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# The United States and the Law of the Sea Convention

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## THE UNITED STATES AND THE LAW OF THE SEA CONVENTION

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Let me begin by thanking David Caron and the other organizers of this conference. I am very pleased to speak to you today about the law of the sea. Now, the first thing to know about this topic is that it is the occasion of endless wordplay. The mere mention of the Law of the Sea Convention, and the puns set sail. I didn't know the topic well when I joined the Administration in 2001, but it's one in which I have since been immersed – at times, submerged. And after plumbing the depths of the issue – and diving into the details – I have concluded (now that I've come up for air) that joining the Convention is the right thing to do.

Seriously, though, I would first like to share with you the details of the Administration's concerted efforts to achieve Senate approval of the Law of the Sea Convention. I'll then discuss some of the law of the sea issues that engage the Legal Adviser's Office. And I'll end with some thoughts on the currently "hot" topic of the melting ice in the Arctic region.

When I was Legal Adviser at the National Security Council, I led the Administration's review of all of the unratified treaties that were still before the Senate when the Bush Administration took office. The prior Administration had classified the Law of the Sea Convention as a category one treaty priority, and one major issue we faced was whether to maintain that designation. Given the history of the Convention, including President Reagan's 1982 refusal to sign because of his concerns about Part XI, we wanted to ensure that the Convention and the 1994 Implementing Agreement, which modified Part XI, were subjected to close scrutiny. In the fall of 2003, after a careful review process involving a wide range of agencies, the Administration decided to strongly support U.S. accession.

We concluded that there were several important benefits to joining the Convention:

First, the Convention strongly advances U.S. national security interests because it guarantees our military and commercial vessels – both ships and aircraft – navigational rights and freedoms throughout the world's oceans, including the right of innocent passage through and over foreign territorial seas and international straits. We concluded that these protections are particularly

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important at a time when the U.S. military is conducting military operations in Iraq and Afghanistan and new initiatives like the Proliferation Security Initiative but faces increasing challenges to its activities around the globe. The navigational rights guaranteed by the Convention led all branches of our military to strongly support accession.

Second, the Convention advances U.S. economic interests. It would codify U.S. sovereign rights over all the resources in the ocean, and on and under the ocean floor, in a 200-nautical mile Exclusive Economic Zone off our coastline. The United States has one of the longest coastlines and the largest Exclusive Economic Zone of all the countries in the world and stands to gain greatly from these provisions. The Convention also codifies sovereign rights over resources on and under the ocean floor beyond 200 nautical miles, if the area meets certain geological criteria set out in the Convention. The Convention establishes an institution -- the Commission on the Limits of the Continental Shelf -- that offers a coastal State the opportunity to maximize international recognition and legal certainty with respect to the continental shelf beyond 200 nautical miles offshore. This is an especially valuable feature of the Convention right now, as it would maximize legal certainty regarding U.S. rights to energy resources in vast offshore areas, including in areas that are likely to extend at least 600 miles north of Alaska.

The third principal benefit of the Convention is that it sets forth a comprehensive legal framework and establishes basic obligations for protecting the marine environment from all sources of pollution. This framework allocates regulatory and enforcement authority so as to balance a coastal State's interests in protecting the marine environment and its natural resources with the rights and freedoms of navigation of all States.

Apart from the benefits of these substantive provisions, joining the Convention would give the United States a "seat at the table" in the interpretation and development of the law of the sea. As a leading maritime power and a country with one of the longest coastlines in the world, the United States has an enormous stake in that project, and we need to ensure a level of influence commensurate with our interests. Although the Convention's first several years were fairly quiet on this score, its provisions are now being actively applied and developed. The Continental Shelf Commission and the International Seabed Authority, for example, are up and running, and we -- the country with perhaps the most to gain, and lose, on law of the sea issues -- should not be sitting on the sidelines. Our status as a non-Party puts us in a far weaker position to advance U.S. interests.

In addition to the benefits of joining, the main stumbling block to accession has been removed. President Reagan had refused to sign the Convention because of concerns regarding its deep seabed mining chapter, including provisions mandating technology transfer and insufficient U.S.

influence in decision-making. As a result of international political and economic changes in the late 1980s and early 1990s, other countries recognized that the collectivist approach to deep seabed mining required modifications. The Implementing Agreement concluded in 1994 contains legally binding changes to the Convention's deep seabed mining chapter. The Administration concluded that the 1994 Agreement overcomes each one of the U.S. objections to the Convention and meets President Reagan's goal of guaranteed access by U.S. industry to deep seabed minerals on the basis of reasonable terms and conditions.

For these reasons, the Administration affirmed in 2003 that it considered U.S. accession to the Law of the Sea Convention a top priority and urged the Senate to approve it. The Senate Foreign Relations Committee unanimously approved the treaty in February 2004, but the treaty unfortunately got caught up in election-year politics and was not taken up by the full Senate that year.

When I became Legal Adviser at the State Department in 2005, I made it a priority to try to win Senate approval of the Convention. Given the obvious benefits of accession, and the Administration's full backing of the Convention, I have to say I was optimistic. National Security Adviser Stephen Hadley wrote to Senator Biden in February 2007 on the President's behalf to urge early approval of the Convention, emphasizing that it "protects and advances the national security, economic, and environmental interests of the United States." And President Bush himself issued a statement in May 2007 urging the Senate to act favorably on U.S. accession during the first session of the 110<sup>th</sup> Congress.

Moreover, the Convention had the backing of the kind of coalition that normally augurs success in Washington. There was certainly no doubt about the military's support. A so-called "24-star" letter from the Joint Chiefs of Staff called on the Senate to approve the Convention. In addition, the Convention had the support of many high-level officials in the civilian agencies. Secretary of Homeland Security Michael Chertoff, Secretary of the Interior Dirk Kempthorne, and Secretary of Commerce Carlos Gutierrez all wrote strong letters urging the Senate to act. And, as a demonstration of high-level Administration commitment, both Deputy Secretary of State John Negroponte and Deputy Secretary of Defense Gordon England testified in support of the Convention at a Senate hearing in September 2007. Moreover, several Reagan-era officials, including former Secretary of State George Shultz and former Ambassador Ken Adelman, argued publicly that President Reagan's problems with the Convention had been fixed and that it was time for the United States to join. Finally, the Convention was also strongly supported by every major ocean industry, including shipping, fishing, oil and natural gas, drilling contractors, ship builders, and telecommunications companies, and representatives of the oil and gas, shipping, and telecommunications industries testified in favor of the Convention before the Senate Foreign Relations Committee.

At the same time, economic arguments for joining the Convention grew even stronger. Public attention was increasingly focused on the melting of Arctic ice and its implications for oil and gas development. The planting of a flag at the North Pole by a Russian submarine in August 2007, while carrying no legal significance, highlighted the Arctic as a source of additional wealth for the countries bordering the Arctic Ocean. Russia and the other Arctic coastal states -- Canada, Denmark, and Norway -- all are parties to the Convention and already have submitted, or are preparing to submit, proposed outer limits for their continental shelves to the Continental Shelf Commission. These submissions will enable these countries to maximize international recognition over their extended continental shelves in the Arctic, including sovereign rights over oil and gas reserves. Because of the similar reserves on the U.S. continental shelf off of Alaska, both Senators Stevens and Murkowski actively supported the Convention, as did Governor Sarah Palin in a September 2007 letter to those Senators. She focused specifically on the continental shelf rights that the other Arctic States were busy securing while the United States sat on the sidelines.

In October 2007, the Senate Foreign Relations Committee voted the Convention out of Committee by a 17-4 vote. The Committee report recommended that the full Senate give its advice and consent to the treaty and set forth a set of declarations, understandings, and conditions that had been carefully worked out between the Committee and the Executive Branch.

Once again, however, the full Senate did not get the opportunity to vote on the treaty. Opponents were ultimately successful in keeping it from reaching the Senate floor by making it clear that a debate on U.S. accession would trigger every possible procedural maneuver and thereby take up maximum floor time. The Senate Majority Leader decided not to send the treaty forward under those circumstances, and the treaty has languished on the Senate calendar for the last year.

In their efforts to block accession, opponents of the Convention have relied on arguments and assertions that were -- to be blunt -- inaccurate, outdated, or incomplete. As many of you know, opponents invariably refer to the Convention using the acronym "LOST" -- Law of the Sea Treaty -- in contrast to proponents' preference to highlight its many benefits by referring to it as "LOTS" -- Law of the Sea. I want to address the criticisms I hear most frequently from those who believe the Convention is "LOST."

The more outlandish arguments against the Convention include allegations that the Convention authorizes a "UN Navy" or "UN taxes," that under the Convention the United Nations would control the world's oceans, that joining would hinder U.S. intelligence activities or forfeit U.S. "sovereignty." None of these claims are accurate, yet critics have somehow managed to present them as plausible. For example, one of the intelligence-related assertions is that the Convention prohibits submarines from transiting submerged through the territorial

sea of a coastal State. It is true that a submarine must surface in order to enjoy the benefits of the right of *innocent* passage through the territorial sea. What is *not* true is that the Convention *prohibits* submerged transit through the territorial sea. Submarines are free to transit submerged; they simply aren't entitled to the benefits of the right of innocent passage if they do. These rules have prevailed for decades, including under a 1958 treaty to which the United States is already a party –a fact that was either unknown to or unacknowledged by the Convention's critics.

The charge that the Convention robs the U.S. of "sovereignty" is particularly perplexing because far from ceding U.S. sovereignty, the Convention in fact reflects an enormous transfer of sovereignty and resources to the United States. The Convention codifies the sovereignty and sovereign rights of the United States over extensive maritime territory and natural resources off its coasts. Our extended continental shelf is estimated to be the size of two Californias.

Opponents of the Convention also rely on arguments about deep seabed mining that are simply outdated. For example, they claim that the Convention mandates transfer of sensitive marine technology to less-developed countries. This argument, and others like it, used to be accurate, and were the reason why President Reagan decided that the United States would not join the original Convention. But the 1994 Implementing Agreement fixed all these flaws, and the Convention now eliminates mandatory technology transfer, guarantees appropriate U.S. influence in Law of the Sea decision-making bodies, and generally facilitates access to mining on reasonable terms. Supporters and opponents can all agree that the original Convention was flawed, but that is not the Convention that the Senate is being asked to approve. Indeed, the Convention, taken together with the 1994 Agreement, represents a success of U.S. diplomacy.

Opponents also contend that accession is basically unnecessary for the United States to enjoy the benefits of the Convention. On this view, we get the benefit of the rest of the world treating the Convention's provisions as customary international law without having to sign up ourselves. And, the argument goes, if there are any deficiencies in our legal rights, the U.S. Navy can make it up through force or the threat of force. So why join the Convention and subject ourselves to, for example, third-party dispute settlement?

This argument misses some key points:

First, asserting customary international law does not secure all the benefits of the Convention for us. For example, as a non-party, we do not have access to the Continental Shelf Commission and cannot nominate nationals to sit on it.

Second, relying on customary law does not guarantee that even the benefits we do currently enjoy are secure over the long term. Customary law is not the most solid basis upon which to protect and assert U.S. national security and economic rights. It is not universally accepted and changes over time based on State practice. We therefore cannot assume that customary law will always continue to mirror the Convention, and we need to lock in the Convention's rights as a matter of treaty law. As Admiral Mullen testified when he was Vice Chief of Naval Operations, "[it is too risky to continue relying upon unwritten customary international law as the primary legal basis to support U.S. military operations." One irony of this debate is that some of the opponents of the Convention are the same people who most question the viability of customary international law.

Third, to obtain financing and insurance and avoid litigation risk, U.S. companies want the legal certainty that would be secured through the Convention's procedures in order to engage in oil, gas, and mineral extraction on our extended continental shelf. So, while it may be true that the Navy will continue to exercise navigational rights with or without the Convention, U.S. companies are reluctant to begin costly exploration and extraction activities without the benefit of the Convention.

Fourth, military force is too blunt an instrument to protect our asserted customary international law rights, especially our economic rights. It is simply unrealistic and potentially dangerous to rely solely on the Navy to ultimately secure the benefits of the Convention. The Navy itself has made clear that treaty-based rights are one of the tools it needs in its arsenal.

A final focus of opponents' criticisms is the Convention's dispute settlement provisions. While reasonable people can differ over whether third-party dispute settlement is, on balance, a "pro" or a "con," I believe that these particular provisions are useful, well-tailored, and in no event a reason to jettison the Convention. The United States affirmatively sought dispute settlement procedures in the Convention to encourage compliance and to promote the resolution of disputes by peaceful means. We sought and achieved procedures that are flexible in terms of forum. For example, the Convention allows a Party to choose arbitral tribunals and does not require any disputes to go to the International Court of Justice. Its procedures are also flexible, allowing a Party to choose to exclude certain types of disputes, such as those concerning military activities. In this regard, some have questioned whether it is up to the United States – or a tribunal – to determine what constitutes a U.S. "military activity" under the Convention. We propose to include a declaration in the Senate's resolution of advice and consent making clear that each Party has the exclusive right to determine what constitutes its "military activity." And I can assure you that there is no legal scenario under which we would be bound by a tribunal decision at odds with a U.S. determination of military activities.

Now, am I saying that I can guarantee that the United States would win every case that it brought against another country or vice versa? Of course not. But this is not a case where there are two perfect choices – joining or not joining. Submitting to dispute settlement involves some risk, to be sure – but not joining the Convention presents a far greater risk: that the United States will be left without solid legal protections for its vital national security, economic, and environmental interests.

In short, I believe opponents' concerns about dispute settlement and other aspects of the Convention are either unfounded or overblown. Moreover, they have not offered a compelling alternative to joining the Convention when it comes to securing U.S. sovereign rights with respect to the continental shelf beyond 200 nautical miles. I frankly find it somewhat remarkable that, with the recent energy crisis and renewed focus on U.S. energy security, more Americans are not actively demanding that the United States join the Convention and catch up with the other Arctic nations in exploring and securing its extended continental shelf. Whether or not we decide, as a domestic matter, to allow exploitation of continental shelf oil and gas resources, it seems hard to imagine why we would not want to maximize our potential ability to do so.

As the nation with the world's largest navy, an extensive coastline and a continental shelf with enormous oil and gas reserves, and substantial commercial shipping interests, the United States certainly has much more to gain than lose from joining the Law of the Sea Convention. In my view, it is most unfortunate that a small but vocal minority – armed with a series of flawed arguments – has imposed upon the United States a delay that is contrary to our interests. Nevertheless, I am convinced this will change and am confident that the United States Senate will approve the Convention in due course.

In the meantime, the United States will continue to abide by the Convention and work within its framework. Even as we remain outside the Convention, the Legal Adviser's Office confronts law of the sea issues on a daily basis. For example, we work at the International Maritime Organization and in regional fora to protect the marine environment by elaborating rules for reducing vessel source pollution, ocean dumping, and other sources of marine pollution. We recently achieved U.S. ratification of a treaty – "MARPOL Annex VI" – aimed at limiting air pollution from ships and a protocol limiting land-based sources of marine pollution in the Caribbean Region. A global treaty on ocean dumping – the "London Protocol" -- awaits action by the full Senate. At home, we coordinate with the Department of Justice to ensure that prosecutions involving foreign flag vessels are consistent with the marine pollution chapter of the Convention, and we scrutinize legislative proposals from both the Executive Branch and the Congress to ensure that U.S. marine pollution jurisdiction is applied and enforced in accordance with law of the sea rules.



We also negotiate maritime boundary treaties with our neighbors in line with the provisions of the Convention. Most people think the United States has only two neighbors – Canada and Mexico – but by virtue of our island possessions, we actually have over thirty instances in which U.S. maritime claims overlap with those of another country. Less than half of them have been resolved. Some involve disagreements about how much effect to give to islands in determining a maritime boundary. In the case of the Beaufort Sea, Canada argues that the existing treaty establishing the land boundary between Alaska and Canada also determines the maritime boundary. Our office is also assisting a State Department-led Task Force to determine the outer limits of the U.S. continental shelf beyond 200 nautical miles. The U.S. Coast Guard icebreaker Healy has recently conducted several cruises in the Arctic Ocean, including one that mapped areas of the Chukchi Borderland where the U.S. shelf may extend more than 600 miles from shore.

U.S. and international efforts to combat terrorism and proliferation have also generated law-of-the-sea-related issues. Consistent with the Convention, we fashion shipboarding agreements to promote the maritime interdiction aspects of the Proliferation Security Initiative. And we bring law of the sea equities into the elaboration of treaties on suppression of criminal acts at sea. In fact, the U.S. Senate has just given its advice and consent to ratification of two protocols that supplement the convention that addresses suppression of unlawful acts at sea – the 2005 so-called “SUA Protocol” and the 2005 “Fixed Platforms” Protocol.

Law of the sea issues have also featured prominently in UN Security Council discussions and resolutions regarding piracy off the coast of Somalia. For example, a key element of UNSCR 1816 is to treat Somali territorial waters as the high seas for interdiction purposes.

Fisheries issues also absorb our legal attention, as depleted stocks have become a major economic and environmental issue. Countries are seeking to create regional fisheries management organizations in more and more areas of the world and are looking to strengthen the means for cracking down on illegal, unregulated, and unreported fishing.

Over the past year or so, some of the most interesting law of the sea issues for us have come from the Arctic, where climate change is creating the prospect for increased shipping, oil and gas activity, tourism, and fishing. As a result, the law of the sea has become more relevant than ever. I want to conclude with a few observations and some ideas about ways forward regarding the melting Arctic.

My first observation is that while some have expressed concern that the Arctic is a “lawless” region, this could not be further from the truth. For one, the law of the sea, as reflected in the Convention, provides an extensive legal framework for a host of issues relevant to the Arctic. It sets forth navigational rights and freedoms for commercial and military vessels and aircraft in various

maritime areas. It addresses the sovereignty of the five Arctic coastal States – the U.S., Russia, Canada, Denmark, and Norway – by setting forth the limits of the territorial sea and the applicable rules. It addresses sovereign resource rights by setting forth the limits of the exclusive economic zone and the continental shelf and rules governing those areas. It provides the geological criteria relevant to establishing the outer limits of the continental shelf beyond 200 nautical miles – a topic of great interest these days as the Arctic coastal States seek to extend their respective shelves to the limits permissible under international law. For Parties to the Convention – that is, the four *other* coastal States – it sets forth a procedure for securing international recognition of those outer limits. International law also sets forth rules for resolving cases where the maritime claims of coastal nations overlap. And finally, the law of the sea provides rules regarding marine scientific research in the Arctic and sets out the respective rights and responsibilities among coastal States, flag States, and port States regarding protection of the marine environment.

But the law of the sea is not the only law governing the Arctic. Various air-related agreements indirectly protect the Arctic, such as the Montreal Protocol on the Ozone Layer and the Framework Convention on Climate Change. There is also so-called “soft law” applicable to the Arctic – for example, non-binding rules such as the International Maritime Organization’s 2002 guidelines for ships operating in ice-covered waters. Further, there is an intergovernmental forum – the Arctic Council – which comprises the eight countries with land territory above the Arctic Circle. The Council, which puts great weight on environmental issues, has issued Guidelines on Arctic offshore oil/gas activities.

My second observation is that we should not be taken in by hyperbole in the press about a “race” to the Arctic. Yes, there are efforts to secure legal certainty in places where previously such certainty was not especially important. But this is not the Wild West. Last May, officials from Canada, Denmark, Norway, Russia, and the United States gathered in Greenland to put to rest the concern that there is a rush to stake out and exploit Arctic natural resources. In the so-called “Ilulissat Declaration,” these countries made clear that there are already robust international legal rules applicable to the Arctic, and that they are committed to observing these rules.

A third observation is that, while there is likely to be a need to expand international cooperation in the Arctic in certain areas, there is no need for a comprehensive Arctic treaty. As the Ministers stated in the Ilulissat Declaration: “We...see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.” Calls for a new Arctic treaty along the lines of the Antarctic Treaty are particularly misguided, as the legal, geographic, and other aspects of these two regions are vastly different. Among other things, unlike Antarctica, where most of the world does not recognize the sovereignty claimed by seven countries and a treaty served to suspend the claims issue so as to permit scientific research, the land territory in the Arctic is almost entirely undisputed.

Also unlike Antarctica, most of the Arctic is ocean and widely recognized as subject to the law of the sea.

My final observation relates again to the Ilulissat Declaration. Some have wondered, with concern, whether the Declaration is intended to reflect the emergence of a new grouping of the five countries bordering the Arctic Ocean. Not at all. These countries are simply geographically located in positions where they have particular rights and obligations under the law of the sea that are relevant to the Arctic Ocean; they have an obvious interest in maintaining a dialogue with one another on these issues. Moreover, we do not view the Ilulissat Declaration or the Greenland Ministerial as excluding the legitimate interests of the other members of the Arctic Council – Finland, Iceland, and Sweden – or other States with an interest in Arctic matters.

Now that I have said what there is not – no lawless region, no “race,” no need for a new treaty, and no new country grouping – I would like to discuss where there may be room for improvement. *First*, as maritime traffic and tourism in the Arctic increases, there will likely be a need for strengthened cooperation in search and rescue. Ship-borne tourism to the Arctic has in fact already grown. Under the Convention, each coastal State is required to “promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose.” The U.S. Coast Guard is working to enhance its own search and rescue capabilities in the Arctic, and we are considering ways to enhance cooperative arrangements with our Arctic neighbors to ensure, among other things, rational allocation of resources and avoidance of gaps in coverage.

*Second*, as the five Ministers noted in the Ilulissat Declaration, there are opportunities for greater scientific cooperation on Arctic issues, both among the Arctic coastal states and with other interested countries. U.S. and Canadian scientists worked together this past summer to gather seismic and bathymetric data related to establishment of the outer limits of the continental shelf in the Arctic – notwithstanding the unresolved maritime boundary with Canada in the Beaufort Sea.

A *third* area is cooperation on the environment. The Ministers in Ilulissat noted the “stewardship role” their nations have in protecting the Arctic Ocean’s unique ecosystem. In the Arctic Council, these and other countries are assessing the state of biological diversity, addressing the regional impacts of non-carbon dioxide climate forcing agents, and enhancing the existing “Arctic Off-Shore Oil and Gas Guidelines” for adoption by Arctic ministers in April 2009. This updating of the oil and gas Guidelines, which is largely based on the Arctic Council’s 2008 “Assessment of Arctic Oil and Gas Activities,” will reflect technological advances since the last update in 2002, and include more detailed provisions on environmental impact assessments. Another environment-related

issue that should involve the broader international community, through the International Maritime Organization, is to update the IMO's Guidelines for Ships Operating in Ice-Covered Waters, also known as the "Polar Code." The IMO is currently looking at ways the Code could be strengthened, including through changes in vessel design and increased safety and life-saving equipment.

*Finally*, I view it as a very positive development that, both domestically and internationally, experts are considering the legal issues associated with the warming of the Arctic. To the extent enhancements are needed in one or more areas regarding the safety, security, or environmental protection of the Arctic Ocean, these can be agreed upon and put in place before they become necessary.

In closing, I hope I have given you a better sense of why this Administration supports, and what we have done to obtain, Senate approval of the Law of the Sea Convention, as well as our views on the issues raised by melting ice in the Arctic. Especially in view of the changes in the Arctic, I hope too much more time does not elapse before the United States joins the Convention and is able to place its rights on the firmest legal footing and take its seat at the table with the other parties to the Convention as they make decisions affecting the world's oceans.