

**UNITED STATES ADHERENCE
TO THE LAW OF THE SEA CONVENTION
A COMPELLING NATIONAL INTEREST**

Prepared Testimony of

John Norton Moore

Before the House Committee on International Relations
May 12, 2004

UNITED STATES ADHERENCE
TO THE LAW OF THE SEA CONVENTION
A COMPELLING NATIONAL INTEREST

Testimony delivered by

John Norton Moore*

*“The day is within my time as well as yours,
when we may say by what laws other nations
shall treat us on the sea.”*

Thomas Jefferson

CHAIRMAN HENRY J. HYDE, RANKING MINORITY MEMBER TOM LANTOS AND HONORABLE MEMBERS OF THE INTERNATIONAL RELATIONS COMMITTEE --

United States accession to the 1982 Law of the Sea Convention is a compelling national interest of the United States. Ratification of the Convention will secure United States sovereign rights in the oceans, enhance United States national security, restore United States oceans leadership, protect United States oceans industry, serve our environmental interests, and enhance United States foreign policy. For these reasons the Convention is broadly supported¹ by the United States Navy (one of the strongest supporters over the years), the Navy League,² the National Ocean Industries Association,³ the United States Outer

¹A good compendium of current support can be found at <http://lugar.senate.gov/sfrc/colleague.html>.

The letters from every living former Legal Advisor to the U.S. Department of State, the Navy League and the Chief of Naval Operations should be particularly noted in support of the Convention.

² On April 29, 2004, the National President of the Navy League urged the Senate to act favorably on the Law of the Sea Convention. The Navy League represents nearly 70,000 members dedicated to supporting the men and women of the Navy, Marine Corps, Coast Guard and U.S. flagged Merchant Marine.

Continental Shelf Policy Committee,⁴ the American Petroleum Institute,⁵ the Chamber of Shipping of America,⁶ The Center for Seafarers' Rights,⁷ the Chemical Manufacturers Association,⁸ the congressionally established National Commission on Ocean Policy and a broad coalition of environmental groups.⁹ This testimony

³ On June 6, 2001, the National Ocean Industries Association submitted a resolution to the Chairman of the Senate Foreign Relations Committee declaring: "The National Ocean Industries Association (NOIA) is writing to urge your prompt consideration of the Convention on the Law of the Sea The NOIA membership includes companies engaged in all aspects of the Outer Continental Shelf oil and natural gas exploration and production industry. This membership believes it is imperative for the Senate to act on the treaty if the U.S. is to maintain its leadership role in shaping and directing international maritime policy."@

⁴ On May 24, 2001, the Outer Continental Shelf (OCS) Policy Committee adopted the following recommendation: "[T]he OCS Policy Committee recommends that the Administration communicate its support for ratification of UNCLOS to the United States Senate"@

⁵ See the statement of Ms. Genevieve Laffly Murphy on behalf of the American Petroleum Institute at the recent oceans forum of the Center for Oceans Law and Policy, October 1, 2003. Ms. Murphy stressed the energy security interest of the American petroleum industry both in access to the continental shelf beyond 200 miles and in protection of navigational freedom. *See also* the letter from the president of the American Petroleum Institute to the Chairman of the Senate Committee on Foreign Relations of October 1, 1996, which states: "The American Petroleum Institute wishes to express its support for favorable action by the Senate on the United Nations Convention on the Law of the Sea (UNCLOS). API favors ratification of the revised treaty because it promotes unimpeded maritime rights of passage; provides a predictable framework for minerals developed; and sets forth criteria and procedures for determining the outer limit of the continental shelf. The latter will be accomplished by the soon-to-be established Commission on the Limits of the Continental Shelf."

⁶ In a letter to the Chairman of the Senate Foreign Relations Committee of May 26, 1998, the president of the Chamber of Shipping of America writes: "[t]he Chamber of Shipping represents 14 U.S. based companies which own, operate or charter oceangoing tankers, container ships, and other merchant vessels engaged in both the domestic and international trades. The Chamber also represents other entities which maintain a commercial interest in the operation of such oceangoing vessels. Over the past quarter century, the Chamber has supported the strong leadership role of the United States in the finalization of the UN Convention on the Law of the Sea (UNCLOS) into its final form, including revision of the deep seabed mining provision. We believe the United States took such a strong role due to its recognition that UNCLOS is of critical importance to national and economic security, regarding both our military and commercial fleets. . . . Mr. Chairman, we appreciate your consideration of these issues and strongly urge you to place the ratification of UNCLOS on the agenda of your Committee. The United States was a key player in its development and today, is one of the few industrialized countries who have not yet ratified this very important Convention. The time is now for the United States to retake its position of leadership."

⁷ On May 26, 1998, the Director of the Center for Seafarers' Rights wrote the following in a letter addressed to the Chairman of the Senate Foreign Relations Committee: "The 1982 United Nations Convention on the Law of the Sea creates a legal framework that addresses a variety of interests, the most important of which is protecting the safety and well-being of the people who work and travel on the seas. I urge you to support ratification of the 1982 United Nations Convention on the Law of the Sea."

⁸ In a July 17, 1998 letter to the Chairman of the Senate Foreign Relations Committee, the President of the Chemical Manufacturers Association wrote the following: "The Law of the Sea Convention promotes the economic security of the United States by assuring maritime rights of passage. More importantly, the Convention establishes a widely-accepted, predictable framework for the protection of commercial interests. The United States must be a full party to the Convention in order to realize the significant benefits of the agreement; and to influence the future implementation of UNCLOS at the international level. On behalf of the U.S. chemical industry, I strongly encourage you to schedule a hearing on UNCLOS, and favorably report the Convention for action by the Senate."

⁹ On November 14, 2001, the National Commission on Ocean Policy adopted a resolution **B** its first on any subject – providing: "The National Commission on Ocean Policy unanimously recommends that the United States of America immediately accede to the United Nations Law of the Sea Convention. Time is of the essence if the United States is to maintain its leadership

will briefly explore reasons for United States adherence to the Convention. First, however, it will discuss the criteria for appraising United States adherence to an international agreement and will then set out a brief overview of the Nation's oceans interests and history of the Convention.

I. Appraising International Agreements

Clearly, a position that the United States should be unable to enter into international agreements is unacceptable. Such a position would deprive the United States of a fundamental sovereign right. Indeed, it would treat the United States like a child unable to enter into contracts. Nor would such a position be consistent with the Constitution of the United States, which clearly envisages that the United States will be able to enter into international agreements. And, of course, such a position would be absurd in relation to the conduct of international relations by this great Nation. For example, the ability of the United States to enter into the NATO Treaty was of enormous importance to this country. Indeed, NATO may well have prevented World War III. Similarly, with respect to the war for the fourth freedom (the war against terror)¹⁰ the United States is a party to many important multilateral anti-terror treaties which delegitimize terrorist activity. In fact, the United States is, as part of the national effort with respect to the Proliferation Security Initiative (PSI), seeking to strengthen one of those, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention), to assist our PSI effort. In relation to oceans issues alone, the United States is party to many multilateral agreements concerning such issues as protection of the marine environment, the protection of whales and fish stocks, and the safety of life at sea. I doubt anyone would suggest that United States leadership in negotiating and adhering to these, or many other such agreements, was wrong.

As such, the criteria for appraising United States adherence to an international agreement, whether bilateral or multilateral, must be the national interest of the United States in relation to the specifics of the agreement being considered and the great principles which have empowered this Nation. Moreover,

role in the ocean and coastal activities. Critical national interests are at stake and the United States can only be a full participant in upcoming Convention activities if the country proceeds with accession expeditiously.”

¹⁰ Roosevelt's famous “four freedoms” speech lists “freedom from fear” as the fourth freedom.

such an appraisal, to be useful, must be informed – it must describe the agreement and its affect on our national interests accurately. And it must include the alternative reality that will govern if we do not adhere.

Similarly, our Nation, as a global leader, must effectively engage in international affairs. Surely this Nation learned at great cost from Pearl Harbor that isolationism is not the answer. Hopefully, no one in a post-9/11 world would seek to turn back to isolationism or seek to deny the United States the fundamental tools for effective international engagement. Such an approach would be folly at any time, but particularly so during the war on terror when coordination with our allies is of special importance.

I am pleased to report to this Committee that the Law of the Sea Convention is strongly in the national interest of the United States. As such, I wholeheartedly support the judgment of President Bush in seeking to move the Convention forward. Indeed, this Convention is compellingly in our national interest and adherence is overdue. Most remarkably, unlike most treaties, there is no trade off for the United States in adhering to this Convention. The Convention powerfully serves our security interests and *no* United States oceans interest is better served by non-adherence.

Mr. Chairman, I believe there is also a special obligation in speaking to the national interest of the United States to learn the facts and present accurate information. I have been particularly troubled in the recent debate about the Law of the Sea Convention to see wildly erroneous allegations about the Convention, particularly charges that it would be giving away the sovereignty of the United States when the reality, diametrically opposed, is that this Convention solidifies the sovereign rights of the United States over resources in an area approximately the size of the continental United States. I am also troubled by charges that it would undermine the security interests of the United States when the reality, diametrically opposed, as attested by every Chief of Naval Operations, and every Combatant Commander to have considered the issues, is that the Convention strongly supports the security interests of the United States. Another troubling charge is that some unnamed “bureaucracy” is pushing the Convention. Having chaired the National Security Council Interagency Task Force on the Law of the Sea under Presidents Nixon and Ford, I can attest, to the contrary, that the Convention is overwhelmingly in the national security interest of the United States as determined by repeated hard-headed interagency review within the United States Government

under multiple Presidents. It is not surprising that past Legal Advisers of the Department of State and past Chiefs of Naval Operations have recently sent letters in support of United States adherence.

II. Background of the Convention

As the quote by Thomas Jefferson which began my testimony illustrates, the United States, surrounded by oceans and with the largest range of oceans interests in the world, has a vital national interest in the legal regime of the sea. Today those interests include naval mobility, navigational freedom for commercial shipping, oil and gas from the continental margin, fishing, freedom to lay cables and pipelines, environmental protection, marine science, mineral resources of the deep seabed, and conflict resolution. Consistent with these broad interests the United States has been resolute in protecting its ocean freedoms. Indeed, the Nation has fought at least two major wars to preserve navigational freedoms; the War of 1812 and World War I. In point II of his famous 14 Points at the end of World War I, Woodrow Wilson said we should secure “[a]bsolute freedom of navigation upon the seas . . . alike in peace and in war.” And the Seventh Point of the Atlantic Charter, accepted by the Allies as their “common principle” for the post World War II world, provided “such a peace should enable all men to traverse the high seas and oceans without hindrance.”

In the aftermath of World War II the United States provided leadership in the First and Second United Nations Conferences to seek to protect and codify our oceans freedoms. The first such conference, held in 1958, resulted in four “Geneva Conventions on the Law of the Sea” which promptly received Senate Advice and Consent. One of these, the Convention on the Continental Shelf, wrote into oceans law the United States innovation from the 1945 Truman Proclamation – that coastal nations should control the oil and gas of their continental margins. During the 1960s a multiplicity of illegal claims threatening United States navigational interests led to a United States initiative to promote agreement within the United Nations on the maximum breadth of the territorial sea and protection of navigational freedom through straits. This, in turn, led some years later, and with a broadening of the agenda, to the convening in 1973 of the Third United Nations Conference on the Law of the Sea. In this regard it should be clearly understood that the United States was a principal initiator of this Conference, and it was by far

the preeminent participant in shaping the resulting Convention. Make no mistake; the United States was not participating in this Conference out of some fuzzy feel good notion. Its participation was driven at the highest levels in our Government by an understanding of the critical national interests in protecting freedom of navigation and the rule of law in the world's oceans. Today we understand even more clearly from "public choice theory," which won the Nobel Prize in economics, why our choice to mobilize in a multilateral setting all those who benefited from navigational freedom was a sound choice in controlling individual illegal oceans claims.¹¹ And the result was outstanding in protecting our vital navigational and security interests. Moreover, along the way we solidified for the United States the world's largest offshore resource area for oil and gas and fishery resources over a huge 200 nautical mile economic zone, and a massive continental shelf going well beyond 200 miles.¹²

Despite an outstanding victory for the United States on our core security and resource interests, a lingering dispute remained with respect to the regime to govern resource development of the deep seabed beyond areas of national jurisdiction. Thus, when the Convention was formally adopted in 1982, this disagreement about Part XI of the Convention prevented United States adherence. Indeed, during the final sessions of the Conference President Reagan put forth a series of conditions for United States adherence, all of which required changes in Part XI. Following adoption of the Convention without meeting these conditions, Secretary Rumsfeld served as an emissary for President Reagan to persuade our allies not to accept the Convention without the Reagan conditions being met. The success of the Rumsfeld mission set the stage some years later for a successful renegotiation of Part XI of the Convention. In 1994, Part XI dealing with the deep

¹¹ The reason supporting this is most easily understood as the high cost of organization of those affected by illegal oceans claims; claims which were externalizing costs on the international community. A multilateral strategy of response to such illegal claims, far from being simply a fuzzy effort at cooperation, effectively enabled coordination of nations to promote the common interest against such illegal claims. Counter to the perception of some that a unilateral U.S. response is always the best strategy, a multilateral forum was indeed the most effective forum for controlling such threats to our navigational freedom. Moreover, since a majority of *coastal* nations are completely *Azone* locked, that is, they have no access to the oceans without traversing the 200 mile economic zones of one or more neighboring states, a multilateral strategy continues to offer an important forum for rebutting illegal unilateral oceans claims threatening navigational freedom. The fact is, because of this "zone locked" geography, a majority of nations should never favor extending national jurisdiction beyond 200 nautical miles or permit interference with navigational freedom in the 200 nautical mile economic zone.

¹² The Convention powerfully supports United States control of its fisheries resources. Indeed, with respect to fisheries, the United States is already a party to the "Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," a treaty that implements certain fisheries provisions of the Law of the Sea Convention. Senator Ted Stevens provided crucial leadership in Senate advice and consent to this implementing Convention.

seabed regime beyond national jurisdiction was successfully renegotiated, meeting all of the Reagan conditions and then some. Subsequently, on October 7, 1994, President Clinton transmitted the Convention to the Senate for advice and consent.¹³ Since that time no administration, Democratic or Republican, has opposed Senate advice and consent – and United States ratification.

At present the Convention is in force; and with 145 states parties it is one of the most widely adhered conventions in the world. Parties include all permanent members of the Security Council but the United States, and all members of NATO but the United States and Denmark. The Convention unequivocally and overwhelmingly meets United States national interests – indeed, it is in many respects a product of those interests.

If one were to travel back in time and inform the high-level members of the eighteen agency National Security Council Interagency Task Force which formulated United States oceans policy under Presidents Nixon and Ford during the principal formative Convention process – an effort never matched before or since in the care with which it reviewed United States international oceans interests – that the Convention today in force, powerfully meeting all United States oceans interests, would not yet be in force for the United States nine years after being submitted to the Senate, the news would have been received with incredulity. As this suggests, the Congress should understand that United States oceans interests, including our critical security interests, are being injured – and will continue to be injured – until the United States ratifies the Convention. Among other costs of non-adherence we have missed out in the development of rules for the International Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf, and in ongoing consideration of cases before the Tribunal as well as ongoing consideration of the Russian continental shelf claim now before the Continental Shelf Commission; we have had reduced effect in the ongoing struggle to protect navigational freedom and our security interests against unilateral illegal claims; and we have been unable to participate in the decisions of the meetings of States Parties. These are not just my conclusions. They are the

¹³ For the letter of transmittal to the Senate and official United States Government article-by-article commentary on the Convention, see SEN. TREATY DOC. 103-39, *reprinted* in U.S. Department of State Dispatch Supplement, *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary* (Feb. 1995, Vol. 6, Supp. No. 1). For the most authoritative article-by-article interpretation of the Convention, see the multi-volume *Commentary on the United Nations Convention on the Law of the Sea 1982*, prepared under the auspices of the Center for Oceans Law and Policy of the University of Virginia School of Law. MYRON H. NORDQUIST (ED.), *UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY* (1985-2003 Martinus Nijhoff Publishers).

conclusions of every Chief of Naval Operations and every Secretary of State who has considered these issues and of all the law of the sea experts I work with on a continuing basis.

Mr. Chairman, and members of the Committee, it is for the reasons expressed in the last paragraph that I welcome consideration by this Committee of the United States posture with respect to the Law of the Sea Convention. Our Nation is now almost a decade overdue in adhering to this Convention. I believe it would be helpful if this Committee were to recommend to the Senate that it move forward as expeditiously as possible with advice and consent. *That* is the action from this Committee that would serve the national interest with respect to the Law of the Sea Convention.

III.

Reasons for United States Adherence to the Law of the Sea Convention

Why should the United States adhere to the Law of the Sea Convention? The most important reasons are summarized under the following nine headings:

A.

Solidifying and Protecting Sovereign Rights of the United States

The Law of the Sea Convention provides “sovereign rights” over the natural resources off the coasts of the United States in an “economic zone” of 200 nautical miles and even beyond where our continental margin goes beyond 200 miles. As such, United States adherence to the Convention will solidify and protect an extension of United States sovereign rights over the living and non-living natural resources off our coasts in an area roughly equal to our continental land mass. Indeed, the size of this resource area for the United States under the Convention is greater than that for any other nation in the world. In the history of actions affecting United States sovereign rights, this Convention would be on the honor roll in its dramatic recognition of an expansive area of sovereign rights over resources.

Of further great importance, this Convention protects the sovereign rights of the United States over our military and commercial vessels; rights that are critical

to the economic and security interests of our Nation. In the ongoing struggle for oceans law, these are our sovereign rights that are at the greatest risk, and adherence to the Convention will unequivocally serve this national interest in protecting navigational freedom. The Convention not only protects navigational freedom through an improved regime of innocent passage in the territorial sea and full freedom of navigation in the new economic zone, but it creates a critical new regime of straits transit passage permitting our submarines to transit straits submerged and our aircraft to enjoy overflight rights over such straits. And it recognizes immunity for our warships and government ships operated for non-commercial purposes.

In contrast, quite to the contrary of arguments advanced against the Convention by some opponents, the Convention does not remove United States sovereignty or sovereign rights over the resources of the deep seabed. Neither the United States nor any other Nation has now, or has ever had, sovereignty over the mineral resources beyond the continental margins. In fact, it has been a consistent position of the United States and other developed nations to oppose any extension of national sovereignty into this area. Indeed, it is precisely because no nation in the world controls the mineral resources of the ocean basins that the Convention has created a narrowly limited international mechanism to permit mining of these resources. For without such a regime, industry simply cannot obtain the legal rights necessary for the over billion dollar cost of a deep seabed mining operation.

B. Protecting the National Security Interests of the United States

The most important interests for the United States in the LOS negotiations were our national security interests, particularly our protection of navigational freedom on the world's oceans against unilateral coastal state claims. The Law of the Sea Convention powerfully serves these interests. This is reflected in the strong and consistent support for the Convention from the United States Navy. To my knowledge, every Chairman of the Joint Chiefs, every Chief of Naval Operations, and every Combatant Commander of the United States to consider the Convention has urged prompt United States adherence. This is not simply an accident. The National Security Council Interagency Task Force that I chaired during the Nixon and Ford Administrations, which developed what became the principal negotiating instructions for the United States, had vigorous representation

from both the Office of the Secretary of Defense (OSD) and the Joint Chiefs of Staff (OJCS) throughout the development of instructions and throughout the negotiations. When I engaged in negotiations as a United States Ambassador and Deputy Special Representative of the President I was accompanied literally around the world by superbly capable representatives of OSD and OJCS. The treatment of national security interests of the United States in this Convention is not some marginal on balance win, it was a decisive victory for the United States, our ocean allies, and, indeed, the community common interest. In this respect, make no mistake, the United States was the single most influential nation in the world in the negotiations leading to this Convention. But we coordinated closely with other principal developed and maritime nations, and the final victory was a victory for all who believe in freedom and the rule of law.

Each and every one of the arguments I have heard advanced on security grounds against this Convention by some of its recent critics is, I believe, in error. I look forward to an opportunity before this Committee to respond to questions about any of these topics. But the greatest error of these critics is that they do not even remotely understand the overall importance of this Convention for our oceans security interests. That is, even if these critics were correct on some of their isolated points, they would still miss the big picture that must provide the overall basis for assessment.

C. Protecting United States Industry

It is no accident that the representatives of the National Oceans Industries Association, the American Petroleum Institute, the Chamber of Shipping of America, the Chemical Manufacturers Association, and the Congressionally established National Commission on Oceans Policy support United States adherence to this Convention. The Convention provides a strong legal basis for development of ocean resources and it provides strong guarantees of navigational freedom so vital to United States trade around the world. To my knowledge, no United States industry association has opposed moving forward with the Convention.

With respect to our oil and gas and deep seabed mining industries, however, there are especially compelling reasons why the United States needs to promptly adhere to the Convention. Our oil and gas industry is simply unlikely to move

forward in development of the continental margin of the United States in areas beyond 200 nautical miles until United States adherence solidifies the legal regime for them in such areas. And our deep seabed mining industry is now moribund, and will remain so, absent United States adherence to the Convention. The United States led the world toward development of the technology for the recovery of deep seabed minerals. Our industry collectively expended more than \$200 million to identify and obtain international recognition for five prime mine sites. At present three of those sites lie abandoned and the other two are on hold with zero chance of activity absent United States adherence. The Congress should clearly understand that accepting the arguments of the critics and opposing moving forward with the Convention is to permanently put the innovative United States deep seabed mining industry out of business, and to accept a reality that only the firms of other nations will be able to mine the deep seabed.

D. Protecting United States Mariners and Fishermen

For many years the United States has been concerned about the fate of United States mariners or fishermen arrested and imprisoned in other nations around the world. This is an issue both of human rights in protecting our citizens and an issue of conflict avoidance with other nations. The Law of the Sea Convention takes the lead in this matter in providing that for fishermen “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security,” and “[c]oastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.” Similarly, with respect to mariners the Convention restricts certain non-serious violations to “[m]onetary penalties only” and provides in all cases for “the observance of recognized rights of the accused.” These are important provisions in protecting United States citizens. They are provisions that should be of considerable concern to maritime unions and American distant water fishermen.

E.
Protecting Environmental Interests

The Law of the Sea Convention provides strong protection for the marine environment. Indeed, the Rio Conference on the Environment accepted Part XII of the Convention as the core environmental provisions for the world's oceans. Not surprisingly, American environmental groups overwhelmingly support adherence to the Convention. Indeed, in one case, that of the protection of marine mammals, the Convention embodies the initiative of a United States environmental NGO. Thus, Article 65 of the Convention on the protection of marine mammals was negotiated following important work done by the Connecticut Cetacean Society. United States influence was also felt in requirements concerning monitoring, publication of reports, and assessment of potential effects of activities. The United States was further successful in avoiding any environmental double standard in the world's oceans.

Remarkably, the important new environmental provisions of the Convention are sufficiently balanced that they enjoy the support of all United States oceans interests. Support for this Convention is that rare public policy issue on which both industry and environmental groups strongly agree.

F.
Encouraging Good Organizational Precedents

One of the original concerns of the United States with respect to Part XI of the Convention prior to its renegotiation was the precedential effect of what was then a very poor international organization for the regulation of seabed mining in areas beyond national jurisdiction. For example, the original organization had three seats that would have been controlled by the former Soviet Union to one that could have been rotated off for the United States. And there was substantial concern that the International Authority was to be controlled by developing countries on a one nation, one vote basis. Following the renegotiation based on the Reagan conditions, however, the Seabed Authority that has emerged sets a strong precedent for international organization in the interest of the United States. Points of particular benefit to the United States in the renegotiated Part XI include:

- The Authority is a small, narrowly mandated specialized agency with regulatory authority only over the mining of deep seabed minerals of the

seabed beyond areas of national jurisdiction. It is not in the slightest some new international authority that will control the oceans that would, for example, have jurisdiction over navigation, fishing or military activities;

- As a first level of protection for the United States and other developed nations it is directed that as a general rule, decision making in the Authority should be by consensus. This consensus procedure was pioneered in the LOS negotiations and has been of substantial benefit within international organizations subsequently using it. My understanding is that it is working quite well in the Authority and that in the almost ten years of the work of the Authority, decisions have been on the basis of this consensus procedure;
- The United States is provided a permanent seat on the Council of the Authority. Indeed, the United States is the only nation in the world assured such a permanent seat, as the nation with the “largest economy” on the date of entry into force of the Convention;
- As a member of the Council the United States will have a veto over the adoption of rules and regulations for seabed mining, the distribution of any revenues collected by the Authority, and any amendments concerning the Authority;
- The United States would also have the ability as a member of the Finance Committee, which adopts all rules of substance by “consensus,” to veto financial decisions of the Authority;
- The Council of the Authority is set up on a chambered voting system in which any three developed nations, from among the five principal mineral consumers, will be able to exercise a veto over non-consensus actions of the Authority. Thus, in areas where the United States would not have a consensus veto, as set out above, the United States and any two other developed nations from among the five principal consumers of

the minerals in Chamber A of the Authority would be able to block action. The Authority is thus quite the opposite of a “one nation one vote” system dominated by developing countries;

- The Authority is directed to operate on market principles. Thus the renegotiation specifies variously that the Authority will operate on the basis of “commercial terms and conditions,” and “sound commercial principles.” Further, it is specifically prohibited for the Authority to provide preferential access, including through the use of “tariff or non-tariff barriers;”
- The Authority is itself directed to be “cost effective.” Indeed, for ten years the Authority has had only about 37 employees. This is hardly an earth-shaking bureaucracy; and
- Miners will have assured access under a first-come system for mining the deep seabed. Private industry will be able to directly mine the seabed and will have first refusal in any joint venture with the Authority itself.

Why do we need a specialized agency to regulate deep seabed mining in areas beyond national jurisdiction? Quite simply, no nation owns or has sovereign rights over these resources, as they are beyond national jurisdiction. Perhaps if a “fishing approach” would work in mining these minerals, no such Authority would have been necessary. But our industry has emphatically told us that they can not mine under a “fishing approach” in which everyone simply goes out to seize the minerals. To mine the deep seabed requires security of tenure for the billion dollar plus costs of such an operation. And the size of the area of a mine site is approximately that of the State of Rhode Island. As such, an international authority of strictly limited functional regulatory authority is needed to provide security of tenure for mining to take place whenever the price of the minerals justifies it. After more than a quarter of a century of negotiations, the United States was able to obtain such an Authority to enable mining to take place, while simultaneously meeting our requirements for good organizational precedents. To turn the Convention down after this considerable success is not in the interest of our nation or our industry.

G. Restoring United States Oceans Leadership

Until our prolonged non-adherence to the 1982 Convention, the United States has been the world leader in protecting the common interest in navigational freedom and the rule of the law in the oceans. We have at least temporarily forfeited that leadership by our continued non-adherence. United States ratification of the Convention will restore that leadership. Specifically, ratification will have the following effects, among others:

- ! The United States will be able to take its seat on the Council of the International Seabed Authority. The authority is currently considering a mining code with respect to polymetallic sulfides and cobalt crusts of the deep seabed. Council membership will also give us important veto rights over distribution of any future revenues from deep seabed exploitation to national liberation groups;

- ! The United States should, at the next election of judges for the International Tribunal for the Law of the Sea, see the election of a United States national to this important tribunal. Since this Tribunal frequently considers issues relating to navigational freedom and the character of the 200 mile economic zone, it is a crucial forum for the development of oceans law;

- ! The United States should, at the next election of members of the Commission on the Limits of the Continental Shelf, see the election of a United States expert to the Commission. This Commission is currently considering the Russian claim in the Arctic that is of real importance for the United States (and Alaska) and for appropriate interpretation of the Convention respecting continental margin limits. Over the next few years the Commission will begin to consider many other shelf limit submissions, beginning next with Australian and Brazilian claims. This is also the Commission that ultimately must pass on a United States submission as to the outer limits of our continental shelf beyond 200 nautical miles. The early work of the Commission, as it begins to develop its rules and guidelines, could significantly affect the limits of

the United States continental shelf. To not actively participate in the work of this Commission could result in a loss of thousands of square kilometers of resource-rich United States continental shelf;

- ! The United States will be able to participate fully in the annual meeting of States Parties that has become an important forum for ongoing development of oceans law. Of particular concern, United States presence as a mere observer in this forum has in recent years led to efforts by some to roll back critical navigational freedoms hard won in the LOS negotiations where we were a leader in the negotiations and our presence was powerfully felt; and
- ! The United States will be far more effective in leading the continuing struggle against illegal oceans claims through our participation in specialized agencies such as the International Maritime Organization; in bilateral negotiations such as those with the archipelagic states; in acceptance by other states of our protest notes and our ability to coordinate such notes with others; and generally in organizing multilateral opposition to threats to our oceans interests and the rule of law in the oceans.

H. Protecting United States Oceans Interests

A further set of important reasons for United States adherence to the Law of the Sea Convention, many of which overlap with earlier points, relate to the particularized protection of United States oceans interests. I have added this crosscut by way of partial demonstration of the remarkable reality with respect to this Convention: that *no* United States oceans interest will be better served by non-adherence. Some of the more important and immediate assists to our oceans interests from United States adherence include:

- More effectively engaging in the continuing struggle to protect our naval mobility and commercial navigational freedom. Protecting the ability of the United States Navy to move freely on the world's oceans and the ability of commercial shipping to bring oil and other resources to the United States and for us to participate robustly in international trade overwhelmingly carried in ships is the single most important oceans

interest of the United States. This interest, however, is also the single most threatened interest; the continuing threat being the historic pattern of unilateral illegal oceans claims. As of June 22, 2001, there were at least 136 such illegal claims.¹⁴ This struggle has been the key historic struggle for the United States over the last half century and gives every indication of continuing. Adhering to the Convention provides numerous ways for the United States to engage more effectively in protecting these interests. An immediate and important effect is that we are able, on acceding to the Convention, to attach a series of crucial “understandings” under Article 310 of the Convention as to the proper interpretation of the Convention, as have many other nations – too many of which have made erroneous interpretations as yet unrebutted by United States statements.¹⁵ Moreover, as a party we will be far more effective in multiple fora in protecting the many excellent provisions in the Convention supporting navigational freedom. Indeed, much of the struggle in the future to protect our vital oceans interests will be in ensuring adherence to the excellent provisions in the Convention. Having won in the struggle to protect these interests within UNCLOS we now have a substantial advantage in the continuing struggle – we need only insist that others abide by the nearly universally accepted Convention. Obviously, that is an advantage largely thrown away when we ourselves are not a party. And for our commercial shipping we will be able to utilize the important Article 292 to obtain immediate International Tribunal engagement for the release of illegally seized United States vessels and crew. It should be emphasized that the threat from these illegal claims is that of death from a thousand pin pricks rather than any single incident in response to which the United States is likely to be willing to employ the military instrument. Moreover, some of the offenders may even be allies of the United States, our NATO partners, or even over zealous officials in our own country who are unaware of the broader security interests of the Nation;

¹⁴ The best general discussion of these illegal oceans claims and their effect on United States interests is J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS*, 66 U.S. Naval War College International Law Studies (1994), and J. ASHLEY ROACH & ROBERT W. SMITH, *UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS* (2d ed. 1996).

¹⁵ It should be clearly understood that these United States “understandings” under Article 310 are not reservations altering the correct legal meaning of the Convention. Such reservations or exceptions are barred by Article 309 of the Convention except as specifically permitted by the Convention, as, for example, in Article 298 of the Convention concerning optional exceptions to the compulsory dispute settlement provisions.

- More effective engagement with respect to security incidents and concerns resulting from illegal oceans claims by others. Examples include the new law of the People’s Republic of China (PRC) providing that Chinese civil and military authorities must approve all survey activities within the 200 mile economic zone; the PRC harassment of the Navy’s ocean survey ship, the *USNS Bowditch*, by Chinese military patrol aircraft and ships when the *Bowditch* was 60 miles off the coast; the earlier EP-3 surveillance aircraft harassment; Peruvian challenges to U.S. transport aircraft in the exclusive economic zone, including one aircraft shot down and a second incident in which two U.S. C-130s had to alter their flight plan around a claimed 650 mile Peruvian “flight information area”; the North Korean 50-mile “security zone” claim; the Iranian excessive base line claims in the Persian/Arabian Gulf; the Libyan “line of death”; and the Brazilian claim to control warship navigation in the economic zone;

- ! More rapid development of the oil and gas resources of the United States continental shelf beyond 200 nautical miles. The United States oil and gas industry is poised in its technology to begin development of the huge continental shelf of the United States beyond 200 miles (approximately fifteen percent of our total shelf). But uncertainties resulting from U.S. non-adherence to the Convention will delay the substantial investment necessary for development in these areas. Moreover, U.S. non-adherence is causing the United States to lag behind other nations, including Russia, in delimiting our continental shelf. Delimitation of the shelf is an urgent oceans interest of the United States;¹⁶

- Reclaiming United States deep seabed mineral sites now virtually abandoned. United States firms pioneered the technology for deep seabed mining and spent approximately \$200 million in claiming five first-generation sites in the deep seabed for the mining of manganese

¹⁶ For a state-of-the-art assessment of the extent of the United States continental shelf beyond the 200 mile economic zone, see the work of Dr. Larry Mayer, the Director of the Center for Coastal and Ocean Mapping at the University of New Hampshire. As but one example indicating the great importance of performing this delimitation of the shelf well **B** and the importance of the United States participating in the resulting approval process in the Commission on the Limits of the Continental Shelf **B** Dr. Mayer’s work shows that sophisticated mapping and analysis of the shelf would enable the United States to claim an additional area off New Jersey within the lawful parameters of Article 76 of the Convention of approximately 500 square kilometers just by using a system of connecting seafloor promontories. The work of Dr. Mayer has been funded in part through an innovative forward-looking grant supported by Senator Judd Gregg of New Hampshire. This work, however, is important for the Nation as a whole, and particularly for Alaska, which has by far the largest shelf beyond the 200 mile economic zone.

nodules. These nodules contain attractive quantities of copper, nickel, cobalt and manganese and would be a major source of supply for the United States in these minerals. Paradoxically, “protecting” our deep seabed industry has sometimes been a mantra for non-adherence to the Convention. Yet because of uncertainties resulting from U.S. non-adherence these sites have been virtually abandoned and most of our nascent deep seabed mining industry has disappeared. Moreover, it is clear that without U.S. adherence to the Convention our industry has absolutely no chance of being revived. I believe that as soon as the United States adheres to the Convention, the Secretary of Commerce should set up a working group to assist the industry in reclaiming these sites. This working group might then recommend legislation that would deal with the industry problems in reducing costs associated with reacquiring and holding the five United States sites until deep seabed mining becomes economically feasible;

- Enhancing access rights for United States marine scientists. Access for United States marine scientists to engage in fundamental oceanographic research is a continuing struggle. The United States will have a stronger hand in negotiating access rights as a party to the Convention. As one example of a continuing problem, Russia has not honored a single request for United States research access to its exclusive economic zone in the Arctic Ocean from at least 1998, and the numbers of turn-downs for American ocean scientists around the world is substantial. This problem could become even more acute as the United States begins a new initiative to lead the world in an innovative new program of oceans exploration;
- Facilitating the laying of undersea cables and pipelines. These cables, carrying phone, fax, and internet communications, must be able to transit through ocean jurisdictions of many nations. The Convention protects this right but non-adherence complicates the task of those laying and protecting cables and pipelines; and
- It should be emphasized again with respect to this Convention that no U.S. oceans interest is better served by non-adherence than adherence. This is a highly unusual feature of the 1982 Convention. Most decisions about Convention adherence involve a trade off of some interest or another. I am aware of no such trade off with respect to the 1982

Convention. United States adherence is not just on balance in our interest; it is broadly and unreservedly in our interest.

I. Enhancing United States Foreign Policy

The United States would also obtain substantial foreign policy benefits from adhering to the 1982 Convention; benefits going quite beyond our oceans interests. These benefits include:

- ! Supporting the United States interest in fostering the rule of law in international affairs. Certainly the promotion of a stable rule of law is an important goal of United States foreign policy. A stable rule of law facilitates commerce and investment, reduces the risk of conflict, and lessens the transaction costs inherent in international life. Adherence to the Law of the Sea Convention, one of the most important law-defining international conventions of the Twentieth Century, would signal a continuing commitment to the rule of law as an important foreign policy goal of the United States;

- ! United States allies, almost all of whom are parties to the Convention, would welcome U.S. adherence as a sign of a more effective United States foreign policy. For some years I have chaired the United Nations Advisory Panel of the Amerasinghe Memorial Fellowship on the Law of the Sea in which the participants on the Committee are Permanent Representatives to the United Nations from many countries. Every year our friends and allies ask when we will ratify the Convention, and they express to me their puzzlement as to why we have not acted sooner. In my work around the world in the oceans area I hear this over and over – our friends and allies with powerful common interests in the oceans are astounded and disheartened by the unilateral disengagement from oceans affairs that our non-adherence represents;

- ! Adherence would send a strong signal of renewed United States presence and engagement in the United Nations, multilateral negotiation, and international relations generally. At present those who would oppose United States foreign policy accuse the United States of “unilateralism” or a self-proclaimed “American exceptionalism.” Adhering to the Law of the Sea Convention will demonstrate that America adheres to those

multilateral Conventions that are worthy while opposing others precisely because they do not adequately meet community concerns and our national interest;

- ! Efforts to renegotiate other unacceptable treaties would receive a boost when an important argument now used by other nations against such renegotiation with us is removed. This argument now used against us, for example, in the currently unacceptable International Criminal Court setting, is: “[W]hy renegotiate with the United States when the LOS renegotiation shows the U.S. won’t accept the Convention even if you renegotiate with them and meet all their concerns?” Let me emphasize this point. The United States will be severely damaged in its international engagement if other nations believe that we will not adhere to agreements, whether they are in our interest or not. And this is particularly true after other nations accommodate the United States in all that it asks in a renegotiation and then see United States inaction toward the renegotiated agreement. If we are to maintain our negotiating leverage we must demonstrate that we distinguish between good and bad international agreements and that we accept the good while rejecting the bad; finally

- ! The United States would obtain the benefit of third party dispute settlement in dealing with non-military oceans interests. The United States was one of the principal proponents in the law of the sea negotiations for compulsory third party dispute settlement for resolution of conflicts other than those involving military activities. We supported such mechanisms both to assist in conflict resolution generally and because we understood that third party dispute resolution was a powerful mechanism to control illegal coastal state claims. Even the Soviet Union, which had traditionally opposed such third party dispute settlement, accepted that in the law of the sea context it was in their interest as a major maritime power to support such third party dispute settlement.¹⁷ International arbitration, which the President has recommended for the United States in this case, is about as American as apple pie. Indeed,

¹⁷ The 1994 submission of the LOS Convention to the Senate recommended that the United States accept "special arbitration for all the categories of disputes to which it may be applied and Annex VII arbitration [general arbitration] for disputes not covered by ... [this]," and that we elect to exclude all three categories of disputes excludable under Article 298." See U.S. Department of State Dispatch IX (No. 1 Feb. 1995). This recommendation has been accepted by the Senate Foreign Relations Committee.

George Washington took great pride in the initiative that led to the Jay Treaty and settlement through arbitration of disputes we had with the United Kingdom. This Convention, negotiated by the first Chief Justice of the United States and one of the principal draftsmen of the *Federalist Papers*, may well have avoided a second war with Britain at a time the new Nation could ill afford it. And, following the Civil War, the United States again led the world to arbitration in the Alabama Claims Arbitration that resulted in substantial net payments to the United States. Modern international arbitration owes its existence to these important American initiatives.¹⁸

IV. Some Points of Confusion to Avoid In Considering United States Adherence

Unfortunately, some of the criticisms directed against the Law of the Sea Convention fail to understand the full context for consideration of the Convention. A few points are particularly worth noting in this connection. These are:

- ! Some critics, while singling out particular articles that concern them in the 1982 Convention, fail to note that the United States is currently bound by the 1958 Geneva Conventions on the Law of the Sea that are considerably less favorable to United States oceans interests than the 1982 Convention, in which the United States was particularly able to offer greater protection to its security, resource, and environmental interests. Thus, inaction with respect to United States adherence to the 1982 Convention simply leaves these less favorable treaties binding on the United States. Once the United States becomes a party to the 1982 Convention, however, under Article 311 of the Convention the 1982 Convention will take precedence over these less protective 1958 Conventions;

¹⁸ According to the Department of State, the United States is already a party to more than 85 agreements (most of them multilateral in nature) that provide for the resolution of disputes by the International Court of Justice. More than 200 treaties – including civil air transport agreements and various types of investment treaties – provide for mandatory arbitration at the request of a party. In addition, there are a number of international organizations that include dispute resolution mechanisms, including the U.S.- Iran Claims Tribunal, and the International Civil Aviation Organization. The acceptance of arbitration in the Law of the Sea Convention is hardly a departure for the United States. Moreover, unlike most such dispute settlement provisions, the Law of the Sea Convention specifically permits the United States to not accept submission of disputes concerning military activities. This provision was insisted on by the United States in the negotiations leading to the Convention and was supported by navies all over the world.

- ! Paradoxically, the critics seem not to have noticed that the less protective 1958 Conventions already binding on the United States, unlike the 1982 Convention, contain no denunciation clause. Unless the United States adheres to the 1982 Convention, which would automatically supercede our obligations under the 1958 Conventions, we would be faced with substantial uncertainty about revision or withdrawal from the 1958 Conventions. Under the 1958 Conventions, a request for revision of the Conventions would simply be referred to the United Nations General Assembly, which would then “decide upon the steps, if any, to be taken in respect of such requests.” And, in the absence of a denunciation clause in the 1958 Conventions, it would be unclear under international law whether the United States would be able to lawfully withdraw at all from these Conventions. In sharp contrast, not only will adherence to the 1982 Convention automatically supercede outmoded United States obligations under the 1958 Conventions, but the 1982 Convention does contain a denunciation clause. Under Article 317 of the Convention the United States may leave the Convention after one year following a simple denunciation. Thus, if the horrors espoused by the critics were to occur, the United States could simply denounce the Convention and withdraw;
- ! Some critics seem also to act as though United States non-adherence would prevent the Convention from coming into effect, that we can engage in further renegotiation, or that we can simply ignore the Convention in our relations with other nations. None of these assumptions is true. The 1982 Convention is in force for 145 nations and is today the basic legal regime for the world’s oceans. For example, whether or not the United States adheres to the Convention, the Seabed Authority will remain in place. The only difference will be that the United States will gratuitously deprive itself of its deep seabed mining industry and our ability to control the rules and regulations, amendments and any distribution of revenues to states parties in the actions of the Authority. And following a major renegotiation at United States insistence before the Convention went into force (a renegotiation that met all United States conditions established by President Reagan for United States acceptance) there is zero possibility of further renegotiation. Any amendments from this point forward can only come from the participation of states parties using normal Convention provisions for amendment. Similarly, whether or not we are a party to the Convention,

when the United States seeks to mobilize its allies around an important initiative such as the Proliferation Security Initiative, it will quickly find, as it has, that our allies will insist on compliance with the Convention provisions;

- ! Some critics seem to believe that there would be a negative sea change in the ability of the United States to protect its interests were we to adhere to the Convention. But to the contrary, pursuant to an order by President Reagan, the United States for over two decades has been complying with the provisions of the Convention other than deep seabed mining, which were not yet renegotiated at the time of Reagan's order. And from 1994 to 1998 – until our right to participate on the Council of the Authority under provisional application ran out – the United States took its seat on the Council of the Authority and participated in adopting the budget of the Authority and formulating rules and regulations for seabed mining. The horrors summoned up by the critics simply have not occurred;
- ! Some critics seem not to understand the critical United States interest in protecting its sovereign rights in freedom of navigation on the world's oceans. I have been particularly troubled by criticisms that seem to assume that an absence of rules, or oceans anarchy, would somehow be in our interest. But to the contrary, the United States sought, and is protected by, rules that limit the ability of other nations to control our shipping and that provide a balanced rule of law in the oceans. Any other understanding of this nation's oceans interests is completely naive in failing to understand the death by a thousand pin pricks nature of the challenge to our freedoms; and
- ! Some critics seem unaware of other articles in the Convention that negate an argument they are making. Admittedly, the Convention, with 320 articles and numerous annexes, is complex. That, however, is no excuse for failing to accurately understand the Convention as a whole.

V.

A Few Examples of These Confusions in Criticisms of the Convention

Examples of the above, and other confusions in recurrent criticisms of the Convention, include the following:

- ! Criticisms that the United States will be required to turn over security information without noting Article 302 of the Convention negating any obligation “to supply information the disclosure of which is contrary to the essential interests of its security;”
- ! Criticisms that under Article 20 of the 1982 Convention submarines are required to navigate on the surface and to show their flag, without noting that this obligation is already binding on the United States under Article 14 of the 1958 Territorial Sea Convention. Nor does this criticism even bother to mention the critical difference between the 1958 and 1982 Conventions, that under the 1982 Convention, this obligation no longer applies in straits used for international navigation. In such straits there is a right under the 1982 Convention of “transit passage,” permitting transit in the normal mode; which includes submerged transit and overflight.
- ! Criticisms that the United States should not commit to provisions in the 1982 Convention to the effect that the high seas are “reserved” for peaceful purposes and that parties to the treaty shall refrain from “any threat or use of force against the territorial integrity or political independence of any state,” without noting that these obligations simply parallel the obligation in the United Nations Charter, already binding on the United States and every other nation in the world banning the aggressive use of force. These obligations, as those in the United Nations Charter, do not in any way inhibit either the right of individual or collective defense or otherwise lawful military activities. If these provisions did in any way inhibit such activities in the world’s oceans there would have been no agreement on the Convention. This is abundantly evident in the robust naval activity of nations for which the Convention has been in force;
- ! Testimony of at least one critic before the Senate Committee on Environment and Public Works setting out a number of articles from the 1982 Convention, without notifying the Committee that those articles were either taken verbatim from the 1958 Conventions currently binding on the United States, or that the version in the 1958 Conventions now binding on us was even more restrictive than the provision cited from the 1982 Convention;

- ! Arguments concerning the PSI as though that initiative, developed with ten other countries, required breach of the 1982 Convention. To the contrary, the statement of principles agreed upon and released by the PSI parties in September 2003 is fully consistent with the 1982 Convention, and it is highly likely that the United States would not obtain agreement on some other basis. Indeed, this PSI argument of the critics, which is not consistent with the official position of the United States in the PSI initiative, seems also to fail to understand both the great United States interest in protecting freedom of navigation of United States shipping and our traditional rights of individual and collective defense that are an overlay over the 1982 Convention. The Law of the Sea Convention guarantees our vessels will be permitted to get on station, which is essential before any issue even arises about boarding. Moreover, we emphatically do not want a legal regime that would permit any nation to seize United States vessels anywhere in the world's oceans. The PSI was carefully constructed, using flag state, port state and other jurisdictional provisions of the 1982 Convention and general international law precisely to avoid this problem.¹⁹ The PSI argument is one of the areas, in which critics have complained about articles in the 1982 Convention without noting that they are already binding on the United States, in a more restrictive fashion, in the 1958 Convention. Thus, critics have cited in connection with PSI Article 110 of the 1982 Convention concerning the right of visit, without noting that a more restrictive version of this article is already binding on the United States in Article 22 of the 1958 High Seas Convention. Indeed, the 1982 Convention adds several new bases for boarding, including that a ship is "without nationality."
- ! A variety of arguments asserting interference with United States intelligence activities without noting that the United States has been operating under the rules objected to by the critics since Ronald Reagan's order; that the intelligence community does not share the critics' concerns; and that the concerns of the critics, if valid at all, may already be engaged with the 1958 Geneva Conventions binding on the United States that would remain in force for the United States were we to fail to

¹⁹ The core legal bases for PSI include actions by states within their territory, actions by states within their national airspace, actions by port states in internal waters, actions by coastal states in territorial waters, actions by flag states over their flag vessels, actions based on flag state or master's consent, actions based on rights concerning stateless vessels, actions based on universal crimes, actions based on rights of individual or collective defense, and actions based on belligerent rights. None of these legal bases require violation of the 1982 Convention or actions inimical to the crucially important United States security interest in the protection of freedom of navigation.

adopt the less restrictive 1982 Convention. Having chaired the eighteen Agency National Security Council Interagency process that drafted the United States negotiating instructions for the Convention, I found these recent arguments of the critics so bizarre that I recently checked with the Intelligence Community to see if I had missed something. The answer that came back was that they, too, were puzzled by these arguments and that they were not opposing United States adherence to the 1982 Convention;

- ! The argument that perhaps the renegotiation of Part XI won't be binding after all and that we will be stuck with the old Part XI. This argument, of course, is flatly at odds with Article 2 of the renegotiation agreement which provides "[i]n the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail." It is at odds with the experience of the United States from 1994 through 1998 when we participated in the Authority on a provisional basis. It is at odds with the practice of the International Seabed Authority toward nations which had adhered to the Law of the Sea Convention before the renegotiation in treating them as fully bound by the renegotiation agreement. It is further at odds with the practice of the Authority in establishing a chambered voting system, a Finance Committee, and mining contracts, all of which are based on the renegotiation agreement. And it is at odds with the official *Compendium of Basic Documents: The Law of the Sea* published in 2001 by the Seabed Authority that not only has an extensive section rewriting Part XI to fully take account of the renegotiation, but which begins this section by noting: "[i]n the event of any inconsistency between the Agreement and Part XI, the provisions of the Agreement shall prevail."²⁰ To my knowledge, not a single nation in the world has advanced this argument asserted by critics. More importantly, on an issue of such importance, the United States would have not only the legal right to leave the Convention, but given our insistence on the renegotiation we would be expected to exercise our denunciation right under Article 317, should a serious effort be made to set aside the renegotiation of Part XI. This argument, then, simply throws up another horrible without noting that the alternative recommended, not moving forward with adherence, will immediately have continuing substantial costs for the United States, which, unlike the imagined horrible, are neither contingent nor imaginary;

²⁰ *International Seabed Authority, The Law of the Sea: Compendium of Basic Documents 191 (2001).*

- ! Assertions that the Convention will create authority for an international organization to tax American citizens. The Convention does nothing of the kind. It does provide for payments on “commercial terms” to mine deep seabed minerals that do not belong to the United States. This is similar to payments to Indonesia or Chile for the ability to have access to resources in those countries. We would not remotely regard payments for such access as authority for taxation of American citizens by Indonesia or Chile. Moreover, unlike arrangements for minerals mining access in foreign countries, in the new deep seabed Authority United States firms will have assured access to mine, and the disposition of payments as well as the rules and regulations for such mining will be subject to a United States veto. Moreover, that veto is exercisable with respect to the distribution of revenues from firms of all other nations mining the deep seabed – thus effectively multiplying the ability of the United States to ensure that the distributions to states parties are put to a good use. Similarly, the Convention provides for minimal revenue sharing for oil and gas development in areas beyond the 200 mile economic zone. Such revenues, which would amount to an average of two to five percent over the life of a well, were an enormous bargain for the United States as payment in return for our obtaining sovereign rights over resources in an area of the continental shelf beyond 200 nautical miles that is roughly equivalent to the size of California. That is, we retain ninety-five to ninety-eight percent of the value of the future resources in this area beyond the 200 mile economic zone placed under United States resource jurisdiction by the Convention. Indeed, the revenue sharing system adopted was drafted by a representative of an American oil company on our law of the sea industry advisory group and has been perfectly acceptable to the oil industry. And even beyond the great bargain that was the purchase of Alaska, in this case not a penny is due until seven years after production begins. Moreover, once again, the distribution of any such revenues to states parties, including revenues from this small royalty from all production beyond 200 miles from other nations, would be subject to a United States veto; and

- ! Allegations that the Convention “is designed to place fishing rights, deep-sea mining, global pollution and more under the control of a new global bureaucracy” This is so in error as to be humorous if it were

not seriously advanced in a respected national newspaper.²¹ As has been seen, the new international organization to be set up to provide security of tenure for deep seabed mining in areas beyond national jurisdiction has regulatory authority only over the mining of minerals from the sea floor beyond national jurisdiction. And even then it would be subject to a United States veto with respect to the adoption of rules and regulations for mining, allocation of any revenues from mining, and any amendments relating to such organization. The suggestion that this organization may someday set up its own navy to enforce its will on the world, in the face of a United States veto, is particularly imaginative fantasy.

Mr. Chairman, and members of the Committee, should we not recognize that the advice from those who proffer such arguments is not more reliable than that from the Joint Chiefs of Staff, the Navy, successive Chiefs of Naval Operations, the Combatant Commanders, Presidents of both parties, United States oceans industries, United States environmental groups, a unanimous Senate Foreign Relations Committee, the United States Arctic Commission, and the unanimous opinion of the Congressionally established National Commission on Ocean Policy?

Conclusion

Adherence to the 1982 Convention on the Law of the Sea is strongly in the national interest of the United States. There are powerful reasons supporting United States adherence to the Convention; reasons rooted in protecting U. S. sovereign rights, protecting U. S. national security interests, protecting U. S. industry, protecting U. S. mariners and fishermen, protecting our environmental interests, encouraging strong precedents for international organization, restoring U.S. oceans leadership, protecting U.S. oceans interests, and enhancing U.S. foreign policy. I would urge this Committee to suggest that the Senate support advice and consent to the 1982 Convention at the earliest possible time.

²¹ See "Bottom-of-the-Sea Treaty," *The Wall Street Journal*, March 29, 2004.

About John Norton Moore

* John Norton Moore is the Walter L. Brown Professor of Law at the University of Virginia School of Law and Director of the Center for Oceans Law and Policy. He formerly served as the Chairman of the National Security Council Interagency Task Force on the Law of the Sea, which formulated United States international oceans policy for the law of the sea negotiations, he headed D/LOS, the office which coordinated both State Department and Interagency Policy on the law of the sea, and he served in the international negotiation as a Deputy Special Representative of the President and a United States Ambassador to the Third United Nations Conference on the Law of the Sea. Subsequently, he chaired the Oceans Policy Subcommittee of the Natural Resources Committee of the Republican National Committee and was appointed by President Reagan to the National Advisory Committee on Oceans and Atmosphere (NACOA). In 1982, before the successful renegotiation of Part XI of the Convention, he wrote to the incoming Reagan Administration opposing United States adherence until the problems with Part XI had been resolved. This letter was instrumental in triggering the Reagan review which in turn led to the successful Rumsfeld mission and ultimately effective renegotiation of Part XI.

The Center for Oceans Law and Policy, which he directs, led the UNCLOS Commentary project, which has provided the most authoritative article-by-article analysis of the 1982 Convention. This six-volume Commentary is I-VI M. Nordquist (ed.) *1982 United Nations Convention on the Law of the Sea, A Commentary* (Center for Oceans Law and Policy, 2002).