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*[via fax and next day delivery]*

October 29, 2007

The Honorable Richard G. Lugar  
Ranking Minority Member  
Committee on Foreign Relations  
United States Senate

Dear Senator Lugar:

The Minority Staff Director of the Senate Foreign Relations Committee suggested that I share with you my views regarding the legal effects of the Law of the Sea Convention in United States courts as well as the state-to-state dispute resolution provisions of that Convention. Let me begin by noting that I have the background experience and knowledge to answer this question, having served as the Chairman of the National Security Council Interagency Task Force on Law of the Sea (which coordinated eighteen U.S. Government agencies in developing U.S. oceans policy) and Deputy Special Representative of the President for the Law of the Sea under the Republican Presidents, Nixon and Ford, was appointed as an Ambassador for the negotiations by President Ford (and in that capacity was a U.S. Representative and Deputy Head of the U.S. Delegation during the negotiations of the dispute resolution provisions of the Convention), and was appointed by President Ronald Reagan to the National Advisory Committee on Oceans and Atmosphere. I also served in the Reagan Administration as the Chairman of the Board of the United States Institute of Peace and in that capacity set up and ran the Institute, then the newest federal agency, for its first five years. Perhaps also of relevance, I am a former four-term chairman of the American Bar Association Standing Committee on National Security Law, and currently direct the Center for Oceans Law & Policy of the University of Virginia, which has published the definitive six-volume article-by-article analysis of the Law of the Sea Convention used by governments all over the world.

First, let me address the legal effects of the Law of the Sea Convention in United States Courts. If the United States ratifies the Convention pursuant to the stipulations contained in the "Resolution of Advice and Consent to Ratification" and the Committee Report of March 11, 2004, the Convention will not create private rights of action or other enforceable legal rights in United States courts. Section 3(24) of the U.S. "Declarations and Understandings" in the proposed Senate Resolution clearly provides that all

provisions of the Convention other than those providing the usual diplomatic privileges and immunities “are not self-executing.” Quite simply this is legally definitive under the foreign relations law now in force in the United States in establishing, as the accompanying Committee Report states, that “the Convention . . . do[es] not create private rights of action or other enforceable legal rights in U.S. courts . . .” Indeed, it is useful to look more fully at the statement made in the 2004 Committee Report, which provides as follows:

The twenty-fourth declaration relates to the question of whether the Convention and Agreement are self-executing in the United States. The committee has included a declaration that the Convention and Agreement, including amendments thereto and rules, regulations, and procedures thereunder, are not self-executing for the United States, with the exception of provisions related to privileges and immunities (articles 177-183, article 13 of Annex IV, and article 10 of Annex VI). Consistent with the view of both the committee and the Executive Branch, this declaration states that the Convention and Agreement do not create private rights of action or other enforceable legal rights in U.S. courts (e.g., for persons accused of criminal violations of U.S. laws, including environmental pollution and general criminal laws).

“United Nations Convention on the Law of the Sea,” Report of the Senate Committee on Foreign Relations, 108<sup>th</sup> Congress, 2<sup>nd</sup> Sess. (March 11, 2004), at 14.

This statement is an accurate statement of the foreign relations law of the United States as set out in § 111 of *The Restatement of the Foreign Relations Law of the United States*. That section clearly provides “ ‘a non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.” That is, absent a subsequent act of the Government of the United States, typically an Act of Congress, to create private rights through the normal law-making process of the United States, the Convention will not be given effect as law in U.S. courts. *See Restatement of the Law Third of the Foreign Relations Law of the United States* § 111 (1987). This *Restatement* is an authoritative statement of the foreign relations law of the United States.

Further, even if the Senate did not attach this clear statement that the Convention will be regarded as non-self-executing in United States courts, most Conventions are viewed by the courts as creating state to state, rather than state to individual, obligations. Thus, Comment A to § 907 of the *Restatement* provides: “International Agreements, even those directly benefiting private persons, generally do not create private rights or provide for a cause of action in domestic courts.” Nevertheless, in the absence of Senate advice and consent to the Convention, declaring the Convention, which would supersede customary international law of the sea in our courts, as non-self-executing in U.S. courts, there is some risk that from time to time a national court may hold a provision of the Convention as self-executing and as creating rights for private parties. Indeed, that is precisely one reason the Justice Department would prefer the Convention to customary international law and why Justice insisted on a clear statement that the Convention would

be non-self executing. Finally, it should be noted that since declaration 24 concerns United States national law in courts of the United States, it is fully permissible under the Law of the Sea Convention.

*The summary conclusion on this first point is that Senate Advice and Consent under the proposed resolution would definitively prevent any use of the Convention, or the customary international law of the sea which it embodies, to create private causes of action or rights in U.S. courts. And, to the contrary, absent such action by the Senate pursuant to its proposed resolution, there is continuing risk that courts may in rare cases find that the customary international law of the sea creates private rights of action in U.S. national courts.*

Second, let me address the state-to-state dispute resolution provisions of the Convention; provisions which have been a routine part of United States efforts in international negotiations since the presidency of George Washington. Indeed, President Washington viewed the 1794 Jay Treaty with Britain, with its submission to arbitration of boundary and property disputes between the United States and Britain, as an important achievement of his presidency. Continuing that tradition of the usefulness of state-to-state arbitration, also a common feature of the commercial world, at present the United States is party to at least 16 multilateral and a plethora of bilateral agreements requiring dispute settlement through arbitration in support of our long-standing national goals of peaceful resolution of disputes and the rule of law. Examples include the Convention on International Civil Aviation, eight terrorism treaties, the International Convention for the Prevention of Pollution from Ships, and the Antarctic Environmental Protection Protocol. Indeed, the Senate recently approved the “Agreement for the Implementation of the Provisions . . . [of the Law of the Sea Convention] Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,” which adopts the dispute resolution procedures of the Law of the Sea Convention itself. While these dispute resolution mechanisms are helpful for general reasons going beyond the substance of the agreements, for the law of the sea such mechanisms have a special importance for the United States that is rooted in the substance of long-standing United States oceans policy. A core struggle of the United States has been to protect the sovereign rights and freedoms of United States vessels on the World’s oceans; a struggle fought against illegal claims by coastal nations to control our commercial and naval shipping. In that context, even the former Soviet Union, a traditional opponent of third party dispute resolution, was persuaded of the importance of such provisions for the law of the sea. It is naïve in the extreme to believe that the United States, or any other nation, can simply shoot its way around the ocean to resolve these disputes, many of which are with our NATO and RIO Treaty partners.

Despite these important reasons why the dispute resolution provisions of the Convention are solidly in the national interest of the United States, the provisions of the Convention are carefully cabined to protect U.S. interests and in no way impinge upon United States sovereignty. Thus:

- Article 287(1) of the Convention permits states to choose from a variety of mechanisms for dispute resolution. The proposed Senate Resolution of Advice and Consent makes it clear that the United States will choose arbitration, a staple of existing United States international agreements, and not the International Court of Justice;
- The principal arbitration mechanism chosen, “special arbitration” under Annex VIII of the Convention, embodies a very ordinary arbitration process by which both parties select two arbitrators and then the four arbitrators initially chosen select the fifth and final arbitrator. In the highly unlikely event that the arbitrators are unable to agree on a fifth arbitrator the parties then have an opportunity to simply agree on any third party to name the fifth arbitrator. And just to close the loop, if no agreement is reached even then, the Secretary General of the United Nations, who becomes Secretary General only upon the recommendation of the Security Council of which the United States is a crucially important permanent member, appoints the fifth arbitrator;
- Moreover, Article 298(1) of the Convention specifically permits nations when ratifying or acceding to the Convention to opt out of the dispute settlement procedures of the Convention with respect to “disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service.” This provision was welcomed, not just by the United States, but by navies large and small the world over who understand the sensitivity of military activities. Already Argentina, Belarus, Canada, Cape Verde, Chile, China, France, Mexico, Portugal, Republic of Korea, the Russian Federation, Slovenia, Tunisia, Ukraine and the United Kingdom of Great Britain and Northern Ireland have made declarations under this article opting out of the dispute settlement provisions with respect to military activities.

The proposed Declaration of the United States under Section 2(2) of the Senate Resolution of Advice and Consent would definitively opt out of the dispute resolution mechanisms set out in Section 2 of the “Settlement of Disputes” chapter of the Convention for disputes concerning military activities just as have all of these nations, including *all* of our fellow permanent members of the Security Council. Moreover, to ensure no misinterpretation of our intent the Senate Resolution of Advice and Consent even goes on to provide: “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.” Since the Convention itself permits any state when ratifying or acceding to the Convention to completely opt out of dispute settlement with respect to disputes concerning military activities this clear statement that the United States is opting out with respect to such “military activities” is a permissible declaration under the Convention. Following such a declaration, which has the effect of removing not only the jurisdiction of the tribunal, but the selection of the tribunal itself, over

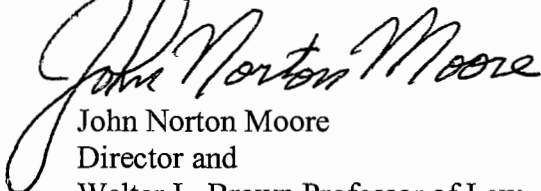
any such activity, any effort by any tribunal to review “military activities” of the United States or any other nation with such a provision would be *ultra vires*, that is, beyond the power of the tribunal. Moreover, under international law, decisions of an international tribunal exceeding its jurisdiction are simply void; and may be disregarded.

- Finally, under the well established foreign relations law of the United States, no Convention can set aside the sovereignty of the United States. Thus, it is settled constitutional law of the United States that no Convention will be able to trump any provision of the Constitution of the United States (*Reid v. Covert*, 354 U.S. 1, 16-17 (1957)), and that the Congress of the United States always reserves the power to override any treaty obligation of the United States for purposes of our national law (*See, e.g., Whitney v. Robertson*, 124 U.S. 190 (1888)).

*The summary conclusion on this second point is that the carefully cabined dispute settlement procedures of the Law of the Sea Convention are quite ordinary dispute settlement provisions as are in force under many U.S. international agreements. They would definitively prevent any submission of military activities to external review; they are in the national interest of the United States as a check on illegal efforts by other nations to interfere with United States sovereign rights over American flag vessels; and, as with all such arbitration procedures, they can in no sense remove the sovereignty of the United States.*

Thank you for your important work to fully inform members of the Senate about this Convention.

Sincerely,

A handwritten signature in cursive script that reads "John Norton Moore". The signature is written in dark ink and is positioned above the typed name and title.

John Norton Moore  
Director and  
Walter L. Brown Professor of Law

Enc.: Annex of Multilateral Treaties to Which the United States is Party Containing  
Compulsory Dispute Settlement Provisions

Cc: Kenneth A. Myers, Jr., Minority Staff Director  
Brian P. McKeon, Counsel to the Majority Staff

## ANNEX

### MULTILATERAL TREATIES TO WHICH THE UNITED STATES IS PARTY CONTAINING COMPULSORY DISPUTE SETTLEMENT PROVISIONS

#### ANTARCTICA

Antarctic Protocol on environmental protection, signed at Madrid October 4, 1991, entered into force January 14, 1998, articles 18-20 (arbitration)

#### CIVIL AVIATION

Convention on International Civil Aviation, 1944, article 84 (arbitration or ICJ)

#### COFFEE

International Coffee Agreement, 2001, article 42 (Council)

#### FISHERIES

Straddling Fish Stocks Agreement, 1995, article 30 (special arbitration)

#### MARINE POLLUTION

MARPOL 1973/1978, ARTICLE 10 & Protocol I (arbitration)

#### TERRORISM

Offenses on aircraft, Tokyo, 1963 Article 24(1) (arbitration; ICJ as default)

Seizure of aircraft, The Hague, 1970, article 12(1) (arbitration; ICJ as default)

Safety of civil aviation, Montreal, 1971, article 14(1) (arbitration; ICJ as default)

Internationally Protected Persons, 1973, article 13 (arbitration; ICJ as default)

Taking of Hostages, 1979, article 61(1) (arbitration; ICJ as default)

Physical Protection of Nuclear Material, 1979, article 17(2) (arbitration; ICJ as default)

SUA 1988, article 16 (arbitration; ICJ as default)

Marking of Plastic Explosives, 1991, article XI(1) (arbitration; ICJ as default)

## TIMBER

International Timber Agreement, 1994, article 31 (Council)

## TRADE

NAFTA, 1992, chapter 20, sections B & C (arbitration)

WTO, 1994, annex 2 (arbitration)