

NATIONAL SECURITY AND THE U.N. CONVENTION ON THE LAW OF THE SEA: U.S. COAST GUARD PERSPECTIVES

*Dr. John T. Oliver**

The world's oceans cover over seventy percent of the globe and contain ninety-seven percent of the world's water.¹ Many scientists consider the ocean to be "our greatest resource," but admit that they know "only a fraction of its secrets"² The oceans have always been a vitally important regime and provided seemingly inexhaustible resources over which the international community has long been engaged. The vast ocean spaces have served as critical avenues for global and regional trade, rich sources of food and commodities, dumping grounds for human and industrial wastes, broad defensive barriers and strategic military battle space, limitless subjects for scientific research, valuable opportunities for recreation, and endless sources of human wonder and joy.

For most of human history, the world community has taken a *laissez faire* approach to the sea and its resources. However, as states have come to realize the limits and vulnerabilities of the ocean, and to stake exclusive claims to sovereignty over them, a consensus has developed that the ocean both needs and deserves a special legal regime to ensure a clear and appropriate balance between the various claimants. Moreover, because ocean space could easily succumb to the adverse consequences of "the tragedy of the commons,"³

* Dr. John T. Oliver is the Senior Ocean Policy Advisor, at Headquarters, U.S. Coast Guard. A graduate of Stanford University (B.A., 1973) and the University of Washington School of Law (J.D., 1980), he holds both an LL.M. (1987) and S.J.D. (1993) from the University of Virginia School of Law. He teaches a seminar, "National Security and the Law of the Sea," as an adjunct professor at the Georgetown Law Center. In 2003, Dr. Oliver retired after thirty years as a captain in the U.S. Navy. His naval assignments included Chief Judge, Navy-Marine Corps Court of Criminal Appeals, acting Department of Defense (DoD) Representative for Ocean Policy Affairs (DoD REPOPA), Director, International Law Division, and Ocean Policy Specialist on the Joint Staff (J-5). The views expressed in this article are those of the author and are not to be construed as official or reflecting the views of the Commandant or of the U.S. Coast Guard.

1. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (NASA), JET PROPULSION LAB., CAL. INST. OF TECH., THE VAST OCEANS, http://www-b.jpl.nasa.gov/earth/ocean_motion/ocean_motion_index.cfm (last visited Mar. 21, 2009).

2. U.S. DEP'T OF COMMERCE, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., OCEAN EXPLORATION: OUTSTANDING ACCOMPLISHMENTS IN RESEARCH (2007), *available at* http://www.oar.noaa.gov/research/2007/ocean_exploration.pdf (last visited Mar. 21, 2009).

3. Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1244, *available at* <http://www.sciencemag.org/cgi/content/full/162/3859/1243> (last visited Mar. 21, 2009). The article describes

international agreement has proven to be essential to protect its environment and its resources from uncontrolled use and abuse. The 1982 United Nations (U.N.) Convention on the Law of the Sea (UNCLOS or the Convention),⁴ which codifies a broad range of international legal principles applicable to the ocean regime, represents a tremendous advance in promoting and protecting our national security and a broad range of other critical ocean policy interests.

UNCLOS promotes many of the most vital interests of the United States. For that reason, it has achieved wide-spread support. Indeed, it is quite remarkable when such often divergent voices as the Bush and Obama Administrations, virtually all congressional Democrats and many leading Republicans, environmental groups, the national security and intelligence communities, the fishing, shipping, and telecommunications industries, each of the Joint Chiefs of Staff, the oil and gas industry, the U.S. Chamber of Commerce, labor organizations, and nearly every international policy expert all come together to strongly support the United States becoming party to an international agreement.⁵ But that is the case with respect to Law of the Sea Convention. While critics suggest that having a “seat at the table” in yet another U.N. bureaucracy is not worth the possible cost to our sovereignty,⁶ our nation’s most knowledgeable and engaged ocean policy experts disagree.⁷ This

the dilemma in which multiple individuals acting independently in their own self-interest can ultimately destroy a shared resource even where it is clear that it is not in anyone’s long term interest for this to happen. The concept is often applied to the oceans. See, e.g., SUSAN J. BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* 75–78 (Island Press 1998). See also MICHAEL BERRILL, *THE PLUNDERED SEAS: CAN THE WORLD’S FISH BE SAVED* 28 (Sierra Club Books 1997).

4. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited Mar. 21, 2009) [hereinafter UNCLOS].

5. James Watkins & Leon Panneta, Letter to the Editor, *Law of the Sea Protects U.S.*, WASH. TIMES, Aug. 5, 2008, at A22, available at http://www.jointoceancommission.org/news-room/in-the-news/2008-08-05_Law_of_the_Sea_Protects_%20U_S.@Washington_Times.pdf (last visited Mar. 21, 2009). President Obama and Vice President Biden strongly supported the Convention as Senators and candidates for President. Secretary of State Clinton during her confirmation hearings that the Convention would be a “priority” with her and that accession was “by order.” Senate Confirmation Hearing: Hillary Clinton, N.Y. TIMES, Jan. 13, 2009, at A13, available at <http://www.nytimes.com/2009/01/13/us/politics/13text-clinton.html> (last visited Mar. 27, 2009).

6. The “seat at the table” argument has been made in several contexts, including in President Bush’s statement of May 15, 2007. Press Release, George Bush, President, Office of the Press Sec’y, President Bush’s Statement on Advancing U.S. Interests in the World’s Oceans (May 15, 2007), available at http://www.fcnl.org/issues/item.php?item_id=2630&issue_id=101 (last visited Mar. 21, 2009). Critics have complained that UNCLOS would have adverse consequences to our sovereignty that outweigh any such benefits. See, e.g., Frank J. Gaffney, Jr., *Protect U.S. Sovereignty: Sink the Law of the Sea Treaty*, HUM. EVENTS, Jan. 28, 2005, available at <http://www.humanevents.com/article.php?id=6431#c1> (last visited Mar. 21, 2009).

7. For the wide range of individuals and organizations that support the Convention, see Rule of

article will focus on how UNCLOS will better enable those responsible for ensuring our national and homeland security, particularly the Coast Guard, to carry out their many critical missions.

The Law of the Sea Convention was negotiated between 1973 and 1982 during the Administrations of Presidents Nixon, Ford, Carter, and Reagan. The results of the negotiations reflect a commitment toward a comprehensive regime to ocean law and policy that both the United States and the Soviet Union made as far back as 1965.⁸ It replaces the four out-of-date 1958 Geneva conventions and provides an effective and balanced framework governing virtually all aspects of the law of the sea. Among other things, UNCLOS covers: the rights and obligations of states within their territorial sea, exclusive economic zone (EEZ), and continental shelf; international straits; the high seas; protection of the marine environment; marine scientific research; and island and archipelagic states. It also contains a long-standing goal of the United States: effective, compulsory provisions to settle most ocean disputes.

UNCLOS is now in force for some 156 states worldwide (plus the European Union), including virtually all of the major maritime powers and our allies and trading partners.⁹ Unfortunately, because of failure to act in the Senate over the past fifteen years, the United States is not yet a party. However, there is now a window of opportunity for the United States to regain its natural leadership position in the development of the international law of the sea while promoting many of our critical national security, global mobility, and economic and environmental interests.

This window has not always been open. Nor has the entire Convention always been so favorable to our vital national interests. When President Reagan considered the entire text of UNCLOS in the early 1980s, he wisely identified several unacceptable provisions concerning a newly crafted, bureaucratic international regime to govern mining activities on the deep seabed. He called for international engagement to renegotiate the objectionable provisions. However, President Reagan also made clear that the United States would comply with the remaining provisions as customary law, because they reflected an appropriate “balance of interests” and clearly contributed greatly

Law Committee for the Oceans, Index of Endorsements of the Law of the Sea Convention, <http://www.oceanlaw.org/index.php?name=Sections&req=viewarticle&artid=2&page=1> (last visited Mar. 21, 2009). See also UNIV. OF VA., CENTER FOR OCEANS LAW AND POL’Y, U.N. CONVENTION ON THE LAW OF THE SEA (2008), <http://www.virginia.edu/colp/los.html> (last visited Mar. 21, 2009).

8. MYRON H. NORDQUIST, U.N. CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 535 (Martinus Mijhoff Publishers 1986).

9. Liberia was the most recent State to accede to the Convention. U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, STATUS OF THE U.N. CONVENTION ON THE LAW OF THE SEA 9 (2008), available at http://www.un.org/Depts/los/reference_files/status2008.pdf (last visited Mar. 21, 2009).

to America's national security interests and economic and environmental well being.¹⁰

Many of our allies agreed with this approach and, working together, in 1994, the United States and others were successful in fixing all of the objectionable provisions.¹¹ However, despite President Clinton's decision to forward UNCLOS and the "Part XI Implementing Agreement" to the Senate that same year, a unanimous (19–0) vote of the Senate Foreign Relations Committee (SFRC) in support in 2004,¹² President Bush's emphatic call to become party on May 15, 2007,¹³ and the 17–4 vote of the SFRC in October 2007,¹⁴ the full Senate has not yet even taken a vote on UNCLOS. The time has now come for the United States to become party to this vital Convention.

Becoming a party to UNCLOS would greatly enhance the functioning of our national and homeland security apparatus. In his testimony before the Senate Foreign Relations Committee, Admiral James Watkins, former Chief of Naval Operations and the Chairman of the U.S. Commission on Ocean Policy, called the Convention "the foundation of public order of the oceans."¹⁵ U.S. military forces, including Coast Guard units, rely heavily on the many critical freedoms of navigation, overflight, and operational principles codified in the Convention. Under the current legal regime, the United States is not guaranteed such rights. While there is a strong argument that transit passage and archipelagic sea lane passage have become established rights under customary international law, not all states agree.

For example, the Islamic Republic of Iran, whose territorial waters overlap the shipping lanes in the critical Strait of Hormuz, through which much of the world's oil passes each day, contends that only states party to UNCLOS are entitled to the full rights of transit passage.¹⁶ Moreover, neither of these critical

10. President Ronald Reagan, Statement on United States Oceans Policy, PUB. PAPERS 378 (Mar. 21, 1983), available at <http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm> (last visited Mar. 2, 2009).

11. Bernard H. Oxman, Letter to the Editor, *Reagan Supported Most of the Law of the Sea Treaty*, WALL ST. J., Oct. 22, 2007, at A17 available at <http://www.oceanlaw.org/index.php?name=News&file=article&sid=71> (last visited Mar. 21, 2009).

12. S. EXEC. DOC. NO. 110-9, at 8 (2007), available at <http://www.virginia.edu/colp/pdf/UNCLOS-Sen-Exec-Rpt-110-9.pdf> (last visited Mar. 21, 2009).

13. See Press Release, George Bush, *supra* note 6.

14. Kevin Drawbaugh, *U.S. Senate Panel Backs Law of the Sea Treaty*, REUTERS, Oct. 31, 2007, <http://www.reuters.com/article/latestCrisis/idUSN31335584> (last visited Mar. 21, 2009).

15. *U.N. Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 2 (2003) (statement of Admiral James D. Watkins, USN (Ret.), Chairman, U.S. Comm'n on Ocean Pol'y), available at <http://www.foreign.senate.gov/testimony/2003/WatkinsTestimony031014.pdf> (last visited Mar. 21, 2009).

16. U.N. Div. for Oceans Affairs and the Law of the Sea, *Declarations or Statements Upon*

navigational rights exists under any of the four 1958 Geneva conventions on the law of the sea, to which the United States continues to be bound. Becoming a party to the 1982 Convention will supersede our obligations under the 1958 conventions, and will ensure the entire range and extent of our critical mobility rights in all the ocean waters of the world.

The navigation principles contained in UNCLOS would allow United States and allied forces to use the world's oceans to meet challenging national security requirements, including those necessary to fight the Global War on Terrorism and to project military power overseas. Stephen J. Hadley, President Bush's National Security Advisor, wrote the Senate in February 2007 to request that it take positive action on UNCLOS as soon as possible, arguing, among other things, that "the Convention protects navigational rights critical to military operations and essential to the formulation and implementation of the President's National Security Strategy, as well as the National Strategy for Maritime Security."¹⁷ The Convention provides the most effective means to exercise U.S. leadership in the management and development of the law of the sea. UNCLOS facilitates combined operations with our coalition partners—all the rest of whom are parties to the Convention—through a commitment to a common set of rules, such as those governing the Proliferation Security Initiative (PSI).¹⁸

Our national maritime security strategy has long required world-wide mobility. Innocent passage includes the rights of foreign military vessels to engage in innocent passage through the territorial sea of coastal states. The Convention protects these rights, specifically and objectively enumerating what actions would constitute a violation of "innocent passage."¹⁹ Global mobility also requires undisputed access through, under, and over international straits, such as the Strait of Malacca and Strait of Hormuz, and archipelagic waters,

UNCLOS Ratification, Islamic Republic of Iran, Interpretative Declaration on the Subject of Straits (2007), available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Iran%20Upon%20signature (last visited Mar. 21, 2009). Iran's declaration states, *inter alia*, that the "right of transit passage through straits used for international navigation [is a product of] *quid pro quo*" and that only "states parties to the Law of the Sea Convention shall be entitled to benefit . . ." *Id.*

17. Letter from Stephen J. Hadley, Nat'l Sec. Advisor, Nat'l Sec. Affairs, to Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on Foreign Relations (Mar. 21, 2007), available at <http://www.jag.navy.mil/documents/HadleyLetter.pdf> (last visited Mar. 21, 2009).

18. "The Convention serves as a foundation for our partnerships in the Proliferation Security Initiative." S. Treaty Doc. No. 103-39, at 2, 4 (2007) (written testimony of John D. Negroponte, Dep't Secretary, Sen. Foreign Relations Comm.), available at <http://www.state.gov/documents/organization/112802.pdf> (last visited Mar. 21, 2009). "Joining is a win/win proposition." *Id.* See generally BUREAU OF INT'L SEC. AND NONPROLIFERATION, U.S. DEPT. OF STATE, INTERDICTION PRINCIPLES FOR THE PROLIFERATION SECURITY INITIATIVE ¶ 2 (2002), available at <http://www.state.gov/t/isn/c27726.htm> (last visited Mar. 21, 2009).

19. UNCLOS, *supra* note 4, art. 18, 19.

such as the key sea lanes through Indonesia and the Philippines. The relevant provisions of the Convention guarantee these critically important transit rights to military and civilian vessels, aircrafts, and submarines, no matter the purpose of the transit, the cargo, or the means of propulsion. From a national security and global mobility perspective, these various passage rights are among the “crown jewels” of the Convention.²⁰

A second critical right that UNCLOS guarantees is the ability to operate and conduct exercises in international waters beyond the territorial sea. Prior to the Convention, many coastal states were insisting on the right to exercise complete sovereignty out to as far as 200 miles or more from their land territory. While the Convention’s provisions establish the right of coastal states to claim a 200 nautical mile (nm) exclusive economic zone, they may only exercise sovereign rights over economic activities, such as fishing, the exploration for and production of oil and gas from under the seabed, and the construction of artificial islands. Under the Convention, coastal states may not restrict freedom of navigation, including military training exercises, law-enforcement activities, and overflight within the EEZ.

These provisions are of great benefit to our national security and global mobility interests. In addition to the global reach of the U.S. Navy and Air Force, Coast Guard units patrol the Persian Gulf, the Caribbean Sea, the eastern Pacific, and other vital maritime areas. There is a disturbing movement among some coastal states to attempt to transform their EEZs into the equivalent of a territorial sea, in which they may limit critical navigational freedoms. The U.S. Navy is concerned about apparent government attempts in China and Iran, for example, to assert excessive control over foreign operations within the EEZ as an “anti-access or sea denial strategy.”²¹ In March 2009, five Chinese vessels “aggressively” shadowed and harassed the USNS Impeccable as it conducted operations in international waters seventy-five nm south of Hainan Island in the South China Sea.²² The United States must not sit on the sidelines while the international community is working out the nuances of how UNCLOS is to be interpreted and applied.

20. “Innocent passage, transit passage, and archipelagic sealanes passage are the crown jewels of navigation and overflight. These rights are vital not just to our Navy, but also to our Army, Air Force, Marine Corps, and Coast Guard.” *U.N. Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong., 4 (2007) (statement of Admiral Patrick Walsh, U.S. Navy, Vice Chief of Naval Operations), available at <http://www.jag.navy.mil/documents/testWalshTestimony070927.pdf> (last visited Mar. 21, 2009).

21. James Kraska, *The Law of the Sea Convention: A National Security Success—Global Strategic Mobility through the Rule of Law*, 39 GEO. WASH. INT’L L. REV. 543, 558 (2007).

22. Ann Scott Tyson, *China Draws U.S. Protest Over Shadowing of Ships*, WASH. POST, Mar. 10, 2009, at A8, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/09/AR2009030900956.html> (last visited Mar. 27, 2009).

There is also a disturbing trend with respect to excessive baseline claims. Baselines are important, because it is from them that the various maritime zones, including the territorial sea, contiguous zone, and exclusive economic zone, are measured. Landward of the baselines are the coastal states internal waters, such as ports, bays, and estuaries. Under the Convention, the "normal baseline" is the low water line along the coast.²³ However, the Convention also provides criteria for the establishment of "straight baselines" and closing lines along coastlines that are "deeply indented and cut into," fringed with islands in the "immediate vicinity," or both.²⁴

There is an interesting true story that highlights the national security importance of straight baselines, and the importance of avoiding uncertainty through agreed-upon, objective legal criteria. In the opening scenes from the movie, "Hunt for Red October," Sean Connery played the role of a Soviet submarine captain in charge of a new Soviet submarine with a revolutionary propulsion system heading out to sea from the Russian naval base at Murmansk. A fictionalized Los Angeles class nuclear submarine, *USS Dallas*, was waiting off the mouth of that bay for *Red October* to emerge. The U.S. submarine planned to gather intelligence as it secretly trailed its Soviet "adversary." This is similar to the intelligence activities that take place in real life.

In the mid-1980s the Soviets had drawn a system of straight baselines in the Arctic Ocean. Segment 8–9 is a twenty-six nm line that enclosed Motovsky and Kola Bays. According to the military experts writing in press and magazine accounts, on February 11, 1992, *USS Baton Rouge* was lurking in what it thought to be international waters when it and a Sierra-class Russian submarine collided.²⁵ In the ensuing diplomatic dispute, the U.S. Navy claimed that the collision occurred more than twelve miles from the "normal baseline," the shoreline, which placed it well within international waters. However, Russia claimed that the U.S. submarine was operating illegally while submerged within its territorial sea as measured from their claimed straight baseline.

Years later, when another Russian submarine, *Kursk*, sank under mysterious circumstances in the same general area, the Russian Navy immediately claimed that it was the fault of the United States, which had intelligence gathering submarines in the area monitoring the Russian exercises.²⁶ If the United States

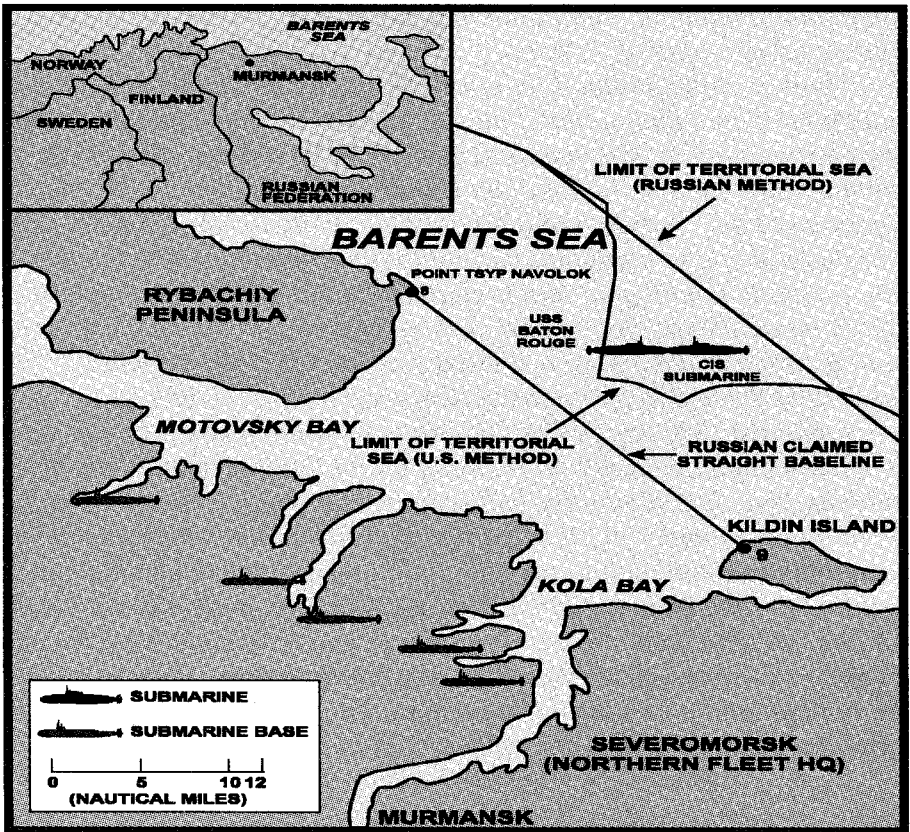
23. UNCLOS, *supra* note 4, art. 5.

24. *Id.* art. 7. See also *id.* arts. 8–14.

25. Eugene Miasnikov, *Submarine Collision off Murmansk: A Look From Afar*, 2 BREAKTHROUGHS 19 (Winter 1992/1993), available at <http://18.48.0.31/ssp/Breakthroughs/1992-93-Winter.pdf> (last visited Mar. 21, 2009). See also John H. Cushman, *Two Subs Collide Off Russian Port*, N.Y. TIMES, Feb. 19, 1992, at A6, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE5DA163CF93AA25751C0A964958260> (last visited Mar. 21, 2009); Bill Gertz, *Russian Sub's Sail Damaged in Collision*, WASH. TIMES, Feb. 27, 1992, at A4.

26. Ian Traynor, *Debris Found Near Kursk Linked to British and U.S. Submarines*, GUARDIAN,

and Russia were both Party to the Convention, we would likely be able to resolve the legality of this particular baseline segment and avoid such potential incendiary incidents. We continue to have similar disputes concerning excessive straight baseline claims with many other countries all over the world, including China, Iran, Colombia, and Vietnam.



The Law of the Sea Convention also provides a solid and workable legal and policy framework for the Coast Guard to interdict maritime terrorists, pirates, illicit drug traffickers, smugglers, and illegal immigrants, both in our own waters and in the seas beyond. The Convention guarantees that our warships and Coast Guard cutters will enjoy sovereign immune status wherever

in the world they may be operating. In a speech before the Brookings Institute, Senator Richard G. Lugar argued:

As the world's preeminent maritime power, the largest importer and exporter, the leader in the war on terrorism, and the owner of the largest Exclusive Economic Zone off our shores, the United States has more to gain than any other country from the establishment of order and predictability with respect to the oceans.²⁷

The Joint Chiefs of Staff wrote the Senate Foreign Relations Committee in June 2007: "From sustaining forward deployed military forces, to ensuring the security of our ports and waters as well as advancing our most important economic and foreign policy objectives, it is important that the United States becomes a party to the Convention."²⁸

The provisions of UNCLOS also directly promote the mission of the U.S. Coast Guard to help protect and manage the living and non-living off-shore resources. The various provisions on the protection of the marine environment are particularly important. At the same time, the Convention does so in a way that limits coastal state sovereign rights in international waters to economic activities, such as off-shore fishing and the generation of alternative forms of energy, and provides an appropriate balance on the jurisdiction to prescribe and enforce environmental laws within the EEZ. By doing so, UNCLOS ensures the inclusive navigational and overflight interests of all countries.

Moreover, from an economic perspective, the United States emerges a clear winner under these provisions of the Convention on the EEZ. Because of its lengthy coastline and island possessions that border on several particularly productive ocean areas, the United States has the largest and richest EEZ in the world. In addition, our extended continental shelf has enormous potential in yet-to-be-discovered oil and gas reserves, particularly in the Gulf of Mexico, Bering Sea, and Arctic Ocean. Working in cooperation with other states, UNCLOS provides the strong and consistent framework to develop additional prudent and workable international standards to protect the marine environment.

Recent discoveries by the U.S. Coast Guard (USCG) icebreaker Healy reveal that the U.S. continental shelf in the Arctic Ocean is much more extensive than originally thought. Only by becoming party to UNCLOS and

27. Senator Richard G. Lugar, Address at the Brookings Inst., *The Law of the Sea Convention: The Case for S. Action* (May 4, 2004), available at http://www.brookings.edu/speeches/2004/0504energy_lugar.aspx (last visited Mar. 21, 2009).

28. Letter from Peter Pace & E. P. Giambastiani, Chairmen, Joint Chiefs of Staff, to Joseph Biden, Jr., Chairman, Comm. on Foreign Relations (June 26, 2007), available at <http://www.virginia.edu/colp/pdf/Biden-Letter-JointChiefs.pdf> (last visited Mar. 21, 2009).

participating in its processes, however, can the United States obtain secure title to these vast resources, adding some 290,000 square miles for sovereign resource exploitation.²⁹ Moreover, no American business enterprise is likely to invest the many billions of dollars necessary to develop a distant, deep-water off-shore oil or gas field, no matter how rich it might be, unless it has an undisputed right to do so under both domestic and international law.³⁰ In addition, the Convention's deep seabed mining provisions, as amended in 1994, would permit and encourage American businesses to pursue free-market-oriented approaches to deep ocean mining. The 1994 "Part XI Implementing Agreement" was crafted in such a way so as to protect the interests of investors and the United States.³¹ As a result, the off-shore oil and gas and mining industries all strongly support accession to UNCLOS. Economic self-sufficiency and development of off-shore ocean resources contribute directly to our national security.

Other Coast Guard missions that the Convention would promote include port and maritime security, law-enforcement, and environmental protection. While guaranteeing rights of innocent passage and the right to seek safe haven in the event of life-threatening storms and other conditions (which the law refers to as *force majeure*), UNCLOS reemphasizes the jurisdictional rights of coastal states within their inland waters, such as harbors and rivers, and within the twelve nm territorial sea. As a result, the Convention would enhance the Coast Guard's ability to protect our nation's coastal security interests.

The United States could use the provisions of UNCLOS effectively to combat excessive maritime claims, which can interfere with narcotics interdiction and other law-enforcement efforts. Several critical coastal states continue to claim territorial seas of 200 nautical miles, in violation of the Convention's twelve nm limit. These countries see our law-enforcement operations in their claimed territorial seas as violations of their sovereignty and

29. BENJAMIN FRIEDMAN & DANIEL FRIEDMAN, BIPARTISAN SEC. GROUP POL'Y BRIEF, HOW THE LAW OF THE SEA CONVENTION BENEFITS THE UNITED STATES 5 (2004), available at http://www.gsinstitute.org/docs/11-20-04_UNCLOS.pdf (last visited Feb. 26, 2009).

30. *Full Comm. U.N. Convention on the Law of the Sea: Hearing Before the Comm. on Env't and Pub. Works*, 108th Cong. (2004) (statement of Paul Kelly, Senior Vice President, U.S. Comm'n of Ocean Pol'y), available at http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=f463432c-802a-23ad-42d9-94b940bb129f&Witness_ID=9a94508f-59fd-426a-9130-ab462789b786 (last visited Mar. 21, 2009).

31. FRIEDMAN, *supra* note 29, at 2. "Twelve years of further negotiation got the United States what it wanted. . . . The 1994 agreement also included renegotiated voting rules that would allow the United States to veto any proposed rules relating to the distribution of ISA revenues, were it to join the Convention." Agreement Relating to the Implementation of Part XI of the U.N. Convention on the Law of the Sea, G.A. Res. 48/263, §§ 3, 5, U.N. Doc. A/RES/48/263 (Dec. 10, 1982), available at <http://www.un.org/documents/ga/res/48/a48r263.htm> (last visited Mar. 21, 2009).

are either reluctant or refuse to cooperate with proposed actions against vessels engaged in drug-smuggling interdicted in these disputed areas. Since we are not now party to UNCLOS, it is very difficult for us to argue credibly that they must give up these excessive claims.

The result is that counter-drug bilateral agreements with these nations are difficult, interdiction efforts in their claimed territorial seas are hampered, and our negotiating ability to change the situation is compromised. The Convention also promotes our authority to protect our ocean waters, seashores, and ports from a wide variety of environmental threats. Admiral Thad Allen, the Commandant of the Coast Guard, and the four previous Commandants have strongly advocated becoming party to UNCLOS as soon as possible, largely because it would promote the ability of the Coast Guard to accomplish its homeland security and law-enforcement missions.³²

Another key purpose of the Coast Guard is to promote safe and secure international trade. The Convention promotes the freedom of navigation and overflight by which international shipping and transportation help supercharge the global economy. Some ninety percent of global trade tonnage, totaling over six trillion in value, including oil, iron ore, coal, grain, and other commodities, building materials, and manufacturer goods, travels on and over the world's oceans and seas each year.³³ By guaranteeing merchant vessels and aircraft their right to navigate on, over, and through international straights, archipelagic waters, and coastal zones, the provisions of UNCLOS promote dynamic international trade. It reduces costs and eliminates delays that would occur if coastal states were able to impose the restrictions on such navigational rights that existed prior to the Convention.

At the same time, UNCLOS encourages international cooperation to enhance the safety and security of all ocean-going ships. Whether it involves lumber and winter wheat shipped from the Pacific Northwest to Japan, high-quality, low-cost goods from Singapore to Long Beach, or oil from the Persian Gulf to Europe, free, safe, and secure commercial navigation and flights provide great economic and security benefits to all of us. That is the key reason the U.S. Chamber of Commerce, shipping industry, aviation industry, and other

32. Press Release, Thad Allan, Admiral, U.S. Coast Guard, Convention on the Law of the Sea (May 17, 2007), available at <https://www.piersystem.com/go/doc/786/156912/> (last visited Mar. 21, 2009). Letter from Thomas H. Collins et al., Retired U.S. Coast Guard, to Joseph Biden, Chairman, Foreign Relations Comm. (Aug. 15, 2007), available at <http://www.jag.navy.mil/documents/Former%20Commandants%20of%20USCG.pdf> (last visited Mar. 21, 2009).

33. Shipping Facts: Information about the International Shipping Industry Home Page, <http://www.marisec.org/shippingfacts/home/> (last visited Mar. 21, 2009). Memorandum from Dep't of Transp. on Maritime Admin.: Strategic Plan for Fiscal Years 2003–08 (Sept. 2003), available at http://www.dot.gov/stratplan2008/strategic_plan.htm (last visited Mar. 21, 2009).

international trade groups have called for immediate accession to the Convention.

UNCLOS would also greatly enhance the global leadership position of the United States in maritime affairs, an area in which the Coast Guard has long played a vital role. Many states have excessive claims with respect to baselines, historic bays, territorial seas, straits, and navigational restrictions which, in the opinion of many, are not permissible under the Convention. As a non-party, our ability to seek to roll back these excessive claims is severely inhibited. Failure to accede to UNCLOS will materially interfere with our ability to engage with other states to improve maritime governance, a major part of the Coast Guard's current strategy for maritime safety, security, and stewardship. Our non-party status is an obstacle that we must overcome in developing virtually any new multilateral maritime instrument. For example, several key states whom we want to join the Proliferation Security Initiative (PSI) often question our non-party status. Likewise, while the United States has long played a key role in the International Maritime Organization (IMO) to promote maritime safety and efficiency and to protect the marine environment, our leadership position is being undermined by our current outsider status.

As a non-party, the United States has no "seat at the table" in virtually all matters concerning the Convention. The United States does not have a judge on the Law of the Sea Tribunal nor a decision-maker or staff experts on the Continental Shelf Committee. And despite the fact that the 1994 "Part XI Implementation Agreement" guarantees the United States a permanent seat on the International Seabed Authority (ISA) and a veto on all key decisions of that body, as a non-party, we cannot play that critical role. In article after article, UNCLOS reflects diplomatic victory after victory for the United States. However, as a non-party, we cannot take advantage of these benefits. One of the key reasons that the congressionally mandated U.S. Commission on Ocean Policy has consistently and unanimously called for the United States to accede to the Convention was to regain its ocean policy leadership position.

In contrast to the nearly unanimous support from the nation's military and civilian national security leadership, ocean policy experts, international trade and shipping communities, oil and gas industry, off-shore mining industry, marine science and environmental groups, and legal associations, a small coterie of strident opponents have echoed a number of badly flawed arguments against the Convention. In responding to those arguments, John Norton Moore, who served as ambassador for the law of the sea negotiations under Presidents Nixon and Ford, and Lawrence Eagleburger, Secretary of State under President H. W. Bush, recently co-authored an article in support of UNCLOS that rejected each of these allegations as fallacious. Their article concluded: "Foreign policy issues deserve debate, but not shameful distortions. The Senate must not

cede its role to uninformed voices, especially when our president and national security leaders are on record as to what is in our country's interest"³⁴

Rather than diminishing U.S. sovereignty, the Convention would greatly expand it. Rather than restricting our military's ability to operate at sea, UNCLOS would guarantee it. Rather than constraining the development of oil, gas, and other minerals from the continental shelf and deep seafloor, the Convention would encourage and protect such investments. Critics have falsely alleged that UNCLOS would somehow impose restrictions on our sea-based military and intelligence operations. But, according to intelligence and legal experts that J. M. McConnell, the Director of National Intelligence, cited in his letter to the Select Committee on Intelligence of August 8, 2007, the Convention would actually enhance our intelligence and security interest.³⁵ Moreover, after conducting several classified and unclassified hearings and receiving testimony from intelligence, military, and legal experts, the Senate's Select Committee on Intelligence concluded that intelligence activities are "not adversely affected by the Convention."³⁶

The specific argument that the Convention would prevent the United States from using its submarines to collect intelligence is fallacious. Several sources, including the Minority Views in the Senate Committee on Foreign Relations, note that Article 20 of the Convention requires submarines and other underwater vehicles to navigate on the surface and show their flag when engaged in innocent passage.³⁷ This is correct, so far as it goes. But the minority report then concludes that this would "fail to protect the significant role submarines have played, especially during the Cold War, in gathering intelligence very close to foreign shorelines."³⁸

What the minority report fails to mention is that the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States has long been party, contains exactly the same restriction.³⁹ Moreover, the

34. Lawrence S. Eagleburger & John Norton Moore, *Opportunity on the Oceans; America Wins with the Law of the Sea Treaty*, WASH. POST, July 30, 2007, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/29/AR2007072900860.html> (last visited Mar. 21, 2009).

35. S. EXEC. DOC. NO. 110-9, *supra* note 12, at 32.

36. S. Treaty Doc. No. 103-39, *supra* note 18, at 17. The Convention does not prohibit or impair intelligence or submarine activities. Joining the Convention would not affect the conduct of intelligence in any way. This issue was the subject of extensive hearings in 2004 before the Senate Select Committee on Intelligence. Witnesses from Defense, CIA, and State all confirmed that U.S. intelligence and submarine activities are not adversely affected by the Convention.

37. UNCLOS, *supra* note 4, art. 20.

38. S. EXEC. DOC. NO. 110-9, *supra* note 12, at 27.

39. Convention on the Territorial Sea and Contiguous Zone art. 14, § 6, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf (last visited Mar. 21, 2009).

collection of intelligence in any guise within the territorial sea is not "innocent passage."⁴⁰ Such operations are called espionage, not innocent passage. The United States would never accept foreign submarines or foreign warships engaging in intelligence-gathering operations in the territorial sea off of San Diego or Norfolk. Indeed, when President Reagan signed a proclamation extending the U.S. territorial sea to twelve nm on December 27, 1988, consistent with the Convention,⁴¹ one of the first things that the Coast Guard did was to advise a Soviet military vessel gathering intelligence just a few miles off of Pearl Harbor to leave the area immediately.⁴² The U.S. military and intelligence communities are well aware that the Convention would have a positive impact on our national security. Moreover, as Senator Richard Lugar, ranking minority member of the Foreign Relations Committee, has argued, it would be unprecedented for the Senate to deny to our nation's military and national security leadership a tool that they have unanimously claimed that they need, especially during a time of war.⁴³

The Coast Guard has many critical national and homeland security missions to perform in ocean space. Simply stated, if the United States were to join UNCLOS, the Coast Guard and the other military services could better use ocean space to carry out these important security missions much more effectively. As a party to the Convention, the State Department and other agencies of the U.S. government could assert our legal and policy positions on ocean issues from a position of strength. The window of opportunity to accede to the Convention is now wide open. Let us now recognize the wisdom of becoming a party to UNCLOS and seize the opportunity to realize the many important benefits that will accrue to our national interest. Moreover, once we become party, let us use our natural leadership position to actively and effectively engage with other states to help guide implementation of the Convention in a way that best ensures our national and international interests. International engagement on the law of the sea can only promote the ability of the Coast Guard to accomplish its many missions.

40. UNCLOS, *supra* note 4, art. 19 § (2)(c).

41. Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989).

42. See Andrew Rosenthal, *Reagan Extends Territorial Waters to 12 Miles*, N.Y. TIMES, Dec. 29, 1988, at A17, available at <http://query.nytimes.com/gst/fullpage.html?res=940DE1DE173AF93AA15751C1A96E948260&scp=13&sq=andrew%20rosenthal%20-%20reagan&st=cse> (last visited Mar. 21, 2009). The author was a member of the U.S. delegation participating in U.S.-USSR talks on the law of the sea when this incident took place. A member of the Russian delegation explained to the author the nature of the challenge to the Russian AGI intelligence vessel.

43. Press Release, Richard Lugar, Sen., Opening Statement for Hearing on Law of the Sea (Sept. 27, 2007), available at <http://lugar.senate.gov/press/record.cfm?id=284357&&year=2007> (last visited Mar. 21, 2009).