed under exclusive United States resource jurisdiction. The abundant fish stocks of the United States are a third critical interest. Deep Seabed Mining with its access to copper, nickel, cobalt and manganese, is important, or I would not have urged President Reagan to require a renegotiation on this issue. But it is far down the list of overall United States oceans interests. No such mining has yet taken place and it is not known at what time any such mining may take place in the future. Another critic, Mr. Doug Bandow, places seabed mining better in context by noting in an article in The Weekly Standard of March 15, 2004, that: "There is no guarantee that seabed mining will ever be commercially viable." Id. at 16. Most importantly, were Mr. Gaffney's advice to be accepted it would mean the permanent death of any United States deep seabed mining industry, whatever its ultimate value.

Continued

a small, narrowly mandated specialized international agency that, emphatically, has no ability to control the water column and only has functional authority over the mining of the minerals of the deep seabed beyond national jurisdiction. Again, this is a necessary requirement for seabed mining, in an area beyond where any nation has sovereignty, to provide security of tenure to mine sites, without which mining will not occur;[6]

• Myth: President Reagan would oppose moving forward with this convention. Again, the actions of the Reagan administration show this to be false. At my urging as a former United States Ambassador to the negotiations, and that of others, President Reagan wisely refused to accept the provisions on deep seabed mining set out in Part XI of the convention and he approved instructions for the United States delegation to reengage in the negotiations to achieve a series of critical access and institutional changes in Part XI. After a full and careful interagency review of the then draft convention President Reagan had no changes to suggest to the remainder of the convention, including the most important security provisions that had been sought by the United States. The reason for this is simple; the United States had superbly achieved its security objectives in the negotiations under Presidents Nixon and Ford. Further, in 1983 President Reagan issued instructions to the Executive Branch to act in accordance with the substantive provisions of the convention, other than Part XI, as though the United States were a party to the convention. While the Reagan conditions for changes in Part XI were not achieved in the negotiations under his tenure, when subsequently negotiations were resumed in the Clinton administration, President Clinton accepted the Reagan conditions as the basis for United States adherence. The Clinton administration negotiators were successful by 1994 in achieving all of the Reagan conditions and then some. They also achieved all of the conditions that had been earlier set out by Congress as requirements for a deep seabed mining regime. Only then did the United States indicate acceptance, and submit the convention to the Senate for advice and consent;

• Myth: The convention is harmful to the PSI. Again, this is false. The PSI has already been negotiated explicitly in conformance with the convention;

I am especially surprised by the charge leveled by Mr. Gaffney that adhering to this convention would (likely have a corrupting effect on one of our most cherished principles: the rule of law," id, at 3; and "could effectively supplant the constitutional arrangements that govern this Nation," id. at 3. It is hornbook constitutional law that international agreements cannot alter the Constitution of the United States. That any such provisions in this convention would have escaped the careful review of the 18 agencies and departments on the National Security Council Task Force I chaired on the convention seems unlikely, but were there any such, the Constitution would prevail. Thus, in the classic 1957 case of Reid v. Covert, 354 U.S. 1, 16–17 (1957), the Court laid this issue to rest when it said: ". . . no agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution." Id.

Perhaps, as Churchill said, we should "not resent criticism, even when, for the sake of emphasis, it parts for the time with reality." Certainly, in other settings, particularly certain arms control issues, I have found Mr. Gaffney to be an informed and able spokesman for United States national interests, and I am pleased to have been on the same side of a number of issues with him. In this connection, I am particularly pleased to be in the same camp with Mr. Gaffney in urging a vigorous, early, and effective Ballistic Missile Defense for the United States. Mr. Gaffney is not, however, remotely an expert on the Law of the Sea and I am saddened that on this issue he has misperceived the national security interests of the Nation.

[6] The United States does not own the mineral resources of the deep seabed any more than it owns the mineral resources of Indonesia. Part XI of the convention provides for a joint venture such as might be the case in American production of minerals abroad—but it does so providing assured access going beyond any right we would have in producing the minerals of another nation.

No one accepts a loss of United States sovereignty. At the same time, one of our most important sovereign rights is our legal ability to enter into agreements—just as individual citizens in our own country have a right to agree to contract with one another. In fact, it is only children and the mentally incompetent who have no right to contract—thus truly losing some of their "sovereignty." Moreover, I do not disagree with critics who observe that in recent years we have sometimes signed treaties that were not in our interest. I attribute that to a poor job of negotiating or bad judgment by our leaders. The solution is to elect better leaders and demand that our negotiators do a better job of looking out for our interests. It is not to give up our sovereign right to make agreements and to distinguish good deals from bad ones.

It should also be understood that under the foreign relations law of the United States national sovereignty, meaning our national freedom of action, can never be lost through an international agreement. It is well accepted law of the United States that a subsequent act of Congress can override a prior international agreement for purposes of national law. See, e.g., Whitney v. Robertson, 124 U.S. 190 (1888); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

and not surprisingly so, since the Nations with which we are coordinating in that initiative are parties to the convention. This charge apparently rests on the false belief that if the United States does not adhere to the convention it will be free from any constraints in relation to oceans law. Again, a false assumption; we are today a party to the 1958 Geneva Conventions that are, if anything on this issue, more restrictive than the 1982 Convention now before the Senate. This charge is also misguided in failing to understand the critically important interest we have in protecting navigational freedom on the world's oceans. The convention allows our vessels to get on station which is essential before any issue even arises about boarding. Moreover, we emphatically do not want a legal regime that would permit any nation in the world to seize United States commercial vessels anywhere in the world's oceans. The Proliferation Security Initiative was carefully constructed with parties to the 1982 Convention, using the flag state, port state and other jurisdictional provisions of the 1982 Convention precisely to avoid this problem. Nor is this charge at all realistic in failing to note that nothing in the UNCLOS trumps our legal rights to individual and collective defense;

• Myth: The convention would interfere with the operations of our intelligence community. Having chaired the 18 agency National Security Council Interagency process that drafted the United States negotiating instructions for the convention, I found this charge so bizarre that I recently checked with the Intelligence Community to see if I had missed something. The answer that came back was that they, too, were puzzled by this charge, and there was no truth to it. I am confident that there is no provision in the UNCLOS which will, or has, added constraints on the operations of our Intelligence Community. Indeed, remember in this connection that the United States is already bound by the 1958 Conventions and that since 1983, pursuant to President Reagan's order, we have been operating under the provisions of the 1982 Convention, other than for deep seabed mining in part XI. Since 1994 we have accepted the revised Part XI;

• Myth: Freedom of navigation is only challenged from "[t]he Russian navy [that] is rusting in port [and] China has yet to develop a blue water capability . . ."[7] The implication here is that the principal challenge to navigational freedom comes from major power war or conflict and we do not really have any national concerns at this time about preserving freedom of navigation. But the 1982 Convention deals with the law of peace, not war. Thus this argument misses altogether the serious and insidious challenge, which, again, is what the LOST is designed to deal with; that is, repeated efforts by coastal states to control navigation, many from allies and trading partners of the United States, which through time add up to death from a thousand pin-pricks. That is the so-called problem of "creeping jurisdiction" that remains the central struggle in preserving navigational freedom for a global maritime power. After years of effort we have won the legal regime to control this "creeping jurisdiction" in the UNCLOS. To unilaterally disarm the United States from asserting what we won in the convention against illegal claimants is folly;

• Myth: The convention would mandate technology transfer and contains other fundamentally non-free market provisions with respect to deep seabed mining in Part XI. This charge seems to stem from a failure to understand that a series of flawed provisions in Part XI of the 1982 Convention, including mandatory transfer of technology, were renegotiated at the courageous insistence of President Reagan. Today, the convention, as so modified, provides for first come rights to mine the deep seabed under a joint venture arrangement providing guaranteed access rights to deep seabed minerals. The renegotiated Part XI even goes beyond the Reagan conditions in adopting the important pro-free-market GATT principle against subsidization of seabed miners. The mining regime adopted by the ISA may well be even more flexible than what we have here at home. But whatever imperfections there may be in the deep seabed regime, it is a certainty that United States non-adherence has to date, and will permanently, kill all hope of a United States seabed mining industry. Bankers simply will not loan the billion dollars plus required for a deep sea mining operation without an unchallengeable legal title to the resource;

[7] See Doug Bandow, "Sink the LOST," The Weekly Standard (March 15, 2004), at 17.

• Myth: We do not need to adhere to the convention because it already represents customary international law binding on the United States.[8] This argument is that our navigational interests are already protected. Curiously, those who advance this argument fail to note that if the United States is already bound to the convention as customary international law it is also bound by provisions they may object to in the convention. The critics cannot have it both ways. More importantly, the argument misses the reality that the United States is legally disenfranchised as a non-adherent and will not fully receive the benefits of the convention without acceding to it;

• Myth: "[T]he Law of the Sea Convention was a grand scheme to create 'an oceanic Great Society'. . . ."[9] It is true that one motivation of developing countries in the UNCLOS negotiations more than three decades ago, played out in the negotiation for Part XI, was an exaggerated hope of riches from deep seabed mining. It is also true that the "new international economic order" played a harmful role in the negotiation of Part XI on deep seabed mining. The motivation of the United States and other major powers, however, was to protect navigational freedom, end the out-of-control coastal state grab for the oceans, extend our jurisdiction fully to the fish stocks and oil and gas off our coasts and achieve international agreement on a mechanism providing security of tenure for deep seabed mining in areas beyond national jurisdiction. It was these other non-Part XI issues that were the real core of the UNCLOS negotiations, as attested by the fact that heads of delegation largely ignored Committee I, where Part XI was being negotiated, and spent their efforts in committees II and III, where more critical national security issues were at stake. The United States and other major developed nations coordinated closely together on these crucial navigational and resource issues in the "Group of Five." Moreover, the interest of certain land-based producers of nickel and copper, including developed nations, in preventing competition from deep seabed minerals, was probably a more important factor in the negotiating difficulties in Part XI than the "new international economic order." The renegotiation of Part XI pursuant to the Reagan conditions solved this latter problem by abolishing the "production limitations" that the land-based producers had written into the original agreement;

• Myth: The convention "is designed to place fishing rights, deep-sea mining, global pollution and more under the control of a new global bureaucracy. . . ." This is so in error as to be humorous if it were not seriously advanced in a respected national newspaper.[10] The executive branch that led U.S. negotiations on the convention and that is supporting Senate Advice and Consent would have supported a Nobel Peace prize for Osama bin Laden before agreeing to any such nonsense. The ISA deals with mineral resources beyond national jurisdiction, not with fishing, not with global pollution and not with navigation—or even activities in the water column. It is necessary in order to create stable rights to mine sites not owned by any nation as required if United States mining firms are ever to mine the deep seabed. The United States is already party to hundreds of specialized international organizations. The ISA would add an unremarkable one more. Indeed, one more that even after 10 years of operation today still has a staff of only 37 dealing with deep seabed exploration in 70 percent of the Earth's surface.

• Myth: United States military activities will be subject to a world court. There was strong feeling in the UNCLOS negotiations that military activities should be exempted from dispute settlement. Accordingly, Article 298 of the convention permits nations to opt out of the dispute settlement provisions for military activities, and under the President's submission, as embodied in the Senate draft resolution of advice and consent, this option is unmistakably exercised for the United States. Further, the scope of dispute settlement is severely cabined in general. For example, none of the decisions of the United States in relation to access by foreign fishermen to our fish stocks are subject to dispute settlement. In addition, under the President's submission, as embodied in the Senate draft resolution, the United States will be accepting "special arbitration" as our preferred modality of dispute settlement rather than the International Court of Justice (the

[8] See, e.g., "Bottom-of-the-Sea Treaty," The Wall Street Journal, March 29, 2004.
[9] See "Bottom-of-the-Sea Treaty," The Wall Street Journal, March 29, 2004.
[10] See "Bottom-of-the-Sea Treaty," The Wall Street Journal, March 29, 2004.

World Court). The United States is already a party to literally hundreds [11] of international agreements, including more than 85 submitting disputes to the International Court of Justice, that provide for compulsory dispute resolution. As a result of these agreements, remedies are often available when the rights of the United States or its citizens are violated by other countries. In this connection, compulsory dispute settlement is particularly useful in controlling illegal interference with navigation. Indeed, because of its importance in constraining these illegal claims, even the former Soviet Union was persuaded of the importance of compulsory dispute settlement in the UNCLOS, despite its longstanding general opposition to compulsory dispute settlement. The severely cabined dispute settlement procedures in the UNCLOS are far more restrictive than in most of the other dispute resolution provisions already binding on the United States. Moreover, as noted above, in the UNCLOS we have chosen special arbitration rather than the International Court of Justice;

• Myth: Adhering to the convention will come with substantial financial obligations. U.S. financial obligations under the convention will be modest. Had we been a full party throughout 2001, our contribution to the ISA would have been approximately $1.3 million computed at the 25 percent rate, and this reduced to a 22 percent rate in 2002. Our contribution to the International Tribunal is estimated to be approximately $2 million per year. This total level of contribution is less than the United States pays each year for membership in the Great Lakes Fish Commission.

• Myth: There has been inadequate consideration of the LOST and we need more time to study it. Nonsense! Those who espouse this view fail to note that this is the second round of Senate hearings on the convention. The first round was held in 1994 when the convention was initially submitted to the Senate. The Senate, and the country, has had a decade to study the convention, and for several decades, since 1983, we have lived under the legal regime of everything but Part XI. I have an especially hard time in finding any sympathy for this position urging delay when it comes from spokesmen who were not heard calling for more consideration of the convention for the full decade while the treaty languished before the Senate Foreign Relations Committee. Rarely has any convention come before the Senate that is more fully understood in its impact and stakes for our Nation, and that has been more fully studied and debated—and, in real effect, lived under; and

• Myth: President Bush is urging Senate advice and consent to the convention for little better than "go-along, get-along multilateralism." Give me a break! Among Presidents prepared to take the heat internationally for actions they believe in, as Afghanistan and Iraq surely demonstrate, this President is near the top. Is it too much to understand that after lengthy and careful review this President has urged Senate advice and consent because it is in the National interest of the United States? Further, does anyone really believe Ronald Reagan was a "go-along, get-along" President?

CONCLUSION

Mr. Chairman, and honorable members of the Armed Services Committee——as the beginning quotation from President George Washington attests, a strong Navy, indeed today a preeminent Navy, is an essential national security interest of the United States. We must not do in that Navy by failing to appreciate our critical national security interests in a legal regime for the oceans which protects the freedom of the seas and ensures global access.

Rarely has the Senate faced such an easy choice in consideration of a major convention. No United States oceans, security, or foreign policy interest is served by continued non-adherence, and our security interests are powerfully served by adherence. Not only Senator Lugar, as Chairman of the Senate Foreign Relations Committee, but also Senator Stevens, as the senior Senator from the most affected state in the United States, Alaska, have recently sent a letter to their Senate colleagues urging prompt advice and consent to the convention. Every industry and oceans in-

[11] According to the Department of State, the United States is a party to more than 85 agreements (most of them multilateral in nature) that provide for the resolution of disputes by the International Court of Justice. More than 200 treaties—including civil air transport agreements and various types of investment treaties—provide for mandatory arbitration at the request of a party. In addition, there are a number of international organizations that include dispute resolution mechanisms, including the U.S.-Iran Claims Tribunal, and the International Civil Aviation Organization.

terest group that has addressed the issue has supported prompt advice and consent, including the one most affected economically, the United States oil and gas industry. Who do the critics speak for? The United States Navy and the Joint Chiefs have never wavered in their support. Our allies have supported United States adherence. Both Republican and Democratic Presidents have recommended Senate advice and consent. Most recently, the congressionally established United States Commission on Ocean Policy, broadly representative of United States oceans interests and chaired by Admiral Watkins, has unanimously recommended accession. I concur wholeheartedly in the statement of the commission that:

> The National Commission on Ocean Policy unanimously recommends that the United States of America immediately accede to the UNCLOS. 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. [Unanimous Resolution of the Commission, November 14, 2001].

Chairman WARNER. The oil and gas industry has taken a similar position?

Mr. MOORE. They have indeed, Mr. Chairman. Every single element that I am aware of in the oil and gas industry—the associations, the individual companies—have powerfully supported this treaty. They know they have an interest in it both in relation to the oil and gas from our continental margin when we are able to go forward with it, but also bringing it in through our tankers and navigational freedom.

Chairman WARNER. The record of their contributions is before the Foreign Relations Committee, am I not correct?

Mr. MOORE. That is correct, and I believe Paul Kelly has been very, very clear on that.

Chairman WARNER. That is correct.

They were before your committee?

Senator INHOFE. Paul Kelly testified before the Committee on Environment and Public Works.

[The information referred to follows:]

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7 April 2004

The Hon. Richard G. Lugar
Chairman
Senate Foreign Relations Committee
SD 450
Washington, DC 20510

Dear Mr. Chairman,

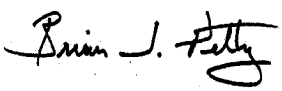
The International Association of Drilling Contractors, representing US companies engaged in the exploration for new sources of oil and natural gas, strongly endorses ratification of the UN Convention on the Law of the Sea, and asks that the Senate see this vital treaty through to completion in the current session of Congress.

If ratified, the Convention codifies the right of the United States to explore and develop potentially large new reserves of oil and natural gas and, more importantly, offers a non-adversarial process for resolving disputes and conflicts over the precise limits of the continental shelf where its margin extends beyond 200 miles. The Convention's rules by which coastal nations may assert jurisdiction over the development of natural resources beyond 200 miles are particularly important to the United States, which has broad continental shelf margins. The legal certainty provided by the Convention is a critical component of industry's willingness to make the investment needed to develop these important energy resources beyond the US OCS.

By remaining outside the treaty, the United States forfeits its membership in institutions that will make decisions about the future of the oceans and increases the risk that such decisions could be adverse to U.S. interests. Later this year the treaty will be open for amendment, creating the possibility that other nations may seek advantage against US interests in the deep ocean.

For these reasons, the US offshore drilling industry has long stood in support of ratifying the UN Convention on the Law of the Sea, and is grateful for your steadfast pursuit of that objective.

Yours sincerely,



Brian T. Petty
Senior Vice President - Government Affairs

April 6, 2004

Senator John Warner
U.S. Senate
Washington, D.C.

Senator Carl Levin
U.S. Senate
Washington, D.C.

Dear Senators Warner and Levin:

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 Armed Services 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. Additionally, on March 23, 2004, we submitted this joint statement of support for the treaty ratification to the Senate Environment and Public Works Committee. We ask that our statement be made part of your committee's record for the April 8, 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

cc:

Majority Leader Bill Frist

Minority Leader Tom Daschle

Senator Richard Lugar

Senator Joe Biden

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
UNITED STATES SENATE
COMMITTEE ON FOREIGN RELATIONS

HEARING ON THE UNITED NATIONS CONVENTION
ON THE
LAW OF THE SEA

WASHINGTON, D.C.
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:

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

- 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 United States Senate. Also, the Outer Continental Shelf Policy Committee, an advisory body to the United States Secretary of the Interior on matters relating to our offshore oil and natural gas leasing program, in 2001 adopted resolutions supporting the United States acceding to the Convention.

Offshore Oil and Natural Gas Resources

The Convention is important to our efforts to develop domestic offshore oil and natural gas resources. The Convention secures each coastal nation's exclusive rights to the living and non-living resources of the 200-mile exclusive economic zone (EEZ). In the case of the United States this brings an additional 4.1 million square miles of ocean under U.S. jurisdiction. This is an area larger than the U.S. land area. The Convention also broadens the definition of the continental shelf in a way that favors the U.S. as one of the few nations with broad continental margins, particularly in the North Atlantic, Gulf of Mexico, the Bering Sea and the Arctic Ocean.

Considering the remarkable advances in offshore exploration technology that have taken us farther and farther offshore into deeper and deeper water, the assessment of the National Petroleum Council in 1973 seems remarkably prescient in retrospect; and that assessment rings more true today than ever.

With what may be the largest and most productive continental shelf in the world, the U.S. obtains about 28 percent of its natural gas and almost as much of its oil production from the outer continental shelf (OCS); this share of U.S. production is increasing thanks to new world class oil discoveries in the deep waters of the Gulf of Mexico.

Exploration Moving Farther from Shore into Deeper Waters

Offshore petroleum production is a major technological triumph. We now have world record complex development projects located in 5,000-6,000 feet of water in the Gulf of Mexico which were thought unimaginable a generation ago. Even more eye-opening, a number of exploration wells have been drilled in the past three years in over 8,000 feet of water and a world record well has been drilled in over 9,000 feet of water. New technologies are taking oil explorers out more than 200 miles offshore for the first time, thus creating a more pressing need for certainty and stability in delineation of the outer shelf boundary. Before the LOS Convention there were no clear, objective means of determining the outer limit of the shelf, leaving a good deal of uncertainty and creating significant potential for conflict. Under the Convention, the continental shelf extends seaward to the outer edge of the continental margin or to the 200-mile limit of the EEZ, whichever is greater, to a maximum of 350 miles. The U.S. understands that such features as the Chukchi Plateau and its component elevations, situated to the north of Alaska, are not subject to the 350-mile limitation. U.S. companies are interested in setting international precedents by being the first to operate in areas beyond 200 miles and to continue demonstrating environmentally sound drilling development and production technologies.

Revenue Sharing

The Convention provides a reasonable compromise between the vast majority of nations whose continental margins are less than 200 miles and those few, including the U.S., whose continental shelf extends beyond 200 miles, with a modest obligation to share revenues from successful minerals development seaward of 200 miles. Payment begins in year six of production at the rate of one percent and is structured to increase at the rate of one percent per year to a maximum of seven percent. Our understanding is that this royalty should not result in any additional cost to industry. Considering the significant resource potential of the broad U.S. continental shelf, as well as U.S. companies' participation in exploration on the continental shelves of other countries, on balance the package contained in the Convention, including the modest revenue sharing provision, clearly serves U.S. interests.

Importance of Delineating the Continental Shelf

The Convention established the Continental Shelf Commission, a body of experts through which nations may establish universally binding outer limits for their continental shelves under Article 76. The objective criteria for delineating the outer limit of the continental shelf, plus the presence of the Continental Shelf Commission, should avoid

potential conflicts and provide a means to ensure the security of tenure crucial to capital-intensive deepwater oil and natural gas development projects.

It is in the best interest of the U.S. to register its claims extending the outer limits of our continental margin beyond 200 miles where appropriate— in so doing the U.S. could expand its areas for mineral exploration and development by more than 291,383 square miles. We need to get on with the mapping work and other analyses and measurements required to substantiate our claims, however. Some of the best technology for accomplishing this resides in the United States. Establishing the continental margin beyond 200 miles is particularly important in the Arctic, where there are a number of countries vying for the same resource area. In fact, Russia has already submitted claims with respect to the outer limit of its continental shelf in the Arctic.

Resolution of Boundary Disputes

As regards maritime boundaries, there presently exist about 200 undemarcated claims in the world with 30 to 40 actively in dispute. There are 24 island disputes. The end of the Cold War and global expansion of free market economies have created new incentives to resolve these disputes, particularly with regard to offshore oil and natural gas exploration. During the last few years hundreds of licenses, leases or other contracts for exploration rights have been granted in a variety of nations outside the U.S. These countries are eager to determine whether or not hydrocarbons are present in their continental shelves, and disputes over maritime boundaries are obstacles to states and business organizations which prefer certainty in such matters. We have had two such cases here in North America where bilateral efforts have been made to resolve the maritime boundaries between the U.S. and Mexico in the Gulf of Mexico and between the U.S. and Canada in the Beaufort Sea. Both of these initiatives have been driven by promising new petroleum discoveries in the regions. The boundary line with Mexico was resolved in 2000 after a multi-year period of bilateral negotiations. Negotiations with Canada, however, seem to be languishing.

While such bilateral resolution is always an option, the Convention provides stability and recognized international authority, standards and procedures for use in areas of potential boundary dispute, as well as a forum for dealing with such disputes and other issues.

The settlement we made with Mexico now makes it possible for leases in the Gulf of Mexico issued by the Department of the Interior's Minerals Management Service (MMS) to be subject to the Article 82 "Revenue Sharing Provision" calling for the payment of royalties on production from oil and natural gas leases beyond the EEZ. According to MMS, seven leases have been awarded to companies in the far offshore Gulf of Mexico which include stipulations that any discoveries made on those leases could be subject to the royalty provisions of Article 82 of the Convention. MMS also reports that one successful well has been drilled about 2.5 miles inside the U.S. 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 towards understanding methane hydrates as a source of energy and as a potential contributor to climate change. That review is now underway. The U.S. Navy has also done work on gas hydrates, as has the U.S. scientific community, including universities such as Louisiana State University and Texas A&M. Significant research is also being conducted by scientific institutions in Japan. The United States needs to have a seat at the table of the Continental Shelf Commission in order to influence development of any international rules or guidelines that could affect gas hydrate resources beyond our EEZ.

Marine Transportation of Petroleum

Oil is traded in a global market with U.S. companies as leading participants. The LOS Convention's protection of navigational rights and freedoms advances the interests of energy security in the U.S., particularly in view of the dangerous world conditions we have faced since the tragic events of September 11, 2001. About 44 percent of U.S. maritime commerce consists of petroleum and petroleum products. Trading routes are secured by provisions in the Convention combining customary rules of international law, such as the right of innocent passage through territorial seas, with new rights of passage through straits and archipelagoes. U.S. accession to the Convention would put us in a much better position to invoke such rules and rights.

U.S. Oil Imports at All-Time High

The outlook for United States energy supply in the first 25 years of the new millennium truly brings home the importance of securing the sea routes through which imported oil and natural gas is transported.

According to API's Monthly Statistical Report published on October 15, 2003, imports of crude oil reached a new, all-time high in September. At close to 10.4 million barrels per day, crude imports surpassed the previous high reached in April 2001. When combined with higher volumes for products such as gasoline, diesel fuel and jet fuel, total imports amounted to nearly two thirds of domestic deliveries for the month. This is an extraordinary volume of petroleum liquids being transported to our shores in ships every day.

The Department of Energy's Energy Information Administration (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

EIA's 2003 Outlook also states that, despite the projected increase in domestic natural gas production, over the next twenty years an increasing share of U.S. gas demand will also be met by imports. A substantial portion of these imports will come in the form of liquefied natural gas (LNG). All four existing LNG import facilities in the U.S. are now open, and three of the four have announced capacity expansion plans. Meanwhile, several additional U.S. LNG terminals are under study by potential investors, and orders for sophisticated new LNG ships are being placed. This means even more ships following transit lanes from the Middle East, West Africa, Latin America, Indonesia, Australia, and possibly Russia, to name the prominent regions seeking to participate in the U.S. natural gas market.

Global Significance of Persian Gulf Exports

Another important factor to consider is that, according to 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

[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.

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.

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.

# # #

Mr. MOORE. Mr. Chairman, I do think that is also a terribly important point, because again we see the price of gas at the pumps today. All of us are in favor of moving forward on the continental shelf with oil and gas development, and not to go forward with this

treaty will in fact significantly inhibit our ability to go forward in the areas beyond 200 nautical miles.

To give you a sense of what that is, it is about the size of the State of California in relation to potential oil and gas and going out there and looking at it.

Okay. Just very briefly in relation to dispute settlement, again my point here is this is not like many of the others that we have entered into. This is the way to do it right. We are party already to about 200 treaties that have third party dispute settlement. We are parties to 85 of those today that have dispute settlement through the International Court of Justice.

What have we done here that is a little different? One, it has an extraordinarily clear provision exempting all military activities because we insisted on it from the very beginning. Second, we are not choosing the World Court and it did not require you to choose the World Court. Instead, it let us go for arbitration, which we have chosen. The third is even in those terms it is severely cabined in relation to United States interests. For example, the questions of our management of fish stocks off our coast cannot go to the dispute settlement provision in relation to that.

Finally, let me just also say, because I think sometimes there is a misunderstanding on this, the determinations of international courts are not stare decisis, as they are under U.S. law. They are res judicata only. That is, they are binding between the parties, but they are not stare decisis in relation to binding other parties that were not before the court at that point.

Finally, just to turn very briefly to this last point in relation to information and data sharing, because I take very seriously any question asked by the distinguished members of this committee. The first thing I would be delighted to say again, Senator Inhofe, since I think you were interested in this: This is one in which we have done it right. It is not like the other problems. We put a specific article in the treaty, article 302, that says no data sharing will be required if it requires you to share data that is inconsistent with the national security interests of the United States. So that issue is absolutely nailed in relation to the treaty.

But there are even a variety of other points I think that you might find of interest on this. One is that any nation in the world right now under the 1958 Conventions is free to go do this research and to do the bottom topography with modern multi-beam sonars and to get all the exact kind of information that anyone might be worried about.

A third point is that we ourselves in the United States intentionally decided in the 1980s not to classify any of that material, so it is already completely out in the public domain. They do not have to get it from the international authority in any way, shape or form. It is all out there in the public domain and has been for many years.

I would also add to that as well that the authority is under an injunction of secrecy for everything that goes to the Continental Shelf Commission. Finally, the real difference is when we join this treaty and are on the commission we get that data submitted by every other nation in the world. So in reality we are not—by staying out we are not preventing any of the data related to national

security from not going in, but if we go in we ourselves begin to get very important data, such as what the Soviets, the Russians today, have submitted to the Continental Shelf Commission in relation to a huge claim in the Arctic Ocean today, and we do not have access to that data because we are not a member of the commission and it affects us very significantly.

Let me just end, Mr. Chairman, again by thanking you and to naturally go back to a statement from another wonderful Virginian, Thomas Jefferson, and to remind us that Thomas Jefferson once wrote: "The day is within my time as well as yours when we may say by what laws other nations shall treat us on the sea."

Well, you and I know that Jefferson did not realize that dream in his day, Mr. Chairman. But by giving advice and consent to this treaty, this Senate can realize that dream.

Thank you.

Chairman WARNER. A very interesting way in which to conclude your testimony and touch the heart of the University of Virginia graduate, this humble Senator.

Admiral, I looked over your distinguished biography here. You have spent your life at sea. You served with distinction in Vietnam. What were your assignments in that period?

STATEMENT OF REAR ADM. WILLIAM L. SCHACHTE, JR., USN (RET.), JUDGE ADVOCATE GENERAL CORPS

Admiral SCHACHTE. I was the officer in charge of a Navy Swift boat.

Chairman WARNER. Oh, down in the delta?

Admiral SCHACHTE. No, sir, but some of the boats in our division were sent there. I arrived in Vietnam in 1968, before Tet.

Chairman WARNER. Before Tet. Is that not interesting.

Admiral SCHACHTE. I actually served on a mission with Senator Kerry.

Chairman WARNER. With the Senator?

Admiral SCHACHTE. Yes, sir. Then I was the executive officer and operations officer of Coastal Division 14 Cam Ranh Bay. Like the rest of us in that line of work, I was a volunteer.

Chairman WARNER. I had the privilege as Secretary, Under Secretary, to visit down with the delta forces and I came back with a lifetime respect for the courageous missions which you carried out on behalf of the cause of freedom. So I thank you.

Then you went on and you have spent much of your career in the DOD and Judge Advocate General's office on international law and particularly the oceans law.

Admiral SCHACHTE. Yes, sir.

Chairman WARNER. So you are eminently qualified to share with us your views today, and I thank you for finding the time to join us.

Admiral SCHACHTE. Thank you very much, Mr. Chairman. It is a real honor to be here and to be on such a distinguished panel. Mr. Chairman, I know the hour is late and I am the last speaker. I will truncate my remarks.

Chairman WARNER. You take such time as you feel it merits here.

Admiral SCHACHTE. Thank you very much, sir.

I would like to echo what Professor Moore just indicated, and that is it really is inaccurate to state that the convention subjects United States military or economic activities to the control of a United Nations bureaucracy. This is not true with respect to either military or economic or other activities. Under the convention all activities with the exception of deep seabed mining are controlled by either the flag state, i.e. the sponsoring nation, or the coastal nation.

If I could take a moment, I would like to quote from President Reagan's Deputy Secretary of State, John Whitehead, and this is from an op-ed piece that appeared in the Washington Times in 1994. It may address some things that Ambassador Kirkpatrick alluded to, and I quote:

"One cannot dispute the reminiscence that some of us in the Reagan administration thought we had slain it for good, the UNCLOS. But that was personal, not administration policy. The fact is that the Reagan White House and State Department never questioned the need for international law to codify a 12-mile limit to coastal sovereignty, naval rights of passage, prohibitions on maritime pollution, and protection of fisheries. All of these advance interests important to Americans. The administration objected very specifically and strenuously to the section of the treaty establishing an International Seabed Authority that would have subjected American mining companies to onerous controls dictated by a third world majority. It singled out those provisions as 'not acceptable,' but insisted that if they were satisfactorily resolved," and here I quote, "the administration will support ratification."

Mr. Whitehead concluded, and this is again in 1994 after the amendments were taken place, effected: "Immediately after the U.N. General Assembly promulgates the new agreement this week, all major industrialized countries will sign the convention. It is vital for America's interests that we be among them. We have no need to fear prudent use and protection of the world's oceans and seas under the rule of law."

Mr. Chairman, my statement then goes into some national security concerns that we have heard testimony on. I would like to focus, however, on some inaccuracies about the convention, some of which were mentioned by Dr. Moore. I will address four areas: the impact of accession on ongoing intelligence and submarine operations; the impact of U.S. accession to ongoing maritime intercept operations and the PSI; reliance on customary international law to exercise our navigational freedoms; and, fourth, the impact of mandatory dispute resolution on U.S. sovereignty, in particular U.S. military activities at sea.

Concerning intelligence and submarine navigation, you have had testimony in closed session this morning and also the CNO eloquently spoke to these matters today. I would simply reemphasize the fact that, concerning submarine navigation and intelligence activities, there will be absolutely no change required by our accession to the convention. There will be no change in the way we conduct any of these activities under the convention, and I elaborate on that, the legal bases and rationale for that in my paper.

Now I would like to talk about the impact of the convention on Maritime Intercept Operations (MIO) and PSIs.

Chairman WARNER. Could I interrupt that?

Admiral SCHACHTE. Yes, sir.

Chairman WARNER. Before you went to the retired status you actually worked on previous drafts of this treaty?

Admiral SCHACHTE. Oh, yes, sir. I was a member of the U.S. delegation.

Chairman WARNER. It clearly reflects it in your biography.

Admiral SCHACHTE. Yes, sir.

Chairman WARNER. Is it currently as it is before the Senate pretty much in the shape that it was when you and others worked on it?

Admiral SCHACHTE. Absolutely, with the grand exception, as Professor Moore mentioned, of the seabed mining amendments, yes, sir, it really is.

When we started out in this evolution in the late 1950s, early 1960s, the Soviets actually came to us out of concern for the expansion of territorial seas. We were going to have a three-article treaty to try to get the world to buy into it so it would be greatly acknowledged. That fell flat. We wanted transit rights through straits, and the result was the formulation of the ground work for the convention. But our negotiators delivered on archipelagic sea lanes passage, transit passage, and other rights that were not existing, in existence, prior to the convention.

Yes, sir, it is exactly as we negotiated it back then at that time.

Mr. Chairman, as a former naval officer you are aware of the fact that the Navy has been conducting MIO-type operations since we first declared our independence.

Chairman WARNER. I would have to—for the record, I was a petty officer, not a commissioned officer.

Admiral SCHACHTE. At the time of our independence—no, okay.

Chairman WARNER. I later became a commissioned officer in the Marine Corps, but my military career is very modest. I am always grateful for what was done for me.

Admiral SCHACHTE. But these operations have been conducted using a variety of legal bases, and I lay those out, but I will sum up here. Some of these bases are codified in the UNCLOS. Others, like the right of self-defense and belligerent rights, exist outside and are unaffected by the convention.

In fact, the convention's preamble is quite clear in this regard, and I will quote: "Matters not regulated by the convention continue to be governed by the rules and principles of general international law." In other words, self-defense and these other legal bases are outside the ambit of the convention.

In short, nothing in the UNCLOS hampers, impedes, trumps, or otherwise interferes with anything we have done in the past, in the present, or will do in the future regarding military intercept operations. I next lay out some examples of those operations that we have conducted since President Reagan announced that we would in essence be bound by the navigational provisions.

I would now like to briefly address the PSI, as mentioned by Senator Levin, and addressed by Mr. Taft and others. PSI is a relatively new concept which was announced by President Bush on the 31st of May 2003 in Krakow, Poland. This initiative was developed in conjunction with ten countries—Australia, Japan, France,

Germany, Italy, The Netherlands, Poland, Portugal, Spain, and the United Kingdom. Since then, three more countries—Canada, Norway, and Singapore—have been added to the partnership. As has been mentioned earlier, all of these parties except us happen to be parties to UNCLOS.

The PSI is a global initiative designed to create a more robust approach to preventing weapons of mass destruction, their delivery systems and related materials flowing to and from the states and non-state actors of proliferation concern. In furtherance of this initiative, the PSI partners agreed to a statement of interdiction principles in September 2003.

Some of the opponents to the convention have argued that becoming a party to the convention will hinder our ability to effectively interdict weapons of mass destruction at sea. This argument, however, fails to recognize that one of the basic tenets in the statement of principles is that PSI activities will be undertaken consistent with national legal authorities and relevant international law and frameworks, including the navigational provisions of UNCLOS. Thus, the UNCLOS absolutely does not provide for any role for the United Nations, much less a role in deciding when and where ships at sea may be boarded.

Now, concerning the legal bases, and I lay them out extensively in my prepared remarks, Mr. Chairman. But as in the case of MIOs, PSI interdictions can also be justified as a self-defense measure. Clearly, international law, including UNCLOS, does not and would not prohibit the United States or any nation from boarding a vessel carrying weapons of mass destruction that posed an imminent threat to our national security just because we did not have flag state or master control or consent. If one thing is clear in international law, it is that a nation is authorized to use armed force in self-defense to protect its national interests against an imminent threat of attack.

In my prepared statement, I next talk about customary international law, Mr. Chairman, and because of the hour the only thing I would mention in that is that reliance on that is ill-conceived. We have seen in the 20th century that customary international law, its evolution has resulted in erosion, not preservation, of any rights, and I have some discussion on that and my concerns that we would experience if we were not a party.

The issue of loss of United States sovereignty. Senator Inhofe has spoken eloquently on this. Senator Levin has also mentioned this today. All I would like to say in that from my own experience and what I elaborate more fully on in my paper is one simple fact: No country, no country would subordinate its national security activities to an international tribunal. No country would subordinate its national security activities to an international tribunal.

This was a point that everyone understood during the negotiation of the convention and, as Professor Moore mentioned, this was very much at the heart of a lot of our activities in the convention. I would stress that this exemption also encompasses military activities, such as MIOs or PSIs or other types of activities that may be undertaken.

I would like, Mr. Chairman, if I could to conclude by respectfully urging that we become a party to this convention. Let me state this

as best I can. This convention has nothing to do with the U.N. and everything to do with the preservation of our sovereignty, national security, and navigational rights.

If we choose to walk now, we will be leaving the fate of our critical navigational freedoms in the hands of others, and here I would submit probably the European Union would be at the forefront of that, probably China leading the third world. It would be a horrible fate, and I feel that it is time for the United States to reassume our prominent and appropriate place of leadership in these matters dealing with the global commons.

It has been an honor to be here today, sir, and I thank you very much.

[The prepared statement of Admiral Schachte follows:]

PREPARED STATEMENT BY REAR ADM. WILLIAM L. SCHACHTE, USN (RET.)

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

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

It is very important to carefully and comprehensively study UNCLOS together with President Reagan's 1983 Ocean Policy Statement and the 1994 Agreement whose provisions prevail on Seabed Mining, ISA. I would submit that the specific reasons put forth by those opposing the convention have been corrected by the 1994 Agreement. For example, it is totally inaccurate to state that the convention subjects U.S. military or economic activities to the control of a U.N. bureaucracy. That is not true with respect to either military or economic or any other activities. Under the convention all activities at sea, with the exception of deep seabed mining, are controlled by either the flag state (or sponsoring nation) or the coastal nation. The most important living and nonliving resources, including oil and gas, are under exclusive coastal nation control. The ISA's role is very carefully circumscribed and limited to coordinating the exploration and exploitation of nonliving mineral resources of the seabed that are not under exclusive coastal nation control. More importantly, by becoming a party, the United States will acquire a seat on the governing council in perpetuity. This seat gives us the power to veto important substantive decisions of the Council such as those concerning revenue sharing from deep seabed mining and decisions on amendments to the deep seabed mining regime. Additionally, by becoming a party, the United States will acquire a seat on the Finance Committee. Our seat on the Finance Committee gives the United States a veto over all decisions of the council and the assembly having financial or budgetary implications.

To quote from President Reagan's Deputy Secretary of State, John Whitehead, from his op/ed piece in the Washington Times of July 28, 1994: "One cannot dispute the reminiscence that 'some of us in the Reagan administration thought we had slain it for good.' But that was personal, not administration policy. The fact is that the Reagan White House and State Department never questioned the need for international law to codify a 12-mile limit to coastal sovereignty, naval rights of passage, prohibitions on maritime pollution and protections of fisheries. All of these advance interests important to Americans."

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

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

NATIONAL SECURITY BENEFITS OF THE CONVENTION

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

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

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

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

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

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

exercised by our operational forces, particularly in the maritime environment of the global commons, an environment that has traditionally been one of claim and counterclaim.

I'm not here to discuss the economic benefits of the convention, but I would like to mention that the U.S. EEZ is by far the largest and richest of any in the world. We have some of the richest and most abundant fisheries in the world—all of which are under our exclusive control. Moreover, the pot of gold in the seabed is the oil and gas, and that was also placed under coastal nation control. With all due respect, the focus on deep seabed mining concerns an activity that has no market and is economically not feasible at this time because many of the same minerals are found on land or within the EEZ. In short, our national security and economic interests will be advanced if we join the convention.

INACCURACIES ABOUT THE CONVENTION

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

IMPACT ON INTELLIGENCE GATHERING.

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

While it is true that article 19 provides that intelligence collection within the territorial sea is inconsistent with the innocent passage regime and that article 20 provides that submarines must navigate on the surface when engaged in innocent passage, it's a far stretch to thus conclude that the convention prohibits intelligence collection and requires submarines to navigate on the surface when transiting the territorial sea. Nothing in article 19 prohibits a U.S. vessel from engaging in intelligence activities in a foreign territorial sea. If a vessel does engage in such activities, it simply cannot claim that it is engaged in innocent passage. The same rule has applied for the past seven decades. Similarly, Article 20 does not prohibit submerged transits through the territorial sea, per se. Article 20 merely repeats the rule from the 1958 Convention on the Territorial Sea, a convention to which the United States is a party. The rule concerning submerged transits from the 1958 Convention has been the consistent position of nations, including the United States, for more than 70 years and it has never been interpreted as prohibiting or otherwise restricting intelligence collection activities or submerged transits in the territorial sea. In short, if or when the need arises to collect intelligence in a foreign territorial sea, nothing in UNCLOS will prohibit that activity.

IMPACT ON MIO/PSI

As a former naval officer, Mr. Chairman, you know that the U.S. Navy has been conducting MIOs or MIO-type operations since we first declared our independence. These operations have been conducted using a variety of legal bases, including: flag State or master's consent, bilateral boarding agreements, conditions of port entry, customs enforcement in waters contiguous to the territorial sea, universal jurisdiction over stateless vessels and vessels engaged in piracy and slave trade, belligerent right of visit and search under the law of armed conflict, and the inherent right of self-defense, most recently reflected in Article 51 of the U.N. Charter. Any of these bases can be used individually or in combination to interdict suspect vessels on the high seas as we continue to fight the GWOT. Some of these bases are codified in the UNCLOS. Others, like the right of self-defense and belligerent rights, exist outside and are unaffected by the Convention. The Convention's preamble is quite clear in this regard—that is, "matters not regulated by the Convention continue to be governed by the rules and principles of general international law." Thus, matters such as self-defense and belligerent rights are unaffected by the Convention. In short, nothing in UNCLOS hampers, impedes, trumps, or otherwise interferes with anything we have done in the past, present or future regarding MIO. Where the provisions of the Convention like Articles 92 and 110 apply, we will use them to our advantage. In situations where other aspects of international law apply, such as our

right of self-defense, the Convention simply is not controlling. To illustrate, since President Reagan's 1983 direction that the United States would conform to the non-seabed mining provisions of the Convention, the United States has relied on its inherent right of self-defense to conduct MIO on the high seas on two occasions. On 16 August 1990, the United States, joined by Australia and the UK, announced that, in the exercise of the inherent right of individual and collective self-defense and at the request of Kuwait, it was commencing a MIO to enforce U.N. Security Council Resolution (UNSCR) 661, which imposed an embargo on goods entering Iraq and Kuwait. Nine days later, on 25 August, the Security Council adopted UNSCR 665, which endorsed the Arabian Gulf MIO. The right of self-defense has also been used as one of the legal justifications for the current MIO in support of OEF and OIF. I would note parenthetically that self-defense was also one of the legal bases used to justify the interdiction of offensive weapons and associated materials to Cuba during the 1962 Cuban Missile Crisis.

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

PSI is a global initiative designed to create a more robust approach to preventing weapons of mass destruction (WMD), their delivery systems and related materials flowing to and from States and non-state actors of proliferation concern. In furtherance of this initiative, the PSI partners agreed to a SOP in September 2003. Some of the opponents to the Convention have argued that becoming a party to the Convention will hinder our ability to effectively interdict WMD at sea. This argument, however, fails to recognize that one of the basic tenets of the SOP is that PSI activities will be undertaken consistent with national legal authorities and relevant international law and frameworks, including the navigation-related provisions of the UNCLOS. The UNCLOS absolutely does not provide any role for the U.N. relating to PSI activities, much less a role in deciding when and where ships at sea may be boarded. There already exists a large body of authority under international law for PSI interdictions at sea, including:

- Enforcement actions by coastal nations in their internal waters, territorial sea and national airspace, consistent with UNCLOS Articles 2 and 21. Coastal nation sovereignty extends beyond its land territory and internal waters to the adjacent territorial sea and the air space over the territorial sea. Within the territorial sea, coastal nations may adopt laws and regulations to prevent the infringement of its customs, fiscal, immigration, or sanitary laws. The coastal nation may also exercise the control necessary within its 24 nautical mile contiguous zone to prevent infringement of these laws and regulations.
- Enforcement actions by a flag State over vessels flying its flag, consistent with UNCLOS Articles 92 and 110. As a general rule, the flag State has exclusive jurisdiction over vessels flying its flag on the high seas, but there are exceptions.
- Boarding of foreign flag vessels on the high seas based on the consent of the flag State or the master, consistent with UNCLOS Article 92. Although the flag State has exclusive jurisdiction over its vessels on the high seas, the jurisdiction can be waived by the flag State or by the ship's master, the flag State's representative on the vessel.
- Boarding of a foreign flag vessel pursuant to a bilateral or multilateral boarding agreement with the flag State, as evidenced by the recently concluded U.S.-Liberia PSI Boarding Agreement (11 February 2004). This agreement is modeled after the counternarcotics cooperation agreements we currently have with 24 nations.
- Enforcement actions against stateless vessels and vessels that have been assimilated to a ship without nationality, consistent with UNCLOS Articles 92 and 110. Mr. Chairman, all nations have jurisdiction over stateless vessels, as well as vessels engaged in piracy and slave trade.

Last, but not least Mr. Chairman, as in the case of MIOs, PSI interdictions can also be justified as a self-defense measure. Clearly, international law, including UNCLOS, would not prohibit the United States or any other nation from boarding a vessel carrying a WMD that posed an imminent threat to our national security

just because we didn't have flag State or master consent. If one thing is clear in international law, a nation is authorized to use armed force in self-defense to protect its national interests against an imminent threat of attack.

RELIANCE ON CUSTOMARY INTERNATIONAL LAW

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

While it is true that many of the convention's provisions are reflective of customary international law, others, such as the rights of transit passage and archipelagic sea lanes passage that I previously discussed, are creations of the convention. Additionally, if you examine the evolution of customary international law in the 20th century, you'll find that it evolved the erosion, not the preservation, of navigational rights and freedoms. In the mid-1950s—it was concluded by the major maritime powers that the best way to stop that erosion was through the adoption of a universally recognized treaty that established limits on coastal nation jurisdiction and preserved traditional navigational rights and freedoms.

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

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

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

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

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

LOSS OF U.S. SOVEREIGNTY

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

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

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

Some may try to argue that Article 288 allows a court or tribunal to make the final determination as to whether or not it has jurisdiction over a matter where there is a dispute between the parties as to the court's jurisdiction. They argue that Article 288 could be read to authorize a court or tribunal to make a threshold jurisdictional determination of whether an activity is a military activity or not and, therefore, subject to the jurisdiction of the court or tribunal. However, Article 288 is also found in section 2 of Part XV and therefore does not apply to disputes involving what the U.S. Government has declared to be a military activity under section 3 of Part XV. I submit this interpretation is supported by the negotiating history of the convention, which reflects that certain disputes, including military activities, are considered to be so sensitive that they are best resolved diplomatically, rather than judicially. This interpretation is also supported by a plain reading of the convention.

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

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

RUSH JOB

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

Few treaties in U.S. history have undergone the level of scrutiny that UNCLOS has undergone. Every aspect of the convention was painstakingly reviewed and analyzed during its 9-year negotiation. Since 1982, it has been exhaustively considered, analyzed and interpreted by every relevant agency in the U.S. Government. The Reagan administration gave it a long, careful review and decided not to sign it solely because of the flaws in Part XI concerning deep seabed mining. The Convention was again closely scrutinized from 1990 to 1994 as Part XI was being renegotiated to fix the problems identified by the Reagan administration. I would note, in this regard, that the efforts to renegotiate Part XI commenced under the first Bush administration. After the Part XI Agreement was successfully negotiated in 1994 to fix the problems identified by President Reagan, the Convention was again reviewed and analyzed when the Clinton administration sent the Convention and the Part XI Implementing Agreement to the Senate for advice and consent. The Convention was again extensively reviewed and analyzed in 2001 after September 11, and again this year. Initial hearings on the convention were held by the Senate Foreign Relations Committee in 1994 and again in 2003, as well as these hearings and the hearings before the Committee on Environment and Public Works. Finally, Mr. Chairman, the Convention has been the topic of debate and discussion at countless academic conferences hosted by numerous prestigious institutions, including but not limited to: Georgetown University, University of Virginia, Duke University, Center for Ocean Law and Policy, Law of the Sea Institute, and National Academy of Sciences. In short, Mr. Chairman, to conclude this has been a "rush job" would insufficiently credit all of those thoughtful reviews.

Mr. Chairman, there is now almost universal adherence to UNCLOS, with 145 parties, including all of our major allies and important non-aligned nations. The

convention establishes a stable and predictable legal framework for uses of the oceans that will benefit our armed forces. As a matter of substance, all of his successors have agreed with President Reagan that the convention sets forth the appropriate balance between the rights of coastal nations and the rights of maritime nations. The United States is both and will benefit two-fold by becoming a party. The convention is good for America—good for our economy, good for our well-being and, most importantly, good for our national security. It is time that we reassert our position as the pre-eminent maritime nation of the world and take our rightful place as a party to the convention.

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

Chairman WARNER. We thank you. You draw on a vast experience on this subject and your testimony reflects that experience.

I wonder if the panel could indulge just quick questions as we go around. I have questioned you on other aspects, so I will just direct it first to my good friend the Secretary of the Navy, Mr. Middendorf. There is one thing I know you love and love dearly is the United States Navy. Am I not correct, the tie you are wearing today is the same one you wore 30 years ago when I was in there, am I not correct?

Ambassador MIDDENDORF. That is the one you gave me, John.

Chairman WARNER. Is it not an old destroyer tie?

Ambassador MIDDENDORF. Destroyer cruiser, World War II.

Chairman WARNER. That is what you served on in World War II, is my recollection.

Ambassador MIDDENDORF. Like yourself, you have promoted me. I was commanding officer of a Landing Craft Support in the Pacific.

Chairman WARNER. You are modest as always.

I ask this because I know as you sat there and listened to the CNO your reverence for all those who have served in that position and the Navy, and indeed the submitted testimony by the Chairman of the Joint Staff. You have worked with many through the years. Do you have anything that you could say as to how you came to such strong views in opposition to your beloved chiefs?

Ambassador MIDDENDORF. It broke my heart. Yesterday I had the privilege of sitting down with, for several hours, the Judge Advocate General Corps at the Navy Department and going over these issues. They know where I am coming from. I said: Look, my problem is not—the Navy benefits mightily for the most part from this program. It is this question of sovereignty that I worry about, and also I have some problems with the opt-out provisions in this treaty.

I proposed today that we make an amendment to the treaty, if possible, and the Senate so advise that we clarify that whole question of a declaration and opt-out provisions. That is my main problem, plus the sovereignty issue. Philosophically, I desperately hope we will take out article 140, which talks about redistributing the world's resources from the successful countries to the poorer countries.

Chairman WARNER. Thank you.

Professor Moore, you mentioned and I wrote down the erosion of sovereign rights of this country as you have seen it through the years. I think you were speaking in terms of navigation and so forth. I was waiting to hear you use the words "and this treaty

would restore some of those areas where there has been erosion." I do not want to lead a witness, but can you say that?

Mr. MOORE. Mr. Chairman, yes, I can say certainly that in relation to the overall negotiations, of our struggle over a 25-year period to get this, Mr. Chairman. We were facing 200-mile economic territorial sea claims that would have cost the sovereign rights of the United States on the high seas, a fundamental principle of international law that every nation's warships and their ships are not subject to the control of other countries on the high seas.

We were facing a series of what were called creeping jurisdiction claims of individual coastal states to make these claims. So this negotiating process I have no doubt, Mr. Chairman, was extraordinarily important in rolling those back and protecting the sovereign rights of the United States of America, and I have no doubt but that that is really the thing at stake as we go forward: Are we going to continue to protect the sovereign rights of the United States in naval mobility and commercial mobility?

So I think that is the real sovereignty issue. I must say, Mr. Chairman, for the life of me I cannot see or understand any other sovereignty issue here. The deep seabed mining area has no area relating to sovereignty and there is simply nothing under U.S. national jurisdiction that is being placed under the international authority, period.

Let me also just make a point on this article 140 to my good friend Bill Middendorf, because that is a little deceptive. You look at that article 140 and it looks like this thing is still part of the new international economic order. But then you look more closely at actually what was negotiated and what the real functional authority is. It appears in article 1, which is in definitions, and it appears in article 134, which is the actual functional authority to deal with mineral resources, and activities in the area are defined basically dealing with mineral resources.

So the article 140, Bill, has really been well-controlled. We have gotten over that. We won that renegotiation, and every single penny that would go anywhere around the world under this notion of a new international economic order is subject to a United States veto.

Chairman WARNER. Professor, I want to allow my distinguished colleague his opportunity.

I would simply say, Admiral, if I could draw your attention, if you know of someone in the building in the DOD or in the retired community that has views at variance with yours and has the depth of experience that you have had, I would appreciate if you would refer that individual to me and I will avail them of an opportunity to provide something for the record, because I value greatly the cadre of individuals in the DOD who have worked on this for so many years dating back to 1969 when I was first exposed.

So I thank you very much, and this record will remain open throughout the next week so that we can compile the record.

I thank you for your indulgence, Senator.

Senator INHOFE. I thank you. I have to say, Mr. Chairman, I do not think I have ever had an experience of seeing so many brilliant, articulate people with such diverse views. But I have only been here 18 years. [Laughter.]

Chairman WARNER. That is a slight dig at the old chairman.

Senator INHOFE. I appreciate it very much and I think you have made good points. I think we can go back as we are making notes on different things that have been said that perhaps we could take some issue with. I think you are right when you say this is not United Nations, but they are essentially the same countries. It is still a type of a treaty where I believe, and I have heard some brilliant people agree, that there are things that we would have to do that might not be in our best interests.

But that is for us to evaluate, and that is why this is very, very significant that we are having this. It is my understanding that there may now be a hearing before the Intelligence Committee because I heard the chairman express that desire.

So I think you all three were very articulate and very thorough, and I cannot think of one thing that they did not cover that I would have to ask a question on.

So, Mr. Chairman, I appreciate very much your holding this hearing.

Chairman WARNER. Thank you very much. I appreciate the work that you have done and we will continue to work on it.

The hearing is adjourned and I thank all our participants.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR PAT ROBERTS

UNITED STATES' VETO POWER

1. Senator ROBERTS. Mr. Taft, you and Admiral Clark have represented to Senators and staff that the convention ensures the U.S. a permanent seat on the ISA Council, and that the U.S. has "veto" power in that organization. The "Gold Standard" for a permanent U.S. seat and an effective U.S. veto is the United Nations Charter. In Article 25 of the Charter, the United States of America is explicitly named in the text as a permanent member of the Security Council. In Article 27 the Charter explicitly provides in the text that U.N. Security Council decisions must have the concurring votes of all permanent members. Where is the United States of America mentioned explicitly by name in the text of the convention, its annexes, in the Clinton Agreement, or in its annex?

Mr. TAFT. The United States is denoted in Section 3, article 15(a), of the 1994 Agreement as having a permanent seat on the Council. That article provides, in pertinent part, that the Council is to include "the state, on the date of entry into force of the convention, having the largest economy in terms of gross domestic product. . . ." On the date of the entry into force of the convention, November 16, 1994, thc United States had the largest economy in terms of gross domestic product.

2. Senator ROBERTS. Mr. Taft, even assuming that the U.S. could exercise some kind of veto power over ISA Council decisions based upon the Clinton agreement, is the Clinton agreement amendable?

Mr. TAFT. Amendments could be proposed to the deep seabed mining provisions. Such an amendment could not be adopted over the objection of the United States.

3. Senator ROBERTS. Mr. Taft, will economic conditions perpetually "guarantee" the U.S. a seat?

Mr. TAFT. The U.S. guaranteed seat does not depend upon future economic conditions. The seat depended upon economic conditions at a particular point in time, which has now passed. The seat is now fixed.

4. Senator ROBERTS. Mr. Taft, assuming that the U.S. really will exercise some kind of "veto" power in the ISA Council, will that power also extend to decisions of the UNCLOS Tribunal?

Mr. TAFT. The proposed resolution of advice and consent would have the United States select arbitration under article 287(1) of the convention rather than the ICJ or the International Tribunal for UNCLOS. Nevertheless, the United States would

be able to nominate up to two persons for election to the Tribunal. Decisions of the Tribunal are taken by majority vote of its 21 members.

5. Senator ROBERTS. Mr. Taft, would that power extend to decisions of the World Court that rely on or interpret the convention?

Mr. TAFT. Where two parties to the convention have elected to have disputes concerning the convention addressed by the ICJ, the Court's normal procedures would apply. The court, pursuant to its statute, makes decisions by majority.

TRIBUNAL'S FIDELITY

6. Senator ROBERTS. Mr. Taft, the Department of State appears to have full confidence in the Tribunal's enduring fidelity to rational behavior. Does the Department of State or the DOD have written analyses of Tribunal jurisprudence that might explain that confidence? If so, may we have copies?

Mr. TAFT. I would refer you to www.itlos.org for the dispute settlement cases under the convention that have been brought to the Tribunal. These cases relate primarily to the prompt release of vessels (in most cases, related to fisheries). The other cases have been either requests for provisional measures pending the establishment of an arbitral tribunal under the convention or cases brought to the Tribunal by mutual agreement of the parties to the dispute. Deep seabed mining disputes are also subject to the jurisdiction of the Tribunal (the Sea-bed Disputes Chamber in particular); however, there have not been any such cases to date.

The specific cases that have been brought before the Tribunal to date are:

Prompt Release:

- the M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea);
- the "Camouco" Case (Panama v. France);
- the "Monte Confurco" Case (Seychelles v. France);
- the "Grand Prince" Case (Belize v. France);
- the "Chaisiri Reefer 2" Case (Panama v. Yemen); and
- the "Volga" Case (Russian Federation v. Australia).

Other:

- the M/V "SAIGA" Case (No. 2) (Saint Vincent and the Grenadines v. Guinea);
- the Southern Bluefin Tuna Cases (New Zealand/Australia v. Japan);
- the case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Community);
- the MOX Plant Case (Ireland v. United Kingdom); and
- the case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore).

In terms of the prompt release cases, the Tribunal has declined jurisdiction in appropriate cases, for example, in the Grand Prince case where it was not clear that the vessel was in fact a Belize flag vessel. As a substantive matter, the decisions have efficiently implemented the convention's objective of providing for the prompt release of vessels/crew upon the posting of a reasonable bond.

Concerning other cases, their procedural and factual circumstances vary considerably. Some cases, such as the "SAIGA" No. 2 case and the Swordfish case, were submitted to the Tribunal by agreement of the parties to the dispute. On the merits, the Tribunal decided in "SAIGA" No, 2 that the arrest by Guinea of the vessel of Saint Vincent and the Grenadines was contrary to the convention's hot pursuit provisions, and compensation was awarded for the unlawful arrest and detention. The parties to the Swordfish dispute agreed to suspend the proceedings and work instead to negotiate a conservation agreement, thereby obviating the need for any decision on the merits by the Tribunal.

Jurisdictional issues were raised in both the Southern Bluefin Tuna Case and the MOX case. Both cases involved a request for provisional measures, and both cases involved the existence of another agreement between the parties to the dispute on the same subject matter that raised a jurisdictional issue under article 282 of the convention. In Southern Bluefin Tuna, the Tribunal found jurisdiction and ordered certain provisional measures, essentially those sought by Australia and New Zealand; in MOX, the Tribunal also found jurisdiction but did not order any of the provisional measures requested by Ireland. (It should be noted that the U.K. did not raise certain jurisdictional defenses that it could have raised.) The latter case also involved the special situation that both the U.K. and Ireland are members of the

European Union; as such, the case is currently suspended pending further action on the issue within the European Court of Justice.

In the Straits of Johor Case, another provisional measures case, Singapore raised jurisdictional arguments concerning, inter alia, the need to exhaust recourse to other means to settle the dispute before proceeding to dispute settlement under the convention. Finding that it had jurisdiction, the Tribunal did not award the provisional measures sought by Malaysia but decided upon other measures of an interim nature.

7. Senator ROBERTS. Mr. Taft, has any party to the convention ever challenged the Tribunal's jurisdiction in a case filed with the Tribunal? If so, please discuss the arguments and outcome when you supply your written analysis of jurisprudence.

Mr. TAFT. Yes. Jurisdictional/admissibility issues have been raised in two prompt release cases, and jurisdictional issues have been raised in several provisional measures cases.

In one prompt release case (the Grand Prince case), contradictory and confusing evidence was presented about the registration status of the vessel in question, creating doubt as to whether it was registered as a Belize flag vessel at the time the application for prompt release was made. The Tribunal found that it did not have jurisdiction, given that article 292(2) requires that applications for release of vessels may be made only by or on behalf of the flag state.

In another prompt release case (the M/V "SAIGA" case), Guinea unsuccessfully argued: that there was no genuine link between Saint Vincent and the Grenadines and the vessel in question; and that local remedies had not been exhausted under article 295. The Tribunal found that there was sufficient evidence that the SAIGA was the flag vessel of Saint Vincent and the Grenadines for purposes of article 292 and that the exhaustion of local remedies was not required by article 295 (which requires exhaustion of local remedies only where that is required by international law).

In the Southern Bluefin Tuna provisional measures case, Japan sought to invoke article 282 to defeat jurisdiction in light of the 1993 Convention for the Conservation of Southern Bluefin Tuna. Article 282 of the LOS Convention provides:

> "If the States Parties which are parties to a dispute concerning the interpretation or application of this convention have agreed, through a general, regional, or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this part, unless the parties to the dispute otherwise agree" (emphases added).

The Tribunal did not find article 282 to be applicable in that case. It concluded that the agreement cited by Japan did not provide for disputes concerning the UNCLOS to be submitted to a dispute settlement procedure; further, it noted that the agreement cited did not provide in any event for dispute settlement procedures entailing a binding decision.

In the MOX provisional measures cases, the U.K. sought to invoke article 282 to defeat jurisdiction, citing the OSPAR Convention (a regional marine pollution treaty) to which both Ireland and the U.K. are parties. The Tribunal found article 282 not applicable because the cited regional treaty did not provide for disputes concerning the UNCLOS to be submitted to a dispute settlement procedure under that treaty. (It should be noted that the U.K. did not raise article 297 as a defense to jurisdiction, which it could have.) The Tribunal thus found jurisdiction. It did not, however, award the measures sought by Ireland.

In the Straits of Johor provisional measures case, Singapore raised jurisdictional arguments under articles 281 and 283 concerning, inter alia, the need to have exhausted recourse to other means to settle the dispute before proceeding to dispute settlement under the convention. The Tribunal concluded that it had jurisdiction, finding that the requirement for prior consultations had been satisfied through exchanges of views and meetings between the parties and that it was explicitly stated at the time that the consultations were without prejudice to Malaysia's right to pursue dispute settlement under the convention.

TRIBUNAL'S JURISDICTION

8. Senator ROBERTS. Mr. Taft, with regard to the jurisdiction of the Tribunal, how far beyond the immediate shoreline can the Tribunal reach to address activity affecting the sea?

Mr. TAFT. The convention addresses land-based sources of marine pollution, one of the major causes of marine pollution. However, alleged marine pollution by coastal states from land-based sources are not subject to dispute settlement jurisdiction under the convention, whether by the Tribunal, arbitration, or otherwise.

Because of the sensitivities of coastal states concerning their land-based (and certain other) activities, the convention sets forth limitations on the obligations related to marine pollution that are to be subject to dispute settlement jurisdiction. These limitations on jurisdiction apply to all parties, unlike the optional exceptions to dispute settlement, such as disputes concerning military activities, which must be affirmatively declared by a party in advance.

Specifically, article 297(1)(c) provides that only certain coastal state obligations related to marine pollution are subject to dispute settlement. Among other things, there needs to be a "specified" international rule or standard "applicable" to the coastal state. The convention does not obligate the coastal state to follow an international rule or standard with respect to land-based sources, much less a specified one. On the contrary, recognizing the sensitivity surrounding land-based activities, coastal states are merely to "take into account" internationally agreed rules, standards, etc.

Thus, alleged marine pollution from U.S. land-based activities would not be subject to dispute settlement under the convention.

9. Senator ROBERTS. Mr. Taft, can the Tribunal reach activity along any navigable waterway in our country?

Mr. TAFT. See answer to Q. 8.

10. Senator ROBERTS. Mr. Taft, does the convention set out territorial jurisdictional limits of any kind for the Tribunal?

Mr. TAFT. See answer to Q. 8.

11. Senator ROBERTS. Mr. Taft, who decides where the borderline will be under the convention between the jurisdiction of our Federal courts and the jurisdiction of the Tribunal? Is there a borderline?

Mr. TAFT. Dispute settlement panels under the convention would be addressing interpretation and application of the convention. In general, U.S. Federal courts would not be addressing the convention; it should be noted in this regard that one of the declarations in the proposed resolution of advice and consent makes clear that the convention would not be judicially enforceable in U.S. courts (with the exception of certain provisions related to privileges and immunities). One area of overlap would be U.S. enforcement of decisions of the Sea-bed Disputes Chamber pursuant to article 39 of Annex VI. In this regard, another proposed declaration makes clear that such decisions are to be enforceable in the United States not directly through invocation of the convention but only in accordance with procedures established by implementing legislation.

12. Senator ROBERTS. Mr. Taft, who will resolve conflicts in views between the U.S. Congress and the Tribunal or other Convention parties?

Mr. TAFT. As I have noted in testimony and a letter to the Senate, the United States would be able to implement the convention under existing laws and regulations (including enforcement practices), which are consistent with the convention and which would not need to be changed in order for the United States to meet its convention obligations. Were Congress in the future to enact legislation in some way at odds with U.S. obligations under the convention, such legislation would prevail in the United States as a matter of U.S. law, notwithstanding the contrary view of any other state or dispute settlement body under the convention.

ADMINISTRATION OBJECTIONS

13. Senator ROBERTS. Mr. Taft, if the Senate decides to take up this treaty, would the administration object in principle if the Senate decided to improve the draft resolution of ratification first?

Mr. TAFT. The administration would have no objection in principle to improvements to the draft resolution of advice and consent. The administration has, however, worked closely with the Foreign Relations Committee in drafting the resolution of advice and consent that has been reported to the Senate and believes that this resolution is satisfactory in its present form. The administration's position on particular proposals would, of course, depend upon the proposal in question.

PROLIFERATION SECURITY INITIATIVE

14. Senator ROBERTS. Mr. Taft, please explain why submitting our Nation's naval activity to the convention regime does not sap vital operational flexibility needed for the Proliferation Security Initiative (PSI) and other operations to confront 21st century threats.

Mr. TAFT. As stated in my testimony, the convention's navigation provisions derive from the 1958 UNCLOS, to which the United States is a party, and also reflect customary international law accepted by the United States. As such, U.S. accession to the convention will not affect applicable maritime law, policy, or practice regarding maritime interdiction of weapons of mass destruction or other maritime operations. If anything, as Admiral Clark testified, joining the convention will support both the worldwide mobility of our forces and our traditional leadership role in maritime matters; it supports the freedom to get to the fight, 24 hours a day and 7 days a week, without a permission slip.

15. Senator ROBERTS. Mr. Taft, since the PSI was conceived and is executed by a group of like-minded and willing allies outside of the United Nations ambit, please explain how the State Department's efforts to directly link it to the United Nations through this Convention will enhance it.

Mr. TAFT. The PSI Statement of Interdiction Principles states clearly that all PSI activities will be undertaken consistent with national legal authorities and international law. The convention reflects customary international law accepted by the United States and therefore ratification of the convention will not impact our PSI maritime-related activities. Adherence to the convention does not link PSI to the United Nations, just as adherence to the U.N. Charter does not link PSI to the United Nations.

16. Senator ROBERTS. Mr. Taft, which is the more important criterion for foreign state participation in PSI? The foreign state's political will to help the United States counter illicit proliferation or the fact that the foreign state is (or is not) a party to the convention?

Mr. TAFT. Any state participating in PSI must have the political will to counter illicit proliferation. That is the purpose of PSI. A PSI partner does not need to be a party to the convention.

17. Senator ROBERTS. Mr. Taft, China opposes interdiction of ships to stop proliferation. This became very clear recently in the U.N. Security Council, when the U.S. attempted to obtain a strong resolution on arms trafficking. Could China, as a party to the convention, use the convention to challenge U.S. PSI operations in the Pacific?

Mr. TAFT. The purpose of UNSCR 1540, as called for by the President, was to require states to criminalize proliferation, put in place strong export controls, and secure sensitive materials. As part of that resolution, we also obtained a strong statement of political support for cooperative action to stop proliferation, consistent with international and national legal authorities. We are pleased with the strong endorsement by the Security Council, including China, for activities like the PSI, which involve cooperative action to stop proliferation. Even so, were China or any other Party to the convention to challenge PSI operations, such operations would not be subject to dispute settlement because of the exception for disputes concerning military activities.

PROTECTING U.S. MARITIME INTERESTS

18. Senator ROBERTS. Mr. Taft, why do you feel that the U.N. Security Council (where the U.S. actually does have a permanent seat and veto) is a forum inferior to convention bodies for protecting U.S. maritime interests?

Mr. TAFT. It is not a matter of the Security Council's being an "inferior" forum. The fact is that various convention bodies, not the Security Council, are charged with implementing and applying convention provisions of great interest to the United States. The Continental Shelf Commission, for example, has begun its work examining the proposed outer limits of various states' continental shelves in accordance with the criteria in article 76 of the convention. Its conclusions have implications not only for the claims of other states, which we will want to ensure do not exceed allowable limits, but also for the future claim of the United States that the United States is currently in the early stages of developing. As another example, the deep seabed mining institutions are engaged in work of interest to potential exploration and exploitation of the deep seabed by U.S. entities.

SO–SAN

19. Senator ROBERTS. Mr. Taft, why did Spanish commandos, instead of U.S. troops, board and stop the SO–SAN off the Horn of Africa in December 2002, as it carried a cargo of SCUD missiles from North Korea?

Mr. TAFT. Spanish commandos boarded and stopped the SO–SAN because those forces were the best available at the time and location of the boarding. Although the PSI did not exist at the time, this is exactly the kind of cooperative action envisioned by the PSI.

20. Senator ROBERTS. Mr. Taft, in preparing the "execute order" for this mission, did the State Department or the Department of Defense take notice of the convention in any way? If so, how?

Mr. TAFT. As directed by President Reagan in 1983 and subsequently, the United States, including the U.S. Navy, has been acting consistently with the non-seabed provisions of the convention. The convention provided a number of possible bases to board the vessel, which were considered as the situation on the scene developed.

21. Senator ROBERTS. Mr. Taft, did the convention present any obstacles to the boarding?

Mr. TAFT. No.

22. Senator ROBERTS. Mr. Taft, if the convention did pose an obstacle to boarding the SO–SAN, why should the United States become a party to a convention that prevents unconventional actions that may be vital to fighting terrorism and proliferation?

Mr. TAFT. Joining the convention would not change the law currently applicable to the United States in conducting such actions, either by virtue of the 1958 Conventions or by virtue of customary international law accepted by the United States.

ARTICLE 110

23. Senator ROBERTS. Mr. Taft, Article 110 of the convention on the "Right to Visit" is very explicit. In summary, it permits a warship on the high seas to board a foreign ship where there is a reasonable ground for suspecting that the ship is:

1. engaged in piracy;
2. engaged in the slave trade;
3. engaged in unauthorized broadcasting;
4. without nationality; or
5. the same nationality as the warship though flying a foreign flag or no flag.

Article 110 does not, however, state that boarding is permitted where there is a reasonable ground for suspecting that the ship is engaged in terrorism or proliferation. China demonstrated in the Security Council recently that it adamantly opposes interdiction of ships to prevent WMD proliferation. Is it safe to assume that China's unhelpful attitude is also supported by convention context?

Mr. TAFT. No. First of all, China did not oppose interdictions and, in the course of negotiations, that a range of actions, including interdictions, could be used to stop proliferation. The specification of certain grounds permitting the boarding of foreign ships in article 110 does not limit the numerous other legal bases under the convention for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction, for example, exclusive port and coastal state jurisdiction in internal waters and national airspace; coastal state jurisdiction in the territorial sea and contiguous zone; exclusive flag state jurisdiction over vessels on the high seas (which the flag state may, either by general agreement in advance or approval in response to a specific request, waive in favor of other states); and universal jurisdiction over stateless vessels. Further, nothing in the convention impairs the inherent right of individual or collective self-defense. Nothing in the convention would support any country's statements of opposition to the PSI.

24. Senator ROBERTS. Mr. Taft, why is it in our counterproliferation and counterterrorism interests to lock ourselves into this restrictive article?

Mr. TAFT. This article reflects existing international law accepted by the United States. We are not changing any policy or practice of the United States relating to activities on the high seas.

25. Senator ROBERTS. Mr. Taft, isn't it true that Article 110 of the convention would require the U.S. to pay damages for "unjustified" boardings?

Mr. TAFT. The United States does not make "unjustified" boardings. It should also be noted that a requirement to pay damages for "unjustified" boardings is contained in the 1958 Geneva Convention on the High Seas, to which the United States is already a party.

26. Senator ROBERTS. Mr. Taft, if the U.S. is required to pay damages, would such damages be payable to convention parties only or to non-parties like North Korea as well?

Mr. TAFT. Inasmuch as all U.S. boardings are justified in advance, the U.S. will not be liable for damages.

27. Senator ROBERTS. Mr. Taft, who decides whether a boarding is unjustified?

Mr. TAFT. The United States will determine whether a boarding is justified before undertaking it.

28. Senator ROBERTS. Mr. Taft, would the SO–SAN have been an "unjustified" boarding?

Mr. TAFT. No. It was originally suspected of being a vessel without nationality. When its nationality was confirmed, the ship was searched with the permission of the flag state. (The ship was found, among other things, to have a false manifest of the goods on board.)

29. Senator ROBERTS. Mr. Taft, if the SO–SAN were to have been an "unjustified" boarding, and assuming that the U.S. had been a convention party at the time of the SO–SAN boarding, to whom could the U.S. have owed damages?

Mr. TAFT. As noted above, the SO–SAN boarding (conducted by Spain) was not an unjustified boarding. The SO–SAN's flag state was Cambodia.

"NO RESERVATIONS" CLAUSE

30. Senator ROBERTS. Admiral Clark, this convention's "no reservations" clause interferes with the Senate's treaty power. The executive branch, by making it difficult for the Senate to attach reasonable conditions to complex treaties, leaves the Senate no choice but to reject them. Such clauses might have made sense during the U.S.-Soviet arms race, but no longer. Would the Navy object to a Senate effort to remove the no reservations clause?

Admiral CLARK. My understanding is that the only way to remove the "no reservations" clause from the treaty would be for the parties to the convention to amend it. Moreover, the "no reservations" clause serves the valuable function of preventing other states parties from picking and choosing among the various provisions of the treaty. For example, if the "no reservations" clause were removed, parties could potentially "opt out" of freedom of navigation articles to which the United States attaches great importance. In that case, the Navy would object to such a result because it would undermine the stable and predictable navigation regime currently embodied in the convention.

31. Senator ROBERTS. Admiral Clark, would the Navy object if the Senate makes other changes to the treaty, or to the resolution of ratification approved by the Foreign Relations Committee to address its concerns?

Admiral CLARK. My understanding is that the Senate cannot unilaterally make changes to the treaty. Except for renegotiating the treaty, the only way to change it is for the United States to become a party and propose amendments. With respect to the resolution of advice and consent, while the Navy staff participated in the drafting of the proposed resolution and believes the resolution is satisfactory in its present form, there is no objection in principle to changes to it. Navy's position on any change would, of course, depend upon the nature of the proposal.

[Whereupon, at 2:16 p.m., the committee adjourned.]

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