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CONVENTION ON THE LAW OF THE SEA

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

REPORT

together with

MINORITY VIEWS

[To accompany Treaty Doc. 103–39]

The Committee on Foreign Relations, to which was referred the United Nations Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982 (the "Convention"), and the Agreement Relating to the Implementation of Part XI on the United Nations Convention on the Law of the Sea, with Annex, adopted at New York on July 28, 1994 and signed by the United States on July 29, 1994 (the "1994 Agreement") (Treaty Doc. 103–39), having considered the same, reports favorably thereon with declarations, understandings, and conditions as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to accession to the Convention and ratification of the 1994 Agreement, as set forth in this report and the accompanying resolution of advice and consent.

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I. PURPOSE

The Convention, together with the related 1994 Agreement, establishes a comprehensive set of rules governing the uses of the world's oceans, including the airspace above and the seabed and subsoil below. It divides the seas into maritime zones and establishes rights, obligations and jurisdiction over each zone that carefully balance the interests of States in controlling activities and resources off their own coasts and the interests of all States in protecting the freedom to use the oceans without undue interference. Among the central issues addressed by the Convention and 1994 Agreement are rights and obligations related to navigation and overflight of the oceans, exploitation and conservation of ocean-based resources, protection of the marine environment, and marine scientific research.

II. BACKGROUND

President Richard M. Nixon, in a statement on oceans policy issued on May 23, 1970, first proposed the concept of a treaty that would set forth a legal framework for the oceans. Negotiations on the Law of the Sea Convention were launched a little over three years later and occupied a nine-year span between December 1973 and December 1982, when the final text was adopted. The impetus for the Convention grew out of two primary international concerns. First, several coastal and naval States, including the United States, were concerned that the rapidly proliferating number of expansive claims regarding ocean space would restrict fundamental freedom of navigation rights. Second, a number of developing countries wanted to guarantee access to resources in the area beyond national jurisdiction, while national and multinational corporations wanted an international Convention that would provide legal certainty to companies interested in deep seabed mining.

The United States and other industrialized countries supported the treaty that resulted in 1982 with the exception of the provisions that related to mining of resources from the seabed, ocean floor and subsoil thereof, beyond the limits of national jurisdiction. In 1983, President Ronald Reagan issued a statement on Oceans Policy explaining that because of enumerated problems with the deep seabed mining provisions the United States would not sign the Convention, but that otherwise the treaty "contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states." Consequently, President Reagan announced that the United States would act in accordance with the balance of interests struck in the Convention relating to the "traditional uses of the oceans—such as navigation and overflight."

Other allies, such as the United Kingdom, shared the concerns expressed by the United States regarding the deep seabed mining provisions in Part XI of the Convention. As a result, the Administration of President George H.W. Bush laid the groundwork for the launch of negotiations on a new agreement that would modify the deep seabed mining regime in the Convention to address the various concerns raised. The result was the 1994 Agreement, which dealt with each of the problems identified by the United States. Consequently, the United States signed the 1994 Agreement on

July 29, 1994. President Bill Clinton submitted both agreements to the Senate in October of that year.

In the 108th Congress, the committee held two hearings on the Convention in October 2003, in response to the Administration's designation of the Convention as one of five "urgent" treaties on its treaty priority list. In February 2004, the committee unanimously approved the Convention and the 1994 Agreement (Exec. Rpt. 108-10). No action was taken by the Senate, and under the operation of the Senate rules, the Convention and the 1994 Agreement were returned to the committee at the end of the 108th Congress.

On May 19, 2007, President George W. Bush urged the Senate to approve the Convention during this session of Congress, stating as follows:

> Joining [the Convention] will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable natural resources they contain. Accession [to the Convention] will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted.

As of October 31, 2007, there are 155 Parties to the Convention, and 131 Parties to the Agreement Relating to the Implementation of Part XI. Every member country of NATO, except Turkey and the United States, is a Party to the Convention and the 1994 Agreement. Most NATO states did not join until the conclusion of the 1994 Agreement.

III. MAJOR PROVISIONS

A detailed article-by-article analysis of the Convention and the 1994 Agreement may be found in the September 23, 1994 Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document No. 103-39. The Bush Administration has confirmed its view that, generally, the Letter of Submittal appropriately analyzes and interprets the Convention and the 1994 Agreement, and has furthermore agreed that the declarations and understandings in the resolution of advice and consent agreed to by the committee further refine the analysis and interpretations contained in the Letter of Submittal. The Executive Branch's views on particular provisions of the Convention and the 1994 Agreement are also found in testimony and responses to questions for the record at various hearings held on the Convention and the 1994 Agreement.

In general, the Convention reflects a careful balance between the interests of the international community in maintaining freedom of navigation and those of coastal States in their offshore areas. The United States has important interests in both arenas. As the world's preeminent maritime power, the United States has a vital interest in freedom of navigation both to ensure that our military has the mobility it needs to protect U.S. security interests worldwide and to facilitate the transport of goods in international trade. In 2006, 29.7 percent of all U.S. exports were shipped on the oceans, amounting to over $308 billion in exports. As a major coast-

al State, the United States has substantial interests in developing, conserving, and managing the vast resources of the oceans off its coasts, in protecting the marine environment, and in preventing activity off its coasts that threatens the safety and security of Americans. Preserving the careful balance the Convention strikes between these various competing interests is of great importance to the United States. A summary of the key provisions of the Convention and Implementing Agreement is set forth below.

Maritime Zones

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

The Convention additionally addresses the delimitation of overlapping territorial seas, exclusive economic zones, and continental shelves. These provisions are fully consistent with U.S. law and would not require a change to the current maritime boundaries of the United States. Moreover, as reflected in questions for the record that are included in the forthcoming hearing print, the Convention's provisions would apply only to maritime boundary delimitation between countries and do not address boundary delimitation between U.S. States.

The Continental Shelf

Part VI of the Convention provides that a coastal State exercises sovereign rights for the purpose of exploring and exploiting the natural resources of its continental shelf, which is comprised of the seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nm from the baselines where the outer edge of the continental margin does not extend up to that distance. The natural resources of the shelf consist of the mineral and other non-living resources of the seabed and subsoil, together with the living organisms belonging to sedentary species.

The Convention establishes rules defining the continental shelf, as well as an expert body—the Commission on the Limits of the Continental Shelf—to consider and make recommendations to coastal States on matters related to the establishment of the outer limit of their continental shelf beyond 200 nm. If the coastal State agrees, the shelf limits set by that State on the basis of the recommendations are final and binding, thus providing important stability and certainty to these claims. The Convention gives the United States one of the largest continental shelves in the world. In the Arctic, for example, the U.S. continental shelf could run at least as far as 600 nm out from the coast.

Under Part XI of the Convention (discussed below), mineral resources of the deep seabed (i.e., the seafloor beyond national jurisdiction) are administered by an international authority established by the Convention, and no State may claim or exercise sovereignty over the resources thereof, though States or individuals may exercise certain rights with regard to minerals in accordance with Part XI, as modified by the 1994 Agreement.

Freedom of Navigation and Overflight

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

During the course of the committee's review, Members questioned whether joining the Convention would have an impact on the Proliferation Security Initiative (PSI). PSI is a global initiative aimed at stopping shipments of weapons of mass destruction, their delivery systems, and related materials worldwide. Testimony from the Executive Branch, including testimony from the Navy and the Coast Guard, was unanimous in the view that joining the Convention would have no adverse impact on, and would in fact strengthen, PSI. In particular, Admiral Mullen, now Chairman of the Joint Chiefs of Staff, testified in 2003 that becoming a Party to the Convention "would greatly strengthen [the Navy's] ability to support the objectives" of PSI by reinforcing and codifying freedom of navigation rights on which the Navy depends for operational mobility. Admiral Walsh, the current Vice Chief of Naval Operations, testified on September 27, 2007, that joining the Convention would help the United States attract new and crucial PSI partners. Admiral Walsh stated that "geographically strategic nations, such as Indonesia and Malaysia, would be more likely to join PSI if we, in turn, join the Convention."

Protection and Preservation of the Marine Environment

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

Questions were raised during the course of the committee's review concerning whether the Convention, including its dispute settlement provisions, would apply to U.S. land-based activities. The committee received oral and written testimony on this question. Article 207 requires coastal States merely to "take into account" internationally agreed rules, standards, and recommended practices and procedures. Alleged marine pollution by the United States from land-based sources would not be subject to dispute settlement under the Convention. 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. There are no specified rules regarding land-based sources that are applicable to the United States that would be subject to dispute settlement. (As noted, even if there were specified rules or standards applicable to the United States, Article 207 would not require the coastal State to follow such standards, only to take them into account.) Furthermore, the "enforcement" provisions in Part XII (such as Article 213) do not address Party-to-Party dispute settlement. Rather, they either allocate enforcement responsibilities among flag States, port States, and coastal States or they address enforcement by Parties vis-á-vis private actors, such as their flag vessels or foreign flag vessels.

Questions were also raised during the course of the committee's review as to whether provisions in Part XII that require Parties to take into account internationally agreed upon rules and standards regarding atmospheric pollution that affects the marine environment could be construed as committing the United States to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, without the Protocol having been approved by the Senate. As reflected in the record, Executive Branch officials confirmed that this is not the case. The United States has not agreed to the Kyoto Protocol, and the Convention does not apply the Kyoto Protocol to the United States, either directly or indirectly.

Living Marine Resources

Most living marine resources of importance to coastal States are located within 200 nm from coasts. The Convention's authorization of the establishment of EEZs, and provision for the sovereign rights and management authority of coastal States over living resources

within such EEZs, bring such living marine resources under the jurisdiction of coastal States. The Convention provides that each coastal State has the sovereign right to make determinations under the Convention related to the utilization, conservation and management of living resources within its EEZ. The Convention also includes specific provisions for the conservation of marine mammals. While the Convention preserves the freedom to fish on the high seas, it makes that freedom subject to certain obligations, including the duty to cooperate in the conservation and management of the living resources in high seas areas.

Marine Scientific Research

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

Deep Seabed Mining

Part XI of the Convention, as fundamentally modified by the 1994 Agreement, establishes a regime governing the exploration and exploitation of the seabed, ocean floor and subsoil thereof beyond the limits of national jurisdiction on the basis of capitalist, market-oriented principles. As modified, Part XI meets the objections raised by the United States and other industrialized countries concerning the original Convention. It is expected to provide a stable and internationally recognized framework in which mining can proceed in response to demand in the future for deep seabed minerals. The Convention establishes an international organization, the International Seabed Authority, to administer the regime. In light of questions raised during the committee's review of the Convention and 1994 Agreement, it is worth noting that the Authority is not a United Nations institution. The Authority is an independent institution established by the Convention, which is located in Kingston, Jamaica and currently employs fewer than 40 individuals.

Responding to a principal U.S. objection to the Convention as it was originally concluded in 1982, the 1994 Agreement provides for a decisionmaking structure for the Authority that protects U.S. interests. Under Section 3(15)(a) of the Annex to the 1994 Agreement, the United States is guaranteed a seat on the Council in perpetuity. The decisionmaking process within the Authority is fairly complex, but any decision that would result in a substantive obligation on the United States, or that would have financial or budgetary implications, would require U.S. consent. Moreover, the United States would need to approve the adoption of any amendment to the deep seabed mining provisions.

In response to other U.S. objections, the 1994 Agreement also eliminates mandatory technology transfer provisions and non-market based controls on the levels of mineral production from the deep seabed that were part of the Convention as originally con-

cluded. Moreover, Article 302 of the Convention explicitly provides that nothing in the Convention requires a Party to disclose information that "is contrary to the essential interests of its security."

IV. ENTRY INTO FORCE AND DENUNCIATION

In accordance with Article 308 of the Convention and Article 6 of the 1994 Agreement, the Convention and the 1994 Agreement will enter into force for the United States on the thirtieth day following the date on which the United States deposits its instrument of accession to the Convention and its instrument of ratification to the 1994 Agreement with the Secretary-General of the United Nations.

A Party may denounce (withdraw from) the Convention on one year's notice in accordance with Article 317.

V. IMPLEMENTING LEGISLATION

The United States has acted in accordance with the Convention's balance of interests relating to the traditional uses of the oceans since it was directed to do so in a 1983 statement issued by President Reagan. The United States does not need to enact new legislation upon joining the Convention and the 1994 Agreement to supplement or modify existing U.S. law. Implementing legislation, however, will be necessary at some point after U.S. accession in order to enforce decisions of the Seabed Disputes Chamber, which is addressed below in connection with understanding 22 of the resolution of advice and consent.

VI. COMMITTEE ACTION

The Convention and the 1994 Agreement were submitted to the Senate and referred to the committee on October 7, 1994. Two hearings were held on October 14, 2003 and October 21, 2003, at which testimony was received from experts on oceans law and policy, former U.S. negotiators of the Convention, representatives of the Departments of State, Defense, and the U.S. Coast Guard, and representatives of organizations interested in oceans issues (a transcript of this hearing may be found in Exec. Rept. 108–10). In February 2004, the committee ordered the Convention and the 1994 Agreement favorably reported by a vote of 19–0. No action was taken by the Senate and, under the operation of the Senate rules, the Convention and the 1994 Agreement were returned to the committee at the end of the 108th Congress.

This year, the committee held two public hearings on the Convention and the 1994 Agreement on September 27 and October 4. (A hearing print of these sessions will be forthcoming.) Testimony was received from John D. Negroponte, Deputy Secretary of State; Gordon England, Deputy Secretary of Defense; Admiral Patrick M. Walsh, Vice Chief of Naval Operations; Admiral Vern Clark, USN (Ret.), Former Chief of Naval Operations; Bernard H. Oxman, Professor at the University of Miami School of Law; Frank J. Gaffney, Jr., President of the Center for Security Policy; Fred L. Smith, Jr., President of the Competitive Enterprise Institute; Paul C. Kelly, President of the Gulf of Mexico Foundation; Joseph J. Cox, President of the Chamber of Shipping of America; and Douglas R. Burnett, Partner at Holland & Knight, LLP. On October 31, 2007, the

committee again considered the Convention and the 1994 Agreement, and ordered them favorably reported by a roll call vote of 17–4, with a quorum present and a majority of those members physically present and voting in the affirmative. The following Senators voted in the affirmative: Biden, Dodd, Kerry, Feingold, Boxer, Nelson, Obama, Menendez, Cardin, Casey, Webb, Lugar, Hagel, Corker, Sununu, Voinovich, and Murkowski. The following Senators voted in the negative: Coleman, DeMint, Isakson, and Vitter.

VII. COMMITTEE RECOMMENDATION AND COMMENTS

The committee recommends that the Senate give its advice and consent to accession to the Convention and ratification of the Implementing Agreement. The committee believes that the Convention advances important U.S. interests in a number of areas. It advances U.S. national security interests by preserving the rights of navigation and overflight through and above the world's oceans on which the military relies to protect U.S. interests around the world, and it enhances the protection of these rights by providing binding mechanisms to enforce them. It advances U.S. economic interests by enshrining the right of the United States to explore and exploit the vast natural resources of the oceans out to 200 nm from our coastline, and of our continental shelf beyond 200 nm, and by protecting freedom of navigation on the oceans over which 29.7 percent of all U.S. exports and 52.3 percent of all U.S. imports were transported in 2006. It advances U.S. interests in the protection of the environment by protecting and preserving the marine environment from pollution from a variety of sources, and by establishing a framework for further international action to combat pollution. Becoming Party to the Convention also advances the ability of the United States to play a leadership role in global oceans issues, including by allowing the United States to participate fully in institutions created by the Convention such as the International Seabed Authority, the Commission on the Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea.

In an era when the United States faces growing energy vulnerability, failing to accede to the Convention will constrain the opportunities of U.S. energy companies to explore beyond 200 nm. Mr. Paul Kelly, testifying on behalf of the oil and gas industry, asserted that under the Convention, the United States would have the opportunity to receive international recognition of its economic sovereignty over more than 291,000 square miles of extended continental shelf. Much of this is in the Arctic, which holds approximately one quarter of the world's undiscovered oil and natural gas, according to the U.S. Geological Survey World Petroleum Assessment in 2000. As Mr. Kelly testified to the committee: "by some estimates, in the years ahead we could see a historic dividing up of many millions of square kilometers of offshore territory with management rights that accrue . . . . So, our question is, how much longer can the United States afford to be a laggard in joining this process?"

The committee believes it important that U.S. accession to the Convention be completed promptly. The Convention became open for amendment in November 2004. As noted above, in negotiating the Convention, the United States was successful in achieving a regime that struck a careful balance in ensuring protection of many

important U.S. interests. If the United States is not a Party to the Convention, our ability to protect the critically important balance of rights that we fought hard to achieve in the Convention will be significantly diminished. In addition, the Convention's Commission on the Limits of the Continental Shelf is now making recommendations with regard to other countries' submissions that could affect the United States' own extended continental shelf. Full U.S. participation in this process requires us to be a Party to the Convention.

The President has expressed his strong support for U.S. accession to the Convention and ratification of the 1994 Agreement. In addition, among others, the National Security Adviser, the Joint Chiefs of Staff, the Secretaries of Homeland Security, Commerce and the Interior, four former Commandants of the U.S. Coast Guard, every living Chief of Naval Operations, former Secretaries of State Shultz, Haig, Baker and Albright, and every living Legal Adviser to the U.S. Department of State have written to the committee to express their support for the Convention and the 1994 Agreement.

The committee has received letters in support of U.S. accession to the Convention and ratification of the 1994 Agreement from affected industry groups, environmental groups, and other affected associations including the Chamber of Commerce of the United States of America, the Chamber of Shipping of America, the National Foreign Trade Council, the American Petroleum Institute, the International Association of Drilling Contractors, the Independent Petroleum Association of America, American Exploration and Production Council, U.S. Oil and Gas Association, National Ocean Industries Association, the National Marine Manufacturers Association, AT & T, Sprint, Tyco Communications Inc., the North American Submarine Cable Association, Pacific Crossing Limited, Pacific Telecom Cable, the National Fisheries Institute, the U.S. Tuna Foundation, the Ocean Conservancy, the World Wildlife Fund, the Humane Society of the United States, the American Bar Association, the Council on Ocean Law, the U.S. Arctic Research Commission, the Center for Seafarers' Rights, Citizens for Global Solutions, the League of Conservation Voters, the National Environmental Trust, the Natural Resources Defense Council, the Pew Oceans Commission, and the Transportation Institute. The committee has also received a statement of support for the Convention and the 1994 Agreement from the U.S. Commission on Oceans Policy (an official body established by Congress).

The committee has received letters of opposition to U.S. accession to the Convention and ratification of the 1994 Agreement from the following organizations: The American Conservative Union, State Department Watch, Freedom Alliance, America's Survival, and the Competitive Enterprise Institute.

Discussion Regarding the Resolution of Advice and Consent

The committee has included a number of declarations, understandings, and conditions in the resolution of advice and consent. Article 309 of the Convention provides that no reservations or exceptions may be made to the Convention unless expressly permitted by other articles (such as with respect to disputes settlement). Article 310 provides that a State may, however, make state-

ments, however phrased or named, with a view, *inter alia,* to harmonizing its laws and regulations with the provisions of the Convention, provided such statements do not purport to modify the effect of the Convention in their application to that State.

Section two of the resolution contains two declarations relating to the dispute settlement procedures under the Convention. The first declaration concerns the forum for dispute settlement. Pursuant to Article 287 of the Convention, a State, when adhering to the Convention or thereafter, is able to choose, by written declaration, one or more of the means for the settlement of disputes (i.e., the International Tribunal for the Law of the Sea, the International Court of Justice, arbitration under Annex VII, or special arbitration under Annex VIII for certain disputes, such as fisheries and marine scientific research). The declaration states that the United States chooses special arbitration for all the categories of disputes to which it may be applied and arbitration for other disputes.

The second declaration concerns the exclusion of certain categories of disputes from the dispute settlement procedures. Article 298 of the Convention permits a State to opt out of binding dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the UN Security Council is exercising the functions assigned to it by the UN Charter. The declaration states that the United States elects to exclude all three of these categories of disputes from binding dispute settlement, which would include all of the procedures related thereto.

With respect to disputes concerning military activities, the declaration further states that U.S. consent to accession is conditioned upon the understanding that, under Article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were "military activities," and that such determinations are not subject to review. Questions were raised during the course of the committee's review as to whether intelligence activities would be considered covered by the term "military activities." Consistent with prior testimony from officials of the Department of Defense and the Central Intelligence Agency before the Select Committee on Intelligence, the Department of State confirmed, in a letter to Chairman Biden (included in the forthcoming hearing print), that intelligence activities at sea are military activities for purposes of the U.S. dispute settlement exclusion under the Convention and thus the binding dispute settlement procedures would not apply to U.S. intelligence activities at sea.

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

The first understanding states that nothing in the Convention impairs the inherent right of self-defense or rights during armed conflict, including Convention provisions that refer to "peaceful uses" or "peaceful purposes." This understanding, which is a state-

ment of fact, underscores the importance the United States attaches to its right under international law to take appropriate actions in self-defense or in times of armed conflict, including, where necessary, the use of force.

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

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

- Paragraph 2(B) clarifies that Article 19(2) of the Convention contains an exhaustive list of activities that render passage non-innocent. The committee understands that the list of activities in no way narrows the right of innocent passage the United States currently enjoys under the 1958 Territorial Sea Convention and customary international law. On the contrary, the Convention improves upon the 1958 Convention's innocent passage regime from the perspective of U.S. navigational mobility by establishing a more objective standard for the meaning of "innocent" passage based on specifically enumerated activities, and by setting forth an exhaustive list of those activities that will render passage not "innocent." (Article 20 provides that submarines and other underwater vehicles are required to navigate on the surface and to show their flag in order to enjoy the right of innocent passage; however, failure to do so is not characterized as inherently not "innocent.")

The committee further understands that, as in the case of the analogous provisions in the 1958 Convention on the Territorial Sea and Contiguous Zone (Articles 18, 19, and 20), the innocent passage provisions of the Convention set forth conditions for the enjoyment of the right of innocent passage in the territorial sea but do not prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right.

- Paragraph 2(A) states the U.S. understanding that, among other things, the "purpose" of a ship is not relevant to the enjoyment of innocent passage, and paragraph 2(C) states the U.S. understanding that a determination of non-innocence cannot be made, among other things, on the basis of a ship's "purpose." The reference to "purpose" is intended to make clear, for example, that a ship navigating for the sole purpose of exercising its right of innocent passage is entitled to the right of innocent passage but that would not preclude a ship's purpose from being taken into account in assessing whether that ship posed a threat to use force within the meaning of Article 19(2)(a).
- Understanding 2(D) reiterates the longstanding U.S. position that the Convention does not authorize a coastal State to condition the exercise of the right of innocent passage by any

ships, including warships, on the giving of prior notification to or the receipt of prior permission from the coastal State. The Convention, and this understanding, do not, however, affect the ability of Parties to the Convention to agree among themselves to a prior notification regime. For example, such regimes have been negotiated under the auspices of the International Maritime Organization. In this regard, regulation V/11 (ship reporting systems) and regulation V/19.2.4 (automatic identification systems) of the regulations annexed to the International Convention for the Safety of Life at Sea, 1974, as amended, should be noted.

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

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

The resolution next contains a series of understandings addressing principally environment-related aspects of the Convention, including provisions of the Convention addressing marine pollution enforcement. Over the past decade or more, the Executive Branch has vigorously enforced U.S. marine pollution laws consistent with the Convention's provisions relevant to foreign flag vessels. In light of substantial experience gained, the Executive Branch has proposed, and the committee agrees, that it would be desirable to highlight certain aspects of the Convention's provisions and harmonize certain terminology as between the Convention and U.S. law. The committee also notes that marine pollution can come from a variety of sources. For example, the committee notes that air pollution from ships, which is the subject of MARPOL Annex VI, constitutes marine pollution due to the impact such air pollution can have on the marine environment.

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

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

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

The twelfth understanding clarifies that the marine pollution provisions of the Convention, specifically sections 6 and 7 of Part XII, do not limit a State's authority to impose penalties for, among other things, non-pollution offenses (such as false statement violations under 18 U.S.C. 1001) or marine pollution violations that take place in a State's ports, rivers, harbors, or offshore terminals.

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

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

The fifteenth understanding addresses the issue of potential marine pollution from industrial operations (such as seafood processing) on board a foreign vessel. While the Convention does not specifically designate on-board industrial operations as a source of marine pollution (as it does, for example, for vessel source pollution and pollution from dumping), this understanding makes clear that the Convention nevertheless supports a coastal State's regulation of discharges into the marine environment resulting from such operations. A variety of provisions in the Convention might be applicable depending upon the circumstances. It should be noted that the United States currently regulates discharges from seafood processing operations on board foreign vessels in its territorial sea and EEZ.

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

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

The Magnuson-Stevens Act provides a national framework for conserving and managing marine fisheries within the U.S. EEZ. The Act is completely consistent with the Convention and enables the United States to exercise its rights and implement its fisheries conservation and management obligations under Articles 61 and 62 of the Convention. The Magnuson-Stevens Act provides the United States with the authority to make determinations related to utilization, conservation and management of living resources within its EEZ, including defining optimum yield and allowable catch, considering effects on non-target species, and determining what, if any, surplus may exist. Articles 61 and 62 provide that the coastal State has the exclusive right to make these determinations. In particular, under both the Magnuson-Stevens Act and Article 62(2), the United States has no obligation to give another State access to fisheries in its EEZ unless, after determining the optimum yield and allowable catch under the Act, the United States has determined both that

there is surplus over and above the allowable catch and that the coastal State does not or will not have the capacity to harvest that surplus. In such event, access may be provided under reasonable terms and conditions established by the coastal State. The Magnuson-Stevens Act and other legislation provide the United States with the authority to cooperate with other States in managing fisheries resources that are highly migratory or that straddle jurisdictional lines, in order to comply with obligations under Articles 63, 64, 118, and 119. Consistent with Article 297(3), binding dispute settlement does not apply to disputes relating to a coastal State's discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its conservation and management laws and regulations.

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

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

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

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

The twenty-first understanding addresses certain decisions of the Assembly, the primary body of the International Seabed Authority. Specifically, the Assembly, under Article 160(2)(e), assesses the contributions of members to the administrative budget of the Au-

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

The twenty-second declaration addresses Article 39 of Annex VI of the Convention, which provides for decisions of the Seabed Disputes Chamber to be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought. Because of potential constitutional concerns regarding direct enforceability of this provision in U.S. courts and because Article 39 does not require any particular manner in which Chamber decisions must be made enforceable, the declaration provides that, for the United States, such decisions shall be enforceable only in accordance with procedures established by implementing legislation and that such decisions shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States. Given the current undeveloped state of deep seabed mining, such legislation would not be necessary before U.S. accession to the Convention.

The twenty-third understanding focuses on the adoption of amendments to section 4 of Annex VI of the Convention, which relates to the Seabed Disputes Chamber, which is established under the Convention to resolve certain disputes arising in connection with deep sea bed mining. The basic rules for amending Annex VI are set forth in section 5 of that Annex. It is clear from Article 41 of that Annex, with respect to amendments to Annex VI other than to section 4, that the United States could block adoption of such an amendment (either through the ability to block afforded by Article 313(2) or through the consensus procedure at a conference of the States Parties). Regarding amendments to section 4 of Annex VI, related to the Seabed Disputes Chamber, Article 41(2) of Annex VI provides that such amendments may be adopted only in accordance with Article 314, which in turn requires that such amendments be approved by the Assembly following approval by the Council. Article 314 does not specify the decisionmaking rule by which the Council must approve the amendment before the Assembly may adopt it; Article 161(8), which lists certain categories of decisions and their corresponding decision making rules, also does not specifically address adoption of amendments to section 4 of Annex IV. Turning to Article 161(8)(f) to determine the default rule for decisions within the authority of the Council for which the decision

making rule is not specified, the Council is to decide "by consensus" which subparagraph of Article 161(8) will apply. Section 3 of the Annex to the 1994 Agreement conflates subparagraphs (b) and (c) of Article 161(8), but it does not affect situations where the Convention, as in the case of 161(8)(f), provides for decision by consensus in the Council. Because the analysis is reasonably complex, the committee agrees with the Executive Branch that an understanding on this point is desirable.

The twenty-fourth declaration relates to the question of whether the Convention and 1994 Agreement are self-executing in the United States. The committee has included a declaration that the Convention and the 1994 Agreement, including amendments thereto and rules, regulations, and procedures thereunder, are not self-executing for the United States, with the exception of provisions related to privileges and immunities (Articles 177-183, Article 13 of Annex IV, and Article 10 of Annex VI). Consistent with the view of both the committee and the Executive Branch, the Convention and 1994 Agreement, including the environmental provisions of the Convention, do not create private rights of action or other enforceable individual legal rights in U.S. courts. The United States, as a Party, would be able to implement the Convention through existing laws, regulations, and practices (including enforcement practices), which are consistent with the Convention and which would not need to change in order for the United States to meet its Convention obligations. Except as noted in connection with declaration twenty-two above, the United States does not need to enact any new legislation to supplement or modify existing U.S. law.

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

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

the United States. The declaration highlights the amendment procedure but does not specifically address under what circumstances a constitutional issue might arise.

VIII. TEXT OF RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION

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

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

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

SECTION 2. DECLARATIONS UNDER ARTICLES 287 AND 298.

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

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

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

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

(2) The Government of the United States of America declares, in accordance with article 298(1), that it does not accept any of the procedures provided for in section 2 of Part XV (including, inter alia, the Seabed Disputes Chamber procedure referred to in article 287(2)) with respect to the categories of disputes set forth in subparagraphs (a), (b), and (c) of article 298(1). The United States further declares that its consent to accession to the Convention is conditioned upon the understanding that, under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were "military activities" and that such determinations are not subject to review.

SECTION 3. OTHER DECLARATIONS AND UNDERSTANDINGS UNDER ARTICLE 310.

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

(1) The United States understands that nothing in the Convention, including any provisions referring to "peaceful uses" or "peaceful purposes," impairs the inherent right of individual or collective self-defense or rights during armed conflict.

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

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

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

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

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

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

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

(B) "normal mode" includes, inter alia—

(i) submerged transit of submarines;

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

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

(iv) underway replenishment; and

(v) the launching and recovery of aircraft;

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

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

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

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

(A) all States enjoy high seas freedoms of navigation and overflight and all other internationally lawful uses of the sea related to these freedoms, including, inter alia, military activities, such as anchoring, launching and landing of aircraft and other military devices, launching and recovering water-borne craft, operating military devices, intelligence collection, surveillance and reconnaissance activities, exercises, operations, and conducting military surveys; and

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

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

(A) prospecting and exploration of natural resources;

(B) hydrographic surveys;

(C) military activities, including military surveys;

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) in determining what constitutes a "serious" act of pollution, a State may consider, as appropriate, the cumulative or

aggregate impact on the marine environment of repeated acts of pollution over time; and

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

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

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

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

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

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

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

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

(17) The United States understands that, with respect to articles 61 and 62, a coastal State has the exclusive right to determine the allowable catch of the living resources in its exclusive economic zone, whether it has the capacity to harvest the entire allowable catch, whether any surplus exists for allocation to other States, and to establish the terms and conditions under which access may be granted. The United States further understands that such determinations are, by virtue of article 297(3)(a), not subject to binding dispute resolution under the Convention.

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

(19) The United States understands that, with respect to article 33, the term "sanitary laws and regulations" includes laws and reg-

ulations to protect human health from, inter alia, pathogens being introduced into the territorial sea.

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

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

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

(23) The United States—

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

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

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

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

SECTION 4. CONDITIONS.

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

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

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

the Senate on any amendment proposed to be adopted pursuant to article 313 of the Convention.

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

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

(B) of any other body under the Convention to consider an amendment that would enter into force pursuant to article 316(5) of the Convention; the President shall consult with the Committee on Foreign Relations of the Senate on the amendment and on whether the United States should object to its adoption.

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

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

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

IX. MINORITY VIEWS

MINORITY VIEWS OF SENATORS DEMINT AND VITTER

Ronald Reagan Biographer Dinesh D'Souza tells of an incident that occurred only a few weeks after Reagan was elected president:

> According to aides who were present at the meeting, Reagan was asked by Alexander Haig, his new Secretary of State, to approve continuing negotiations for the Law of the Sea treaty. Reagan said he would not support the treaty and asked that negotiations be suspended.
>
> Incredulous, Haig tried to make him see the light by pointing out that discussions had been ongoing for years and that every recent president and virtually all leading figures in both Parties accepted the general framework of the treaty.
>
> "Well, yes," Reagan said, "but you see, Al, that's what the last election was all about."
>
> "About the Law of the Sea treaty?" Haig sneered.
>
> "No," Reagan replied. "It was about not doing things just because that's the way they've been done before."

Since that time, proponents have attempted to paint Reagan's objections as limited in scope, focused on a few minor changes to the seabed mining section. Meanwhile, key Reagan advisers like Ed Meese, Jeanne Kirkpatrick and James Malone have countered that his concerns were much more broad, relating to the fundamental collectivist philosophy embodied in the treaty. They suggested that even if the seabed mining regime was fixed or even deleted altogether, Reagan would still not have signed it. Who is correct?

For a quarter century, this question has gone unanswered. However, we now have new insights, with the release of The Reagan

Diaries. On page 90, we find the answer in President Reagan's own hand—

> Tuesday, June 29 [1982]. Decided in NSC meeting—will not sign "Law of the Sea" Treaty even without seabed mining provisions.

Reagan's concerns with the treaty were summed up in a 1984 article written by his chief Law of the Sea Negotiator, James Malone.

> The Law of the Sea Treaty's provisions establishing the deep seabed mining regime were intentionally designed to promote a new world order—a form of global collectivism known as the new international economic order (NIEO) that seeks ultimately the redistribution of the world's wealth through a complex system of manipulative central economic planning and bureaucratic coercion.

This applies not only to the seabed mining regime, but to all of the treaty with the exception of a few provisions dealing with navigation. In 1995, Commenting on the 1994 Agreement, Ambassador Malone reiterated his earlier criticism:

> This remains the case today. All the provisions from the past that make such a [new world order] outcome possible, indeed likely, still stand. It is not true, as argued by some, and frequently mentioned, that the U.S. rejected the Convention in 1982 solely because of technical difficulties with Part XI. The collectivist and redistributionist provisions of the treaty were at the core of the U.S. refusal to sign.

We believe certain provisions of the United Nations Convention on the Law of the Sea, particularly those dealing with navigation, have merit. We further appreciate the Navy's interest in the treaty. However, the navigation provisions are primarily limited to the first 4 parts—11 pages out of a 188 page treaty. The rest establishes a massive bureaucracy to govern the seas and anything that can be construed to impact the seas—even if the impact is de minimus.

Taxes.—Article 13 imposes direct "fees" on United States' corporations engaged in seabed mining. Article 82 requires "payments" of up to 7 percent for drilling on the outer continental shelf (OCS). The United States would be assessed for 7 percent of any oil, natural gas, or other resources derived by OCS exploration. The payments would be made directly to the Authority, which would redistribute the money to the other signatory nations. We believe it is unwise to create an international organization with taxing authority.

Land-Based Sources of Pollution.—Articles 194, 207, and 213 specifically apply the treaty's provisions to land-based sources of pollution. These provisions were tested in the "MOX case." In the case, Ireland sued England over a land-based nuclear power plant, and the International Tribunal on the Law of the Sea asserted jurisdiction over the case. In his letter of submittal, found on the first page of the treaty document, President Clinton reinforces this point.

> As a far-reaching environmental accord addressing vessel source pollution, pollution from seabed activities, ocean dumping and land-based sources of marine pollution, the

Convention promotes continuing improvement in the health of the world's oceans.

There is almost no limit to what any smart international lawyer could do with these pollution provisions. Further, the United States has demonstrated historically that it takes its treaty obligations seriously. Other nations have not done the same. Why should we bind ourselves to a treaty that will handcuff our economy, while other nations will simply ignore the rules? The Senate has voted to reject the Kyoto Agreement for these same reasons; we should reject this backdoor Kyoto now.

UN Secretary General Picks Arbitrators.—If ratified, the United States has stated it will select binding arbitration if disputes arise. Under Annex VIII, Article 3, in the likely event that Parties to a dispute cannot agree on arbitrators, they are selected by the Secretary General of the United Nations. This was confirmed by key witnesses in support of the treaty.

It is puzzling why we would want to submit to a judicial authority selected by the United Nations, given the organization's corruption scandals, and the fact that of the 152 countries Party to the treaty, the median voting coincidence with the United States in the 2006 General Assembly was less than 20 percent. This treaty subjects the United States to a governing body that is hostile to American interests.

Nations Vote Against U.S. interests.—Like the United Nations, the US would be ″assessed″ for 22 percent of the operations, even though we only have one vote in the 152 nation assembly, and no veto. The American people have lost confidence in Congress. Handing over sovereignty to a new international body with the power to tax and regulate American citizens and businesses will not help restore that confidence.

Military Activities.—The treaty reserves the sea for "peaceful purposes" and creates a labyrinth of regulations and restrictions on acceptable activities. We are worried that the treaty could be used to inhibit legitimate military and intelligence activities. The Resolution of Ratification highlights the vagueness of Article 298(1)(b), suggesting 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. However, this is not stated in the treaty, and therefore it is our belief that the court or tribunal will likely make its own decision as to what constitutes a ″military activity″ notwithstanding the non-binding understandings included in the Resolution.

Intelligence Gathering Activities.—The Treaty fails to clearly include intelligence, surveillance, and reconnaissance activities under "military activities." While administrations have stated that these terms are covered, the United States Senate and House of Representatives consider these separate functions and have different committees that oversee the intelligence community and the armed services. When there is a disagreement on terms, this disagreement is settled by the courts.

In addition, under Article 19 foreign ships may be denied passage through a coastal state's Territorial Sea if it engages in a number of activities, including any act aimed at collecting information to the prejudice or security of the coastal state; the carrying

out of research or survey activities; any other activity not having a direct bearing on passage. These are activities that would be necessary for the United States to collect intelligence information that could be crucial to our self-defense.

Article 20 further limits the ability of the United States to collect intelligence: in the Territorial Sea, submarines and other underwater vehicles are required to navigate on the surface and must show their flag. Under the treaty, the United States would have to surface the submarine, and fly a conspicuous American flag, so that everyone would know that an American submarine was in the vicinity. The Treaty fails to protect the significant role submarines have played, especially during the Cold War, in gathering intelligence very close to foreign shorelines.

ANNEX

Letters From Other Senate Committees

United States Senate
SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, DC 20510-6475

September 14, 2007

The Honorable Joseph R. Biden, Jr.
Chairman
The Honorable Richard G. Lugar
Ranking Member
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Lugar:

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

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

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

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

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

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

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

Sincerely,

John D. Rockefeller IV
Chairman

Christopher S. Bond
Vice Chairman

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

SSCI# 2007 - 3239

AUG 08 2007

The Honorable John D. Rockefeller IV
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

The Honorable Christopher S. Bond
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Vice Chairman Bond:

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

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

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

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

> "First, the overwhelming opinion of Law of the Sea experts and legal advisors is that the Law of the Sea Convention simply does not regulate intelligence activities nor was it intended to . . .

> Second, the Convention provides that a party may exclude military activities from jurisdiction of the Convention's dispute settlement procedures . . . the term 'military activities' includes intelligence activities.
>
> Third, the definition of 'innocent passage' in the 1982 Convention seems to provide a small advantage over the 1958 Convention, which the U.S. ratified and [under] which we currently operate. . .
>
> Fourth, the 1982 Convention explicitly recognizes an additional right of passage through international straits, a recognition that is absent from the 1958 Convention. This right of transit passage through one part of the high seas to another further reinforces the freedom of navigation for U.S. vessels and may thereby facilitate national security activities.
>
> Fifth, regardless of any party's attempt to bring forth a claim under the Convention, the Convention makes clear that parties shall not be required, in the course of any dispute settlement, to disclose information that may be contrary to the party's essential interests of security. This protection against compulsory disclosure is not in the current 1958 Convention to which the U.S. is a party."

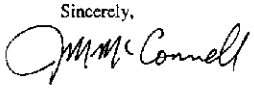
Finally, William H. Taft IV, then Legal Advisor at the Department of State, provided unclassified testimony that may be used in its entirety.

> We also would call your attention to the Report of the Committee on Foreign Relations in the Senate of the 108th Congress (Executive Report 108-10 dated March 11, 2004), and in particular to Part VI, which discusses Committee recommendations and comments. The points of understanding that the Committee noted with respect to military activities and innocent passage are particularly relevant.

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

If you have any questions regarding this matter, please contact the Director of Legislative Affairs, Kathleen Turner, who can be reached at 202-201-1698.

Sincerely,



J. M. McConnell

cc: The Honorable Robert Gates
The Honorable Condoleeza Rice

SSCI# 2004 - 2516

WRITTEN STATEMENT OF

WILLIAM H. TAFT IV, LEGAL ADVISER
U.S. DEPARTMENT OF STATE

BEFORE THE
SENATE SELECT COMMITTEE ON INTELLIGENCE
ON JUNE 8, 2004, CONCERNING

ACCESSION TO THE 1982 LAW OF THE SEA CONVENTION AND RATIFICATION OF THE 1994 AGREEMENT AMENDING PART XI OF THE LAW OF THE SEA CONVENTION
[Senate Treaty Document 103-39, Senate Executive Report 108-10]

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify on the 1982 United Nations Convention on the Law of the Sea ("the Convention"), which, with the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the 1994 Agreement"), was reported favorably by the Senate Foreign Relations Committee on March 11, 2004. Administration witnesses have previously testified before that Committee, the Senate Armed Services Committee, the Senate Environment and Public Works Committee, and the House International Relations Committee in support of U.S. accession to the Convention and reviewed the benefits of becoming a party from a national security, economic, resource, and environmental point of view. This testimony focuses on the intelligence-related issues posed by this Committee. (I have attached to this testimony the more general testimony given by Assistant Secretary John Turner and myself before those Committees and ask that it be made part of the record.)

I must say at the outset that I have been puzzled by recent criticisms of the Convention, particularly the notion that the Convention is not in our national security or

military interest. I have been familiar with the Convention for more than twenty years, including during my tenure as General Counsel of DOD in 1982, when we rightly rejected the deep seabed chapter of the treaty, and later as Deputy Secretary of Defense. In all that time I never heard it suggested by any Chief of Naval Operations or Chairman of the Joint Chiefs of Staff that there would be any adverse impact on the United States from a national security point of view as a party to the Law of the Sea Convention. And the current Chief of Naval Operations and Chairman of the Joint Chiefs of Staff both strongly support accession.

BACKGROUND:

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

When the text of the Convention was concluded in 1982, the United States recognized that its provisions supported U.S. interests, except for Part XI on deep seabed

mining. In 1983, President Reagan announced in his Ocean Policy Statement that the United States accepted, and would act in accordance with, the Convention's balance of interests relating to traditional uses of the oceans. He instructed the Government to abide by the provisions of the Convention other than those in Part XI.

Part XI has now been fixed, in a legally binding manner, to address the concerns raised by President Reagan and successive Administrations. We urge the Senate to give its advice and consent to this Convention, on the basis of the proposed Resolution of Advice and Consent, to allow us to take full advantage of the many benefits it offers.

INTELLIGENCE ISSUES

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

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

The Convention does not prohibit or regulate intelligence activities. And disputes concerning military activities, including intelligence activities, would not be subject to dispute settlement under the Convention as a matter of law and U.S. policy. As such, joining the Convention would not affect the conduct of intelligence activities in any way, while supporting U.S. national security, economic, and environmental interests.

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

With respect to whether articles 19 and 20 of the Convention would have any impact on U.S. intelligence collection, the answer is no. The Convention's provisions on innocent passage are very similar to article 14 in the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party. (The 1982 Convention is in fact more favorable than the 1958 Convention both because the list of 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, under this Convention any more than under the 1958 Convention, enjoy the right of innocent passage in the territorial sea if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act aimed at collecting information to the prejudice of the defense or security of the coastal State, however, such activities are not prohibited or otherwise affected by the Convention. In this respect, the Convention makes no change in the situation or legal regime that has existed for many years and under which we operate today. As to whether our understanding of these provisions' effect (or lack of effect) on intelligence collection is shared by other States, we are not aware of any State's taking the position, either under this Convention or under the 1958 Convention, that the provisions setting forth the conditions for the enjoyment of the right of innocent passage prohibit or otherwise regulate intelligence collection or submerged transit of submarines.

Concerning whether any current Convention party restricts intelligence collection activities in its exclusive economic zone and the potential impact of U.S. ratification in relation to such a party, the Convention does not prohibit, regulate, or authorize the coastal State to regulate intelligence activities in the EEZ. On the contrary, high seas freedoms of navigation and overflight are ensured, including the right to engage in intelligence

activities. Certain Parties have published regulations purporting to prohibit military activities in general (which are presumably intended to cover intelligence activities) in their EEZs, including Bangladesh, Brazil, Cape Verde, China, India, Malaysia, the Maldives, Mauritius, Pakistan, and Uruguay. If the United States were to become a party to the Convention, while I could not speculate as to whether this would end or affect Chinese or other challenges to intelligence activities, we would be in a stronger position to protest such unlawful assertions of coastal State jurisdiction.

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

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

would not apply to any dispute concerning military activities, including intelligence activities.

Concerning the question whether executive branch priorities already have an impact on intelligence collection activities and the implications of U.S. accession, review from a foreign policy point of view does not include the Law of the Sea Convention, because it does not affect or impair those activities. No change is expected if the United States accedes to the Convention, noting that we have been operating for decades under the 1958 conventions and customary international law, as reflected in the 1982 Convention.

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

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

PROLIFERATION SECURITY INITIATIVE:

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

CONCLUSION:

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

United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510–6050

October 30, 2007

Honorable Joseph R. Biden, Jr.
Chairman
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Honorable Richard G. Lugar
Ranking Member
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Dear Joe and Dick:

We understand that the Senate Foreign Relations Committee may soon meet to consider reporting out the United Nations Convention on the Law of the Sea (the "Convention"). We are writing to express our support for the Convention and to share views provided by the Departments of Defense and State to the Senate Armed Services Committee concerning the national security implications of the Convention.

As you know, President Bush has urged the Senate to act in support of U.S. accession to the Convention. President Bush stated on May 15, 2007, "Joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide."

The Senate Armed Services Committee has heard from both proponents and opponents of the Convention, at a hearing on April 8, 2004. The Administration witnesses were Admiral Vernon A. Clark, USN, then Chief of Naval Operations, and Department of State Legal Adviser William H. Taft, IV. The Committee also heard from: the Honorable Jeane J. Kirkpatrick, Senior Fellow and Director of Foreign and Defense Policy Studies at the American Enterprise Institute, and the Honorable William J. Middendorf, former Secretary of the Navy, both of whom testified in opposition to the Convention; and Professor John Norton Moore, University of Virginia Law School, and Rear Admiral William L. Schachte, Jr., USN (Ret.), Judge Advocate General Corps, both of whom testified in favor of the Convention.

At that hearing, Admiral Clark and Legal Adviser Taft testified regarding the impact of U.S. adherence to the Convention on U.S. national security. Admiral Clark stated "I fully support ratification of the [Convention] because in my mind it first defines and then preserves our navigational freedoms." He added that U.S. adherence to the Convention puts the United States "in a position of leadership to protect these vital freedoms and to shape the future direction

of the treaty." Legal Adviser Taft told the Committee "Joining the Convention will advance the interests of the U.S. military." He noted that the Convention's navigational provisions "preserve and elaborate the rights of the U.S. military to use the world's oceans to meet national security requirements."

On September 14, 2007, Chairman Levin wrote to the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to ask whether the views presented by Admiral Clark at the Committee's April 8, 2004, hearing continue to represent the Department's position. Chairman Levin also wrote to Secretary of State Condoleezza Rice on September 14, 2007, asking whether Ambassador Taft's April 8, 2004, testimony continues to reflect the position of the State Department regarding the Convention.

On September 26, 2007, Deputy Secretary of Defense Gordon England confirmed in writing that the testimony of Admiral Clark continues to accurately reflect the position of the Department of Defense. On September 27, 2007, State Department Assistant Secretary for Legislative Affairs Jeffrey Bergner replied in writing that the testimony provided by Ambassador Taft at the April 8, 2004, hearing continues to represent the views of the Administration. Copies of the letters from Secretary England and Assistant Secretary Bergner are attached.

In the past few months, Department of Defense officials have repeatedly expressed their support for U.S. accession to the Convention. On June 13, 2007, Secretary England, along with Deputy Secretary of State John D. Negroponte, wrote an op-ed in the Washington Times in favor of U.S. accession to the Convention, stressing that the Convention "supports and strengthens navigational rights essential to global mobility and it clarifies and confirms important ocean freedoms." As you know, General Peter Pace, USMC, then Chairman of the Joint Chiefs of Staff, Admiral E.P. Giambastiani, USN, then Vice Chairman, and the chiefs of the Army, Navy, Air Force and Marine Corps wrote to Senate Foreign Relations Committee Chairman Biden on June 26, 2007, expressing support for the United States joining the Convention.

Admiral Mullen, in the course of the Senate Armed Services Committee's consideration of his nomination to be the Chairman of the Joint Chiefs of Staff in July 2007, reiterated that he strongly favors U.S. accession to the Convention. In response to Committee questions in advance of his nomination hearing, he stated:

> "The ability of United States military forces to operate freely on, over and above the vast military maneuver space of the oceans is critical to our national security interests, the military in general, and the Navy in particular. Your Navy's – and your military's – ability to operate freely across the vast domain of the world's oceans in peace and in war make possible the unfettered projection of American influence and power. The military basis for support for the Law of the Sea Convention is broad because it codifies fundamental benefits important to our operating forces as they train and fight."

In addition, Admiral Gary Roughead, USN, during the Committee's consideration of his nomination to be the Chief of Naval Operations, emphasized the benefits of the United States joining the Convention for the Navy. He stated,

> "I believe that accession to the Law of the Sea Convention is in our national security interests. The basic tenets of the Law of the Sea Convention are clear and beneficial to the Navy. From the right of unimpeded transit passage through straits used for international navigation and reaffirming the sovereign immunity of our warships, to providing a framework for countering excessive claims of other states and preserving the right to conduct military activities in exclusive economic zones, the Convention provides the stable, predictable, and recognized legal regime we need to conduct our operations today and in the future."

We support ratification of the Convention because we believe it will advance the interests of the United States as a global maritime power and will preserve and strengthen our rights, on which our military depends, to use the world's oceans to meet U.S. national security requirements. The United States has a strong and continuing interest in supporting international agreements that advance U.S. maritime interests, protect the principle of freedom of navigation, and reduce the possibility of conflict by accident, miscalculation, or the failure of communication. U.S. accession to the Convention will enhance the ability of the U.S. Armed Forces to protect and advance U.S. national security interests, and demonstrate continued U.S. leadership in maritime affairs.

We ask your consideration of our views and appreciate the opportunity to share them with you.

Sincerely,

John Warner

Carl Levin
Chairman

Attachments

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

SEP 2 6 2007

17466

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter to the Secretary of Defense and the Chairman of the Joint Chiefs of Staff about Admiral Vernon Clark's testimony at the April 8, 2004 Senate Committee on Armed Services hearing concerning the national security benefits of U.S. accession to the Law of the Sea Convention. The Department confirms that Admiral Clark's testimony remains accurate and continues to reflect the position of the Department of Defense. As you are aware, on May 15, 2007, President Bush urged the Senate to act favorably on U.S. accession during this session of Congress, stating that: "Joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide."

As Deputy Secretary of Defense and former Secretary of the Navy, and as former Deputy Secretary of Homeland Security, I am well acquainted with the Convention and strongly support U.S. accession. The Senate Foreign Relations Committee has scheduled hearings on the Convention and has asked me to appear. A copy of my written statement to the Committee is attached, which notes that Secretary Gates, the Military Department Secretaries, the Joint Chiefs of Staff, all the Combatant Commanders, and the Commandant of the Coast Guard fully support accession to the Convention. The Department appreciates the support of the Senate Committee on Armed Services on this important treaty.

Gordon England

enclosure:
as stated

cc: The Honorable John McCain
Ranking Member

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United States Department of State

Washington, D.C. 20520

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Dear Mr. Chairman:

Thank you for your letter of September 14 regarding the Senate Armed Services Committee's 2004 hearing on the national security implications of U.S. accession to the Law of the Sea Convention.

We are pleased to confirm that the testimony provided at the April 8, 2004 hearing continues to represent the Administration's views.

William H. Taft IV, then Legal Adviser to the Secretary of State, testified that U.S. adherence to the Convention would "promote the stability of the legal regime of the oceans, which is vital to U.S. global mobility and national security." He also explained that disputes concerning military activities, including intelligence activities, would not be subject to dispute settlement under the Convention as a matter of law and U.S. policy, as elaborated in the declarations and understandings contained in the draft Resolution of Advice and Consent.

During the Committee's consideration of the Convention in 2004, the Proliferation Security Initiative was less than a year old. Today more than 80 countries have endorsed the Statement of Interdiction Principles. We have entered into PSI shipboarding agreements with seven countries: Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, and Panama, and are engaged in negotiations with other countries.

The Honorable
Carl Levin, Chairman,
Committee on Armed Services,
United States Senate.

Each PSI agreement is premised on the relevant provisions of the Convention and provides expedited procedures for obtaining authorization to board and search ships in international waters that are flying their flag and that are suspected of transporting weapons of mass destruction, their delivery systems, and related materials to or from States or non-state actors of proliferation concern. One third of the world's merchant fleet is presently subject to these procedures.

The Department of State joins President Bush in urging the Senate to act favorably on U.S. accession to the Convention during this session of Congress.

Sincerely,

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

United States Senate
WASHINGTON, DC 20510

January 24, 2007

The Honorable Joseph Biden
Chairman
Committee on Foreign Relations
United States Senate
450 Dirksen Senate Office Building

Dear Joe:

The United States, the world's largest maritime power, has one of the largest exclusive economic zones (EEZs) in the world. As a result, we have enormous interests in the oceans and their uses, including important national security, economic and environmental protection interests. To safeguard these interests, we strongly urge the Foreign Relations Committee and the United States Senate to approve ratification of the United Nations Convention on the Law of the Sea. The Bush Administration strongly supports its ratification, as did the Clinton Administration before it. The Convention is also supported by industry and the environmental community. Its ratification was a key recommendation of the U.S. Commission on Ocean Policy.

The Convention provides important rights to the United States and other countries regarding freedom of navigation and, at the same time, recognizes coastal states' authority to protect their ocean and coastal areas and the natural resources within them. These authorities are critically important to our ability to protect and conserve these resources. For example, last Congress we worked hard to ensure the passage of the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act, which has guided sustainable management of fisheries since its enactment in 1976. Before passage of the original Act, fisheries around the world, including those off the coasts of Alaska and Hawaii, were subject to overfishing, primarily by large, distant-water foreign fleets. These fleets devastated our fisheries and coastal resources until the 200-mile fishery conservation zone was established in the 1976 Act, which the Convention incorporates in recognizing national EEZs. The Convention also places substantive restrictions on fishing activities, including the Article 87 moratorium on the use of large-scale high seas driftnets.

Among many other benefits, the treaty will provide the United States with important international authorities to resolve jurisdictional matters over control of our outer continental shelf. Two-thirds of the continental shelf off the United States lies off Alaska. Article 76 of the Convention allows member States to expand the

national jurisdiction over resources on their continental shelves beyond their 200-mile EEZ, based on appropriate charting and relevant geodetic data. Russia has asserted rights to parts of the outer continental shelf that may conflict with U.S. interests, and U.S. ratification will be important to protect such interests.

As an island state, Hawaii is also tremendously dependent on its ocean and coastal resources. Its fishery resources and its fishing industry are directly impacted by the Convention and the rights and protections it provides. For example, the Convention's provisions regarding conservation of living marine resources form the guiding principles of the first regional fishery management treaty covering the high seas stocks of the Western and Central Pacific, which the Senate approved last Congress. The Convention also recognizes coastal state authorities important to helping us protect our other precious natural resources, such as those found in the Northwestern Hawaiian Islands.

Because of the importance of the rights of coastal states in their waters, we request that understandings upholding such rights be included in the package that moves to the full Senate, particularly with respect to Articles 61 and 62 and the marine environment protection provisions of the Treaty. Such a set of understandings was included in the Committee's report on the Convention in the 108th Congress, Executive Report 108-10.

Approval of the Law of the Sea Convention serves the national interest and will provide us with a comprehensive legal framework to facilitate our responsible use of the oceans' resources, while ensuring their productivity for future generations. We urge you to support its prompt consideration.

With Best Wishes,

Daniel K. Inouye
Chairman
Committee on Commerce,
Science, and Transportation

Ted Stevens
Vice Chairman
Committee on Commerce,
Science, and Transportation

○