

The Law of the Sea Convention

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Hearing on The Law of the Sea Convention

Mr. Chairman, Ranking Member Lugar, thank you for inviting me to appear before the Committee today to discuss the Convention on the Law of the Sea. My last appearance before this Committee was at this Committee's last hearing on the Law of the Sea Convention in September 2007, when I appeared together with then Deputy Secretary of State John Negroponte and then Deputy Secretary of Defense Gordon England to support the Convention on behalf of the Bush Administration.

I am now a partner in the international and national security law practices at Arnold & Porter LLP and an Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations. Although I am advising several clients on legal issues relating to the Law of the Sea Convention, I am appearing today in my personal capacity and not on behalf of any client.

I served for eight years as a senior legal official in the Administration of President George W. Bush, and I was actively involved in the Administration's consideration of the Convention for all eight years. During the first term, I served in the White House as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001-2005. I was in the White House Situation Room on September 11. Although I spent the vast majority of my time in this position focused on military, intelligence, and counter-terrorism issues, I was also responsible for coordinating the Bush Administration's treaty priorities and for reviewing all treaties transmitted to the Senate by the President.

In the second term, I served as The Legal Adviser for the Department of State from 2005-2009 under Secretary of State Condoleezza Rice, after a confirmation hearing before this Committee in March 2005 and

confirmation by the full Senate in April 2005. As Legal Adviser, I was the most senior international lawyer in the Administration and was responsible, among other duties, for the negotiation and legal interpretation of treaties and for securing Senate approval and Presidential ratification of treaties supported by the Administration. I also represented the United States before international tribunals.

Today, I would like to explain why the Bush Administration decided, after a careful review, to support the Law of the Sea Convention. I will also address some of the concerns that have been raised by critics of the Convention.

Let me emphasize at the outset that I very much appreciate many of the concerns that have been raised about the Convention, including by Senators on this Committee. I watched this Committee's hearing on May 23 and listened to the concerns that were raised. During the Bush Administration, we carefully examined many of these same issues before allowing Administration witnesses to testify in favor of the treaty before this Committee in 2003 and 2007. Although some of the criticisms of the Convention are inaccurate or based on outdated information, other criticisms raise legitimate concerns that the Bush Administration reviewed before we decided to support the Convention.

When the Bush Administration came into office in January 2001, we began a careful review of all of the treaties that had been submitted to the Senate by the Clinton Administration to determine which treaties the Bush Administration would support and would not support. The Bush Administration did not support all of the treaties that had been supported by the prior Administration. For example, the Bush Administration did not support the Comprehensive Nuclear Test Ban Treaty, which had been strongly supported by the Clinton Administration. We did not support the Kyoto Protocol, which had been signed by the Clinton Administration. Many Bush Administration officials were similarly skeptical of the Law of the Sea Convention because it was a multilateral treaty, and President Reagan had refused to sign it. However, after a year-long interagency review, the Bush Administration concluded that the Convention was in the U.S. national interest and decided strongly to endorse the treaty. In February 2002, the Administration submitted its first Treaty Priority List to this Committee and listed the Law of the Sea Convention as a treaty for which there was an "urgent need for Senate approval."

Let me emphasize that the Bush Administration did not decide to support the Law of the Sea Convention out of a blind commitment to multilateral treaties or international organizations. No one has ever accused the Bush Administration of an over-abundance of enthusiasm for the United Nations or multilateralism. Indeed, the Bush Administration was especially skeptical of the United Nations and many U.N. bodies, such as the Human Rights Council. And the Bush Administration was especially committed to defending U.S. sovereignty and international freedom of action, particularly after September 11.

The Bush Administration decided to support the Law of the Sea Convention and to provide senior Administration officials to testify in favor of the Convention only after weighing the Convention's benefits against its risks. We ultimately concluded that, on balance, the treaty was clearly in the U.S. national security, economic, and environmental interests.

First and foremost, the Bush Administration concluded that the Convention was beneficial to the United States military, especially during a time of armed conflict, because it provided clear treaty-based navigational rights for our Navy, Coast Guard, and aircraft. This was especially important for the Bush Administration as we asked our military to take on numerous new missions after the 9-11 attacks during the Global War on Terrorism; several countries had challenged U.S. military activities in their territorial waters, and the Administration concluded that it was vital to have a treaty-based legal right to support our freedom of movement and activities. We also concluded that joining the Convention would support our Proliferation Security Initiative.

Second, the Administration concluded that the Convention was in the U.S. commercial and economic interests because it codified U.S. rights to exploit the vast and valuable resources in the U.S. Exclusive Economic Zone -- the largest in the world -- and on its substantial extended continental shelf (ECS), to lay and service submarine telecommunications cables, and to engage in mining in the deep seabed outside the sovereign jurisdiction of the United States. Later, as the melting Arctic ice opened up new commercial opportunities on the U.S. extended continental shelf off of Alaska, the Administration concluded that codifying U.S. rights in the Arctic and participating on the Continental Shelf Commission created by the Convention was even more important than before.

Third, the Administration concluded that joining the Convention supported important U.S. environmental interests in the health of the world's oceans and the living resources in them.

The Bush Administration reviewed the specific concerns that President Reagan had raised about the Convention, which focused on Part XI of the Convention, regarding deep sea-bed mining. We concluded that all of these concerns had been satisfactorily addressed by the amendments made to the Convention in 1994. For example, the provisions in the original Part XI requiring transfer of technology to less developed countries or mandating limits on deep seabed mining based on non market factors had been eliminated. Moreover, the United States had been given a permanent seat on the Council of the International Seabed Authority and the power to veto all decisions of the International Seabed Authority relating to budgetary or financial matters. During our review, we noted that, in his January 1982 statement on "U.S. Policy and the Law of the Sea," President Reagan had stated that the "The United States remains committed to the multilateral treaty process for reaching agreement on the law of the sea." President Reagan had said that if U.S. concerns were addressed, "my Administration will support ratification."

We also noted that after 1994, all of the major industrialized countries -- including the United Kingdom, Japan, Italy and Germany -- had decided to join the Convention. These were the countries that had followed President Reagan's lead and had refused to sign the 1982 Convention because they shared U.S. concerns about the Convention's deep seabed mining provisions, but then concluded that the 1994 amendments had fixed the original problems with the treaty. China and Russia -- two members of the U.N. Security Council that also jealously protect their sovereignty and freedom of action -- had also joined the Convention in 1996 and 1997, respectively.

As a result of its reviews of the Convention, the Bush Administration did identify several concerns. The Administration concluded, however, that these concerns could be adequately addressed through declarations and understandings that could be included with the Senate's Resolution of Advice and Consent to Ratification.

A broad array of senior Bush Administration political appointees from a variety of agencies testified in favor of the Convention, and wrote letters supporting the Convention, between 2003 and 2009. In October 2003, Assistant Secretary of State John Turner, Legal Adviser William H. Taft IV, and Deputy Assistant Secretary of Defense Mark Esper testified before this Committee in favor of the treaty. Dr. Esper, who had previously served as Chief of Staff at the Heritage Foundation, testified on behalf of the Department of Defense that the Administration had "undertaken a review of the Law of the Sea Convention to ensure that it continues to meet United States needs in the current national security environment." Dr. Esper testified that the review "did not reveal particular problems affecting current U.S. operations." He stated that the Administration "supports accession to the Convention because the Convention supports navigational rights critical to military operations."

Ambassador Taft testified on behalf of the Bush Administration in favor of the Convention on several additional occasions before other Senate committees. Ambassador Taft had broad experience in defense matters, having served previously as General Counsel of the Department of Defense and later as Deputy Secretary of Defense and Acting Secretary of Defense during the Reagan Administration, and as Ambassador to NATO in the Administration of President George H.W. Bush.

In addition, in June 2004, the Senate Select Committee on Intelligence held a closed hearing on the intelligence implications of U.S. accession to the Convention. The Director of Naval Intelligence, the Assistant Director of Central Intelligence for Collection, and Ambassador Taft all expressed support for the Convention and stated that the Convention would not affect the conduct of U.S. intelligence activities.

In March 2004, this Committee unanimously reported the Convention with a recommendation that the full Senate vote on it promptly. The full Senate, however, did not vote on the treaty in 2004.

In 2007, the Bush Administration stepped up its efforts to urge the Senate to approve the Convention. On February 8, 2007, then Assistant to the President for National Security Affairs Stephen Hadley wrote to this Committee to urge the Senate to approve the Convention “as early as possible in the 110th Congress.” Mr. Hadley stated that “As the President believes, and many members of this Administration and others have stated, the Convention protects and advances the national security, economic, and environmental interests of the United States.” On May 15, 2007, President Bush himself issued a statement on “Advancing U.S. Interests in the World’s Oceans,” in which he said “I urge the Senate to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea Convention during this session of Congress.” In September 2007, senior Administration witnesses again testified before this Committee in favor of the Convention. This time, Deputy Secretary of State John Negroponte and Deputy Secretary of Defense (and former Secretary of the Navy) Gordon England testified. Secretary Negroponte had previously served as the Deputy National Security Adviser during the Reagan Administration. I joined Deputy Secretary Negroponte, and Deputy Secretary England was joined by Admiral Patrick Walsh, the Vice Chief of Naval Operations, and Admiral Bruce MacDonald, the Judge Advocate General of the Navy.

Shortly before the hearing, on September 17, 2007, then Governor of Alaska Sarah Palin wrote to the Committee to “put my administration on record in support of the convention as the predicate for asserting sovereign rights that will be of benefit to Alaska and the nation.” Governor Palin noted that Senate “ratification has been thwarted by a small group of senators who are concerned about the perceived loss of U.S. sovereignty. I believe that quite the contrary is true.”

Also before this Committee’s 2007 hearing, the Chairman of the Senate Intelligence Committee Jay Rockefeller and Vice Chairman Christopher Bond wrote a letter to this Committee stating that “we concur in the assessment of the Intelligence Community, the Department of Defense, and the Department of State that the Law of the Sea Convention neither regulates intelligence activities nor subjects disputes over intelligence activities to settlement procedures under the Convention. It is therefore our judgment that accession to the Convention will not adversely affect U.S. intelligence collection or other intelligence activities.”

After the September 2007 hearing, Secretary of Homeland Security Michael Chertoff, Secretary of the Interior Dirk Kempthorne, and Secretary of Commerce Carlos Gutierrez all submitted letters to the Committee strongly endorsing the Convention.

In December 2007, this Committee again favorably reported the treaty to the full Senate, but the full Senate again did not act on the treaty before the end of the 110th Congress.

The Bush Administration, however, continued to support Senate approval of the treaty. On January 9, 2009, President Bush signed National Security Presidential Directive 66, relating to “Arctic Region Policy.” In this directive, President Bush again called on the Senate promptly to act favorably on the Law of the Sea Convention.

I would now like to address some of the concerns that have been raised by critics of the Law of the Sea Convention.

Reliance on Customary International Law. Some have suggested that it is not necessary for the United States to join the Convention in order to enjoy its benefits because the main provisions of the treaty are now accepted as “customary international law.” According to this argument, the United States can enjoy international freedom of navigation and exploit the resources on the U.S. extended continental shelf and on the deep seabed, without having to assume any obligations ourselves under the treaty, because these provisions have become accepted as customary international law.

Reliance on customary international law to protect U.S. interests is insufficient for many reasons:

First, asserting customary international law does not give the United States important rights that are available only to parties to the Convention. For example, the U.S. may not take our permanent seat on the Council of the International Seabed Authority, or have a U.S. national elected to the Continental Shelf Commission, unless we are party to the Convention. These bodies are currently making important decisions that affect our interests without our participation. For example, the Continental Shelf Commission is reviewing the claims of Russia and other Arctic coastal states to their continental shelves in the Arctic, and we have no say in its decisions. Similarly, the Council of the ISA is adopting rules relating to deep seabed mining without U.S. input. And the U.S. may not sponsor U.S. companies, such as Lockheed, to engage in mining on the deep seabed.

Second, it is not at all clear that all of the substantive provisions of the Convention are in fact recognized as customary international law. It could be extremely difficult for the U.S. to establish that there was general agreement by countries around the world that a country has a legal right to exploit the resources on its extended continental shelf or on the deep seabed, without joining the Convention. Similarly, contrary to the claims of some, the U.S. does not have a clear right to its extended continental shelf under the 1958 Convention on the Continental Shelf; the lack of clarity in the 1958 Convention is a principal reason why President Nixon endorsed the concept of a new Law of the Sea Convention.

Third, U.S. companies have been unwilling to begin costly exploration and extraction activities in reliance on theoretical and untested legal arguments that have not been accepted by other countries and that are flatly contrary to the terms of Law of the Sea Convention. Companies instead want the clear legal certainty provided by the Convention before making investments that could run into the billions of dollars. Critics of the Convention who are concerned about the possibility of international litigation should be much more concerned about the possibility of lawsuits against the United States or U.S. companies if the United States were to engage in resource extraction on the U.S. extended continental shelf or on the deep seabed contrary to the terms of the Convention, than about possible environmental claims against the United States if the U.S. were to join the Convention. Moreover, a U.S. company that initiates deep seabed mining outside the Convention risks having a foreign company sponsored by a country that is party to the Convention jump on its claim after it has proven to be profitable. No U.S. company would want to take that legal risk.

Fourth, relying on customary international law does not guarantee that even the benefits we do currently enjoy are secure over the long term. Customary international law is not the most solid basis upon which to protect and assert U.S. navigational and economic rights. It is not universally accepted and may change 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. Indeed, it is surprising that opponents of the Convention

who are usually critical of the haziness and unpredictability of “customary international law” should urge the U.S. military and U.S. businesses to rely on it to protect their essential interests.

U.N. “Taxes”/Royalty Payments. Some have objected that the U.S. would be obligated to pay fees to the International Seabed Authority -- which some have inaccurately called “U.N. taxes” -- if the U.S. were to join the Convention and allow resource development on its extended continental shelf. Some have suggested that these fees could result in the loss of billions of dollars to the U.S. Treasury. The Bush Administration carefully considered these concerns and concluded that the licensing and fee structure established by the Convention was acceptable.

First, the fees are minimal in comparison to the enormous economic value that would be received, and the jobs that would be created, by the United States if its industry were to engage in oil, gas, and mineral development on the U.S. extended continental shelf in the Arctic. The U.S. would be required to make no payments for the first five years of production at any site, and then to pay a fee of one percent per year starting in year six, up to a maximum of seven percent in year twelve. Assuming the U.S. Government imposed, for example, a royalty fee of approximately 18 percent on the value of production on the U.S. extended continental shelf, that would be 18 percent more than the U.S. would gain if we stayed outside the Convention. In other words, joining the Convention would attract substantial investment, and produce substantial revenues for the Treasury, that would not otherwise be produced. So, even when the Convention payment is at its highest rate of 7 percent, the U.S. Treasury would still be 11 percent better off with respect to each production site than it would be if the U.S. does not join the Convention. This would be an enormous benefit -- not a loss -- to the U.S. budget.

Second, these fees would only have to be paid by the United States if there is actually production on the U.S. extended continental shelf.

Third, these fees were negotiated by U.S. negotiators in consultation with experts from the U.S. oil and gas industry, who deemed them to be acceptable.

Fourth, all of the western industrialized countries, including our major allies, as well as Russia and China, have concluded that these fees are acceptable and have joined the treaty. If these fees would actually cause the economic woes claimed by critics, then certainly these other countries would not have been willing to agree to pay them. Instead, most of these countries are already busily surveying and staking claims to their extended continental shelves so that their oil, gas, and mining companies can exploit these resources. For example, Norway – which already has a sovereign wealth fund worth \$700 billion, all of which has been derived from Arctic oil and gas profits -- is preparing to make a claim to the oil and gas on its extended continental shelf in the Arctic. Russia, Canada, and Denmark are all preparing to make similar claims in the Arctic using the provisions of the Convention, and they have agreed to pay royalties if they exploit the resources on their extended continental shelves.

Finally, royalty fees would not be paid to the United Nations. They would be paid through the International Seabed Authority, and back to the Parties to the Convention under a distribution formula developed by the Seabed Authority’s Council, where the U.S. would have a permanent seat and a decisive voice on how fees would be spent.

International Seabed Authority. Some have objected to the creation of, or to having the U.S. join, the International Seabed Authority created by the Convention. Critics claim that the ISA is a large U.N. bureaucracy that is hostile to American interests, that includes undemocratic governments, that would regulate U.S. activities over or under the world’s oceans, and that would distribute money to rogue regimes. These claims are inaccurate or exaggerated.

First, the ISA is not part of the United Nations. It is an independent body that is not part of the U.N. Moreover, the ISA is very small. It has fewer than 50 employees.

Second, the ISA has already been in operation for 18 years. The United States cannot prevent its coming into existence or its operations by not joining the Convention.

Third, the U.S. is guaranteed a permanent seat on the Council of the ISA, with veto power over financial and substantive decisions of the ISA, but only if the U.S. joins the Convention. If critics are concerned about the potential actions of the ISA (including the potential distribution of fees to rogue states), the most effective way to restrict its activities would be for the U.S. to become party to the Convention and to exercise its veto rights over Council decisions. Indeed, if Russia, China, and other countries begin to pay fees to the ISA, the U.S. would be able to affect how these fees are distributed if it takes its guaranteed seat on the ISA Council.

Fourth, the ISA has authority only to regulate mining activities on the deep seabed beyond the jurisdiction of any country. It has no authority to regulate activities on the deep seabed unrelated to mining, or with respect to resource development on the continental shelf of the U.S. or other countries. Nor does the ISA have authority over activities of the United States or other countries in the world's oceans.

Finally, while the United States participates in numerous international organizations in which undemocratic countries are also members and even hold leadership positions, the International Seabed Authority is the only international organization where the U.S. alone is given a permanent seat and veto authority over its activities.

Environmental Obligations/Environmental Disputes. Some have argued that the Convention might obligate the U.S. to comply with international environmental agreements (such as the Kyoto Protocol) to which the U.S. is not a party, or subject the U.S. to mandatory dispute resolution for marine pollution (such as atmospheric pollution or pollution from land-based sources). I share the concerns of some critics of the Convention about the goals of some groups to embroil the U.S. in international litigation. As the State Department Legal Adviser during the Bush Administration, I witnessed first-hand the efforts of many groups hostile to U.S. counter-terrorism actions to wage “lawfare” against the United States. In my view, however, joining the Law of the Sea Convention does not subject the United States to significant new legal risks, especially when compared to the benefits of joining the Convention.

The terms of the Convention do not require Parties to comply with other international environmental treaties. With respect to land-based sources and pollution through the atmosphere, Part XII, Section 5 of the Convention requires Parties at most to adopt laws and regulations to prevent, reduce and control marine pollution, but in doing so, parties are required only to “tak[e] into account internationally agreed rules, standards and recommended practices and procedures.” This does not impose an obligation to comply with Kyoto or any other environmental treaty or standard, including treaties to which the U.S. is not a party.

In addition, the U.S. would not be subject to dispute resolution for allegedly violating the Kyoto protocol or any other environmental treaty, including agreements governing pollution from land-based sources. The Convention’s dispute settlement system applies only to disputes “concerning the interpretation or application” of the Convention itself, not to the alleged violation of other treaties. Articles 297 and 298 of the Convention further exclude certain potentially sensitive disputes from dispute settlement.

Finally, as I have noted previously, those who are rightly concerned about international litigation against the United States should be *much* more concerned about subjecting the United States and U.S. businesses to international claims if the United States were to try to claim the resources on its extended continental shelf or on the deep seabed

without becoming party to the Law of the Sea Convention. In my view, the risk of environmental litigation against the United States if it joins the Convention is low. The risk of international litigation against the United States if it were unilaterally to claim the resources on its extended continental shelf or on the deep seabed, without becoming party to the Convention, is much higher.

In closing, I want to focus on the bigger picture. In deciding whether to accede to the Law of the Sea Convention, as with any treaty, the question for the President and the Senate is whether the treaty, on balance, is in the national interest of the United States. Do the advantages of the treaty outweigh its disadvantages? Can the disadvantages or risks be mitigated? Can the United States achieve its objectives in other ways?

No treaty the United States has ever joined has been one hundred percent perfect from our point of view. And yet the U.S. Senate has approved and the United States has become party to thousands of treaties, including hundreds of multilateral treaties, over its history, which have benefited the United States greatly. Many of these treaties have required the United States to give up theoretical rights that we might otherwise have tried to assert, in order to persuade other countries to do the same. Many of these treaties have dispute resolution mechanisms in which the dispute bodies can rule, and even have ruled, against the United States, but they have also ruled in favor of the United States. This is all in the nature of treaties. Over the course of our history, numerous Presidents and Senators have concluded that entering into treaties with other countries is not a sign of weakness, but rather the most effective way for the United States to get other countries to do what we want them to do.

Through dogged diplomacy and the insistence of President Reagan, the United States has been able to achieve all of its important objectives in the original 1982 Convention and the 1994 amendments. The Bush Administration concluded that the Convention, as amended, strongly serves U.S. military, economic and commercial, and environmental interests. We concluded that the concerns we did identify with the Convention could be addressed in our instrument of ratification. And we concluded that important U.S. objectives -- especially our goals to develop the valuable resources on our extended continental shelf in the Arctic and on the deep seabed and to participate in the Convention's decision-making bodies -- could not be achieved through other means, for example, through reliance on customary international law alone. For these reasons, President Bush decided to support the Law of the Sea Convention and urged the Senate to approve it rapidly.

Mr. Chairman and members of the Committee, thank you for this opportunity to appear before you today.