

**SENATE ADVICE AND CONSENT
TO THE LAW OF THE SEA CONVENTION
UNITED STATES SECURITY INTERESTS**

Prepared Testimony of

John Norton Moore

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*“Without a decisive naval force we can do nothing definitive.
And with it, everything honorable”*

George Washington to Lafayette, November 15, 1781

CHAIRMAN WARNER AND HONORABLE MEMBERS OF THE ARMED SERVICES
COMMITTEE –

Mr. Chairman, you have long been a leader in protecting United States security interests in the oceans. Your service as Under Secretary of the Navy, then as Secretary of the Navy, and currently as Chairman of this Committee, sets a sterling record of achievement for our Navy and our Nation. You led our country in negotiating the important Incidents at Sea Agreement¹ with the former Soviet Union, signed with you by Admiral Sergei G. Gorshkov, the Commander-in-Chief of the Soviet Navy. You were of great assistance to me, in my role as an Ambassador and Deputy Special Representative of the President for the Law of the Sea Negotiations, in ensuring that those negotiations served United States security interests. Indeed, your earlier service as the Representative of the Secretary of Defense to the Law of the Sea Negotiations in Geneva established the framework for the successful Convention you now have before this Committee.

Senate advice and consent to the 1982 Law of the Sea Convention is strongly in the security interests of this Great Nation. For that reason, since the Treaty was submitted to the Senate a decade ago, every Chairman of the Joint Chiefs of Staff and every Chief of Naval Operations has actively supported United States adherence. Indeed, as the Chairman of the National Security Council

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Interagency Task Force that developed United States instructions for the negotiations of this treaty under both Presidents Nixon and Ford, I find prompt United States adherence to this Convention a compelling security interest. In fact, Mr. Chairman, I believe I can speak for the many superb civilian and military security experts with whom I have worked on this Convention in saying that to my knowledge each and every one I have worked with on these issues in more than a quarter of a century believes adherence to this Convention serves the security interests of the United States.

The genesis of United States interest in this Convention was our powerful interest in maintaining naval and commercial freedom of navigation throughout the world's oceans. During the 1960s and 1970s a growing number of coastal nations were beginning a race to grab ocean space. The implications of this for United States naval and commercial mobility were grave. Every study by our Government has concluded that protecting naval and commercial mobility is our most important oceans security interest. Yet paradoxically, this was, and is, the national interest most threatened by illegal claims. Accordingly, the Navy and the Defense Department sought to work with our oceans allies in developing a law of the sea that would constrain these illegal claims. In the negotiation that ensued for more than a decade, the United States was the central player. And the result, which you see before you, achieved every security objective of the United States. We obtained a legal regime fully protecting navigational freedom throughout the world's oceans, including transit passage of straits and navigational freedom in the 200 mile exclusive economic zone. Along the way the United States also solidified the largest area of resource jurisdiction in the world with respect to the fishery and oil and gas resources off our coasts. And following a successful renegotiation of Part XI on Deep Seabed Mining, the United States in 1994 secured access to the mineral resources of the deep seabed for our industry, meeting the conditions set by Ronald Reagan.

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

I.
Framing Considerations

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

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

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Make no mistake; our prolonged failure to adhere to the Law of the Sea Convention is harming the security interests of the United States on an on-going basis. For example, the United States, without a seat on the Commission on the Continental Shelf, is excluded from participating in the important Russian submission concerning the limits of their continental shelf claim in the Arctic Ocean, an issue of direct interest to the United States, and especially the State of Alaska. And Uncle Sam has one arm tied behind his back in the continuing struggle to ensure adherence to the navigational freedoms embodied in the Convention. Scofflaws simply argue, when we complain of their transgressions, that as a non-party to the Convention we have no rights under it and no standing to raise the illegality of their actions in violation of the Convention. And the world moved ahead without us with exploration licenses for deep seabed mining being issued to companies from China, France, India, Japan, Poland, South Korea and Russia while the United States industry, which once led in technology development, is moribund from our non-adherence.² Advice and consent to the Convention is not an issue for the next Senate; it is an issue for this Senate.

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

This ought not be a partisan issue. Partisanship ought to stop at the water’s edge, and members of our political parties ought to share a commitment to both a coherent foreign policy and the long-term security of this great Nation. That would be true even if this Convention were associated with only one administration. But this Convention was negotiated on a bipartisan basis under five Presidents of both

parties. Principal negotiations took place under the aegis of three Republican Presidents: Nixon, Ford and Reagan, and one Democratic President: Carter. Part XI on deep seabed mining was then renegotiated under the aegis of President Clinton, a Democrat, who sought and achieved the conditions for renegotiation laid down by Ronald Reagan. And now the Convention has been submitted to the Senate under yet another Republican President, George W. Bush. It should be noted that the principal security components of this Convention, including those critical provisions protecting navigational freedom, were negotiated completely under Republican Presidents.

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

II. ***General Security Considerations***

Some general security considerations include the following:

- The greatest single threat to our oceans interests throughout the history of the Nation has been threats to navigational freedom. But navigational freedom is not protected solely by a strong navy. The first line of defense is a strong legal regime. This nation achieved that in this Convention and it will be tragic if, through continued disengagement, we permit that regime so favorable to our security interests to erode. To an extent not remotely appreciated by those not

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on the oceans firing line for the United States, this struggle for law is an ongoing process in which we are severely handicapped by not being a party to the Convention. This has meant, not just in speculation but in reality, that the natural role of the United States as the leader in oceans issues has been put on hold. We cannot simply shoot our way in when we have disagreements with our NATO allies; nor is such a response at all realistic in the real-world challenge to navigational freedom from a thousand pinpricks;

- Given the price of gasoline today, surely there is broad agreement that the United States needs to get on with the task of developing the oil and gas of our continental margins beyond 200 miles. Without adherence to the Convention that is unlikely to happen for years to come. The large investments that must be made to drill in deep water simply will not be made without legal certainty and security of tenure. Further, the United States has a crucial interest in protecting navigational freedom for the oil and gas brought to the United States that is so crucial for our economy. About 44 % of U.S. maritime commerce concerns petroleum and its products. To put this in further perspective, offshore oil and gas is now the world's largest marine industry, with oil production alone in the range of \$300 billion per year. For these and other reasons of relevance to our security interest in oil and gas, and the interests of our oil and gas industry, Mr. Paul L. Kelly, speaking on behalf of the American Petroleum Institute, the International Association of Drilling Contractors, and the National Ocean Industries Association, testified before the Senate Foreign Relations Committee and the Senate Environment and Public Works Committee that "the U.S. oil and natural gas industry supports Senate ratification of the Convention at the earliest date possible;"³
- The opportunity to attach important United States understandings, as have been formulated for the Senate Resolution of Advice and Consent, is a crucial opportunity for the United States finally to have its official interpretations of the Convention on the record. Many countries intent on undermining the security interests of the United States have already provided erroneous statements with no response

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from the United States. Such a response from the nation with the largest oceans interests in the world is of great importance and is overdue;

- The United States needs to reengage in deep seabed mining. U.S. firms spent more than \$200 million in leading the world in the technology of deep seabed mining and in obtaining four first-generation deep ocean mine sites. Continued United States non-adherence to the Convention has not served our industry – rather it has effectively killed our industry. Only one company now retains mine sites, the other companies are now out of the business, and two of the U.S. mine sites simply lie abandoned. This while seven licenses have been issued to competitors from countries that are parties to the Treaty. As soon as the United States adheres to the Convention, I would urge the Secretary of Commerce to put together an industry working group to see what might be done to remove any domestic legal obstacles preventing our industry from resuming its previous leadership in deep seabed mining. The access to the copper, nickel, cobalt and manganese from these sites is of considerable economic interest to the United States. But today investment will not be made in deep seabed mining without a license from the International Seabed Authority. Thus, it is clear that continued United States non-adherence will be a death knell for our industry;
- For the United States to refuse to adhere to a Convention even after the rest of the world met every single one of our demands for changes to the Convention will severely impact the ability of the United States to negotiate international agreements. I believe this will have a particularly serious effect on our security interests, many of which depend on mobilizing our allies. Certainly, as a sovereign nation, we have every right to negotiate a treaty and then decide not to ratify, but in this instance, where we specified the changes necessary for United States support that were then agreed to by the rest of the world, even some of our closest friends have difficulty understanding our behavior in not moving forward to date. A failure to ratify at this point *will* have adverse effects for our foreign relations with even some of our

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closest allies. We are the world's most powerful military power, but we still need the understanding and support of our friends – and we need to act with consistency and reliability in our foreign policy;

- The United States has an important national interest in a stable and efficient rule of law in the world's oceans. We have achieved that in this Convention and only risk losing it by continued non-adherence. Power alone cannot replace law in providing stable expectations and a check on irresponsible unilateral actions; and
- Isolationism is not a strategy for victory against terrorism. The threat is global and our engagement must be global. That inevitably means that we must enhance our ability to influence other nations and to multiply United States actions through cooperative actions worldwide. If our country is viewed as simply turning inward and being unwilling to participate internationally despite agreements in which we have clearly served our interests, we will not facilitate such needed assistance from others. United States adherence to the Law of the Sea Convention will be carefully monitored by our allies, all of whom have been urging us to move forward, and it will have an impact on the climate in the war on terrorism, as well as other security and foreign policy objectives of the United States. The view that such "soft" considerations are unimportant is profoundly unrealistic. The Law of the Sea Convention is low hanging fruit that lets us send a clear message: America will support good international agreements, but it will stand firm against the bad ones. This differentiated message is crucial. If we are viewed as simply opposing all international agreements, no matter how favorable to the United States (as this one truly is), we will have far less ability to multiply our national interests through cooperative actions with others.

III. The Core Security Threat

The core oceans security threat to the United States is the continuing

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

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

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

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

IV. A Few Specific Examples of Security

Issues Supporting United States Adherence

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

- For the first time in the history of oceans law, and quite in contrast to the 1958 Conventions to which we are now a party, the 1982 Convention provides full protection for navigation and overflight through international straits. This means that United States submarines can go through straits submerged and without having to reveal their location, that our aircraft can overfly, and that military and commercial vessels can go through without fearing harassment from coastal states. Maintaining the secrecy of our SSBN submarines, as this Committee knows so well, is an essential element in the effectiveness of our strategic deterrent;
- The maximum breadth of the territorial sea is restricted to 12 nautical miles, thus blocking the more expansive claims of nations which would interfere with our military and commercial mobility by promulgating territorial seas out to 200 miles;
- The Convention provides for full high seas navigational freedom beyond the territorial sea. This includes the Exclusive Economic Zone of up to 200 nautical miles, areas of the continental shelf under coastal state control beyond that, and all areas seaward of national jurisdiction. The core trade-off in the Convention was a good one for us on both sides of the trade; that is, an extension of coastal state jurisdiction over the fish stocks and oil and gas resources off our coasts in return for full navigational freedom in the areas of extended coastal state resource and economic jurisdiction around the world;
- There is a much improved regime of “innocent passage” in the territorial sea even outside of international straits. Among other important changes the vague regulatory competence of the coastal state, reflected in Article 17 of the relevant 1958 Geneva Convention, has been clarified in Article 21 of the Convention in a balanced

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fashion accommodating both coastal state concerns and navigational rights. There are now new obligations not to “[i]mpose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage” and not to “[d]iscriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.” As this Committee knows, allies of the United States, including Israel, have in the past found their shipping a victim of discrimination, in turn triggering international tensions and conflict;

- The Convention contains a new provision mandating cooperation “in the suppression of illicit traffic in narcotic drugs . . .”;
- The Convention contains new provisions, significant in reducing potential conflicts with other nations and in protecting our citizens, that prohibit other nations from inflicting corporal punishment on American fishermen and merchant seamen, and prohibit or severely limit their imprisonment;
- Article 76 of the Convention massively extends the continental shelf resource jurisdiction of the United States to include the oil and gas deposits of the continental margin and provides a workable standard for delimiting United States national jurisdiction, in contrast with the relevant 1958 Convention which does neither. This clear legal regime permitting the United States to get on with development of its oil and gas resources is a substantial security interest of the United States;
- Whenever deep seabed mining does occur, United States adherence and taking its seat on the Council of the Seabed authority will give us the ability to exercise an effective veto over critical issues. This would include the ability to veto the adoption of inappropriate rules and regulations or revenue sharing with the PLO or similar organizations. Until we accede, the United States will not have this effective veto power; and
- When the United States accedes to the Convention we will be eligible

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

V. Misperceptions

Misperceptions about the Convention include the following:

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

international waters and on the sea-floor.”⁵ Rather, the Authority is a small, narrowly mandated specialized international agency that, emphatically, has no ability to control the water column and only has functional authority over the mining of the minerals of the deep seabed beyond national jurisdiction. Again, this is a necessary requirement for seabed mining, in an area beyond where any nation has sovereignty, to provide security of tenure to mine sites, without which mining will not occur⁶;

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

- **Myth: The Convention is harmful to the Proliferation Security Initiative (PSI).** Again, this is false. The Proliferation Security Initiative has already been negotiated explicitly in conformance with the Convention; and not surprisingly so, since the nations with which we are coordinating in that initiative are parties to the Convention. This charge apparently rests on the false belief that if the United States does not adhere to the Convention it will be free from any constraints in relation to oceans law. Again, a false assumption; we are today a party to the 1958 Geneva Conventions that are, if anything on this issue, more restrictive than the 1982 Convention now before the Senate. This charge is also misguided in failing to understand the critically important interest we have in protecting navigational freedom on the world's oceans. The Convention allows our vessels to get on station which is essential before any issue even arises about boarding. Moreover, we emphatically do not want a legal regime that would permit any nation in the world to seize United States commercial vessels anywhere in the world's oceans. The Proliferation Security Initiative was carefully constructed with parties to the 1982 Convention, using the flag state, port state and other jurisdictional provisions of the 1982 Convention precisely to avoid this problem. Nor is this charge at all realistic in failing to note that nothing in the Law of the Sea Convention trumps our legal rights to individual and collective defense;
- **Myth: The Convention would interfere with the operations of our intelligence community.** Having chaired the eighteen Agency National Security Council Interagency process that drafted the United States negotiating instructions for the Convention, I found this charge so bizarre that I recently checked with the Intelligence Community to see if I had missed something. The answer that came back was that they, too, were puzzled by this charge, and there was no truth to it. I am confident that there is no provision in the Law of the Sea Convention which will, or has, added constraints on the operations of our intelligence community. Indeed, remember in this connection that the United States is already bound by the 1958 Conventions and that

since 1983, pursuant to President Reagan's order, we have been operating under the provisions of the 1982 Convention, other than for deep seabed mining in part XI. And since 1994 we have accepted the revised Part XI;

- **Myth: Freedom of navigation is only challenged from “[t]he Russian navy [that] is rusting in port [and] China has yet to develop a blue water capability . . .”⁷** The implication here is that the principal challenge to navigational freedom comes from major power war or conflict and we do not really have any national concerns at this time about preserving freedom of navigation. But the 1982 Convention deals with the law of peace, not war. Thus this argument misses altogether the serious and insidious challenge, which, again, is what the LOS Treaty is designed to deal with; that is, repeated efforts by coastal states to control navigation, many from allies and trading partners of the United States, which through time add up to death from a thousand pin-pricks. That is the so-called problem of “creeping jurisdiction” that remains the central struggle in preserving navigational freedom for a global maritime power. After years of effort we have won the legal regime to control this “creeping jurisdiction” in the Law of the Sea Convention. To unilaterally disarm the United States from asserting what we won in the Convention against illegal claimants is folly;
- **Myth: The Convention would mandate technology transfer and contains other fundamentally non-free market provisions with respect to deep seabed mining in Part XI.** This charge seems to stem from a failure to understand that a series of flawed provisions in Part XI of the 1982 Convention, including mandatory transfer of technology, were renegotiated at the courageous insistence of President Reagan. Today, the Convention, as so modified, provides for first come rights to mine the deep seabed under a joint venture arrangement providing guaranteed access rights to deep seabed minerals. And the renegotiated Part XI even goes beyond the Reagan conditions in adopting the important pro-free-market GATT principle against subsidization of seabed miners. The mining regime adopted

by the Authority may well be even more flexible than what we have here at home. But whatever imperfections there may be in the deep seabed regime, it is a certainty that United States non-adherence has to date, and will permanently, kill all hope of a United States seabed mining industry. Bankers simply will not loan the billion dollars plus required for a deep sea mining operation without an unchallengeable legal title to the resource;

- **Myth: We do not need to adhere to the Convention because it already represents customary international law binding on the United States.**⁸ This argument is that our navigational interests are already protected. Curiously, those who advance this argument fail to note that if the United States is already bound to the Convention as customary international law it is also bound by provisions they may object to in the Convention. The critics cannot have it both ways. More importantly, the argument misses the reality that the United States is legally disenfranchised as a non-adherent and will not fully receive the benefits of the Convention without acceding to it;
- **Myth: “[T]he Law of the Sea Convention was a grand scheme to create ‘an oceanic Great Society’”**⁹ It is true that one motivation of developing countries in the UNCLOS negotiations more than three decades ago, played out in the negotiation for Part XI, was an exaggerated hope of riches from deep seabed mining. It is also true that the “new international economic order” played a harmful role in the negotiation of Part XI on deep seabed mining. The motivation of the United States and other major powers, however, was to protect navigational freedom, end the out-of-control coastal state grab for the oceans, extend our jurisdiction fully to the fish stocks and oil and gas off our coasts and achieve international agreement on a mechanism providing security of tenure for deep seabed mining in areas beyond national jurisdiction. It was these other non-Part XI issues that were the real core of the UNCLOS negotiations, as attested by the fact that heads of delegation largely ignored Committee I, where Part XI was being negotiated, and spent their efforts in Committees II and III, where more critical national security issues were at stake. The United

States and other major developed nations coordinated closely together on these crucial navigational and resource issues in the “Group of Five.” Moreover, the interest of certain land-based producers of nickel and copper, including developed nations, in preventing competition from deep seabed minerals, was probably a more important factor in the negotiating difficulties in Part XI than the “new international economic order.” The renegotiation of Part XI pursuant to the Reagan conditions solved this latter problem by abolishing the “production limitations” that the land-based producers had written into the original agreement;

- **Myth: The Convention “is designed to place fishing rights, deep-sea mining, global pollution and more under the control of a new global bureaucracy”** This is so in error as to be humorous if it were not seriously advanced in a respected national newspaper.¹⁰ The Executive Branch that led U.S. negotiations on the Convention and that is supporting Senate Advice and Consent would have supported a Nobel Peace prize for Osama bin Laden before agreeing to any such nonsense. The International Seabed Authority deals with mineral resources beyond national jurisdiction, not with fishing, not with global pollution and not with navigation – or even activities in the water column. It is necessary in order to create stable rights to mine sites not owned by any nation as required if United States mining firms are ever to mine the deep seabed. The United States is already party to hundreds of specialized international organizations. The Seabed Authority would add an unremarkable one more. Indeed, one more that even after ten years of operation today still has a staff of only 37 dealing with deep seabed exploration in 70% of the earth’s surface.
- **Myth: United States military activities will be subject to a world court.** There was strong feeling in the UNCLOS negotiations that military activities should be exempted from dispute settlement. Accordingly, Article 298 of the Convention permits nations to opt out of the dispute settlement provisions for military activities, and under the President’s submission, as embodied in the Senate draft resolution

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of advice and consent, this option is unmistakably exercised for the United States. Further, the scope of dispute settlement is severely cabined in general. For example, none of the decisions of the United States in relation to access by foreign fishermen to our fish stocks are subject to dispute settlement. In addition, under the President's submission, as embodied in the Senate draft resolution, the United States will be accepting "special arbitration" as our preferred modality of dispute settlement rather than the International Court of Justice (the World Court). The United States is already a party to literally hundreds¹¹ of international agreements, including more than 85 submitting disputes to the International Court of Justice, that provide for compulsory dispute resolution. As a result of these agreements, remedies are often available when the rights of the United States or its citizens are violated by other countries. In this connection, compulsory dispute settlement is particularly useful in controlling illegal interference with navigation. Indeed, because of its importance in constraining these illegal claims, even the former Soviet Union was persuaded of the importance of compulsory dispute settlement in the Law of the Sea Convention, despite its longstanding general opposition to compulsory dispute settlement. The severely cabined dispute settlement procedures in the Law of the Sea Convention are far more restrictive than in most of the other dispute resolution provisions already binding on the United States. Moreover, as noted above, in the Law of the Sea Convention we have chosen special arbitration rather than the International Court of Justice;

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

- **Myth: There has been inadequate consideration of the Law of the Sea Treaty and we need more time to study it.** Nonsense! Those who espouse this view fail to note that this is the second round of Senate hearings on the Convention. The first round was held in 1994 when the Convention was initially submitted to the Senate. The Senate, and the Country, has had a decade to study the Convention, and for several decades, since 1983, we have lived under the legal regime of everything but Part XI. I have an especially hard time in finding any sympathy for this position urging delay when it comes from spokesmen who were not heard calling for more consideration of the Convention for the full decade while the treaty languished before the Senate Foreign Relations Committee. Rarely has any Convention come before the Senate that is more fully understood in its impact and stakes for our Nation, and that has been more fully studied and debated – and, in real effect, lived under; and
- **Myth: President Bush is urging Senate advice and consent to the Convention for little better than “go-along, get-along multilateralism.”** Give me a break! Among Presidents prepared to take the heat internationally for actions they believe in, as Afghanistan and Iraq surely demonstrate, this President is near the top. Is it too much to understand that after lengthy and careful review this President has urged Senate advice and consent because it is in the national interest of the United States? Further, does anyone really believe Ronald Reagan was a “go-along, get-along” President?

Conclusion

MR. CHAIRMAN, AND HONORABLE MEMBERS OF THE ARMED SERVICES COMMITTEE –

As the beginning quotation from President George Washington attests, a strong Navy, indeed today a preeminent Navy, is an essential national security interest of the United States. We must not do in that Navy by failing to appreciate our critical national security interests in a legal regime for the oceans which

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protects the freedom of the seas and ensures global access.

Rarely has the Senate faced such an easy choice in consideration of a major Convention. No United States oceans, security, or foreign policy interest is served by continued non-adherence, and our security interests are *powerfully* served by adherence. Not only Senator Lugar, as Chairman of the Senate Foreign Relations Committee, but also Senator Stevens, as the senior Senator from the most affected state in the United States, Alaska, have recently sent a letter to their Senate colleagues urging prompt advice and consent to the Convention. Every industry and oceans interest group that has addressed the issue has supported prompt advice and consent, including the one most affected economically, the United States oil and gas industry. *Who do the critics speak for?* The United States Navy and the Joint Chiefs have never wavered in their support. Our allies have supported United States adherence. Both Republican and Democratic Presidents have recommended Senate advice and consent. And most recently the Congressionally established United States Commission on Ocean Policy, broadly representative of United States oceans interests and chaired by Admiral Watkins, has unanimously recommended accession. I concur wholeheartedly in the statement of the Commission that:

The National Commission on Ocean Policy unanimously recommends that the United States of America immediately accede to the United Nations Law of the Sea Convention. Time is of the essence if the United States is to maintain its leadership role in ocean and coastal activities. Critical national interests are at stake and the United States can only be a full participant in upcoming Convention activities if the country proceeds with accession expeditiously. [Unanimous Resolution of the Commission, November 14, 2001].

Footnotes

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

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

³ See statement by Paul L. Kelly, Senior Vice President Rowan Companies, Inc., on behalf of the American Petroleum Institute, the International Association of Drilling Contractors, and the National Ocean Industries Association. Testimony cited was given before the United States Senate Committee on Foreign Relations for a hearing on the United Nations Convention on the Law of the Sea in Washington, D.C., October 21, 2003, at 7.

¹See Statement by Paul L. Kelly Senior Vice President Rowan Companies, Inc., On Behalf of the American Petroleum Institute, the International Association of Drilling Contractors, and the National Ocean Industries Association, before the United States Senate Committee on Foreign Relations, Hearing on the United Nations Convention on the Law of the Sea, Washington, D.C., October 21, 2003, at 7.

⁴ Data is approximate as of June 22, 2001.

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

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

It is further noteworthy that Mr. Gaffney, in his reference to “what could be billions of dollars worth of ocean-related commerce,” *id.* at 3, is, at least by implication from his overall

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

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

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

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

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

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

⁷ *See* Doug Bandow, “Sink the Law of the Sea Treaty,” *The Weekly Standard* (March 15, 2004), at 17.

⁸ *See, e.g.,* “Bottom-of-the-Sea Treaty,” *The Wall Street Journal*, March 29, 2004.

⁹ *See* “Bottom-of-the-Sea Treaty,” *The Wall Street Journal*, March 29, 2004.

¹⁰ *See* “Bottom-of-the-Sea Treaty,” *The Wall Street Journal*, March 29, 2004.

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

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 a member of the National Advisory Committee on Oceans and Atmosphere (NACOA). In 1982, before the successful renegotiation of Part XI of the Treaty, 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).