

**John Norton Moore**  
Director, Center for Oceans Law &  
Policy and Professor of Law,  
University of Virginia

**William L. Schachte, Jr.**  
RADM, JAGC, USN (Ret.)

**Edwin D. Williamson**  
Senior Counsel, Sullivan &  
Cromwell LLP

November 26, 2007

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

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

Dear Chairman Biden and Ranking Member Lugar:

At the Committee business meeting on October 31<sup>st</sup>, during discussions preceding the Committee's vote on the Law of the Sea Convention, two members of the Committee raised questions concerning the military activities exemption to compulsory dispute resolution. Given the importance of this issue, we would like to take this opportunity to review the compulsory dispute resolution procedures contained in Part XV, Section 2, of the Convention, and explain, in detail, how Article 298 of the Convention, under its express terms, will permit the United States to completely exempt its military activities from dispute resolution, and prevent any court or tribunal from reviewing our determination that an activity is an exempted military activity.

Part XV, Section 2, of the Convention is titled, "Compulsory Procedures Entailing Binding Decisions." Section 2 is comprised of a number of Articles which contain the compulsory dispute resolution procedures that some are concerned could be used to effect a review of our military activities.

Section 2 begins with Article 286, which provides that, "[s]ubject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to Section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." That is, the limitations and exceptions to jurisdiction set out in Section 3 of Part XV are regarded as sufficiently central to this entire Section 2 as to begin the first sentence of the first article of the section.

Article 287 then provides the choice of tribunal election. The proposed Senate advice and consent resolution, at the President's request, rejects the first two choices available (*i.e.* the International Court of Justice and the International Tribunal for the Law of the Sea) and instead chooses arbitration (referred to formally as arbitral tribunals).

The other *procedures* established in Section 2 include Article 288, which provides that a court or tribunal has authority to determine its own jurisdiction, Article 290, which empowers a court or tribunal to impose provisional measures, and Article 292, which empowers a court or tribunal to order the prompt release of a vessel or crew detained only for illegally fishing or committing an act of marine pollution (in accordance with Articles 73 or 230 of the Convention).

The military activities exemption is then contained in Part XV, Section 3, Article 298, as was cross-referenced as an exception in the very first sentence of Section 2 which sets up the compulsory dispute settlement procedures. It provides in pertinent part:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State may...declare in writing that it does not accept any one or more of the *procedures provided for in section 2* with respect to one or more of the following categories of disputes.” (emphasis added)

There then follow three categories of disputes: maritime boundary disputes, disputes concerning military activities, and disputes involving matters before the United Nations Security Council. The President has asked the Senate to exempt all three categories and this blanket exemption is in the proposed Senate resolution of advice and consent.

The key language in Article 298 is: “A State may...not accept any one or more of the *procedures provided for in section 2*.” Thus, under this provision a State has the right when adhering to the Convention to preemptively and completely reject *any or all* of the dispute resolution procedures in Section 2, including the procedures set out in Articles 286, 287 and 288. It is those very procedures that a court or tribunal would have to rely upon to seek to assert authority. That is, by “not accepting” for military activities the obligation itself to submit to dispute settlement procedures under article 286, not accepting *any* of the tribunals under Article 287, and not accepting the jurisdiction of any court or tribunal even to determine its own jurisdiction under Article 288, there is not even an initial acceptance of the principal of dispute settlement, or a tribunal for any purpose, with respect to military activities. That is, no tribunal, or even agreement over dispute resolution, exists for military activities following U.S. exemption of such activities as permitted by Article 298.

Thus, the Convention itself makes clear that a State party can completely reject all the dispute resolution procedures in Section 2 for disputes involving maritime boundaries, military activities, and matters before the Security Council. There would be no processes or procedures available to an opposing State or court or tribunal to attempt to review the State’s determination that an activity is a military activity. Military officers serving as members of the United States delegation that negotiated the Convention, and one of us as Presidents Nixon’s and Ford’s Deputy Special Representative for the Law of the Sea Negotiations, ensured that the military activities exemption is ironclad.

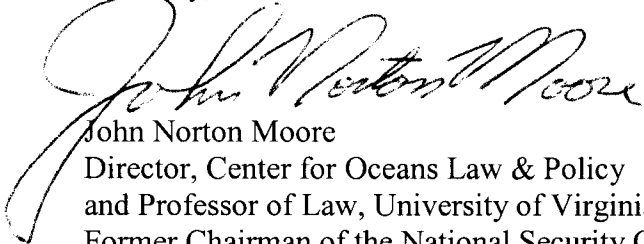
All permanent members of the United Nations Security Council (except, as yet, the United States) and numerous other countries have invoked the military activities exemption when adhering to the Convention. They, like us, would never accept a court or tribunal acting *ultra vires*--beyond the limits of the Convention itself.

We note also that the Convention provides for complete sovereign immunity for warships. Thus, Article 32 provides in relevant part “nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.” It would be a mistake to attempt to define the phrase “military activities.” It is unnecessary and unwise to try to capture, in a definition today, future military activities and technologies that are yet to be imagined.

Finally, so that no one could mistake the United States non-acceptance under Article 298, the proposed Senate Resolution of Advice and Consent provides “The United States further declares that its consent to accession to the Convention is 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.” Clearly under this provision *ultra vires* actions of any tribunal which were taken despite the clear language of the Convention would simply not be followed by the United States.

The language of the Convention and of the Senate Resolution of Advice and Consent matters. It cannot simply be ignored. That language makes it clear that military activities are completely exempted from dispute settlement and that warships have complete sovereign immunity.

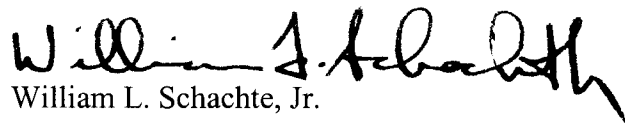
Sincerely,



John Norton Moore

Director, Center for Oceans Law & Policy  
and Professor of Law, University of Virginia

Former Chairman of the National Security Council Interagency Task Force on Law of the Sea,  
and U.S. Ambassador and Deputy Special Representative of the President for the Law of the Sea  
negotiations



William L. Schachte, Jr.

RADM, JAGC, USN (Ret.)

Member of the US Delegation to the Law of the Sea Convention under President Reagan  
Former DOD Representative for Ocean Policy Affairs



Edwin D. Williamson

Senior Counsel, Sullivan & Cromwell LLP  
Former State Department Legal Adviser