### Section III-Q

Doug Bandow, 2004 testimony before the U.S. Senate Committee on Armed Services *The Law of the Sea Treaty: Inconsistent with American Values*  
John Norton Moore, Toward More Effective Counter Piracy Policy, unpublished paper, June 2009  
<table>
<thead>
<tr>
<th>Reading</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robert C. Spindel, Arctic Science and Investment, Testimony before the U.S. Ocean Commission, 14 June 2002</td>
<td>332a</td>
</tr>
<tr>
<td><strong>III-U</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Canadian Arctic Claims:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Chilean Claim:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Canadian Straddling Stock Claim:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Turkish Claim:</strong></td>
<td></td>
</tr>
</tbody>
</table>
SENATE ADVICE AND CONSENT TO THE LAW OF THE SEA CONVENTION

URGENT UNFINISHED BUSINESS

Testimony of

John Norton Moore

Before the Senate Foreign Relations Committee
October 14, 2003
SENATE ADVICE AND CONSENT
TO THE LAW OF THE SEA CONVENTION

Testimony delivered by

John Norton Moore

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

Thomas Jefferson

CHAIRMAN RICHARD G. LUGAR AND HONORABLE MEMBERS OF THE
FOREIGN RELATIONS COMMITTEE ---

Senate advice and consent to the 1982 Law of the Sea Convention is
strongly in the national interest of the United States. Ratification of the
Convention will restore United States oceans leadership, protect United States
oceans interests, and enhance United States foreign policy. For these reasons the
Convention is broadly supported by United States oceans organizations, including
the United States Navy (one of the strongest supporters over the years), the
National Ocean Industries Association\(^1\), the United States Outer Continental Shelf
Policy Committee\(^2\), the American Petroleum Institute\(^3\), the Chamber of Shipping of

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\(^1\)On June 6, 2001, the National Ocean Industries Association submitted a resolution to the Chairman of the Senate
Foreign Relations Committee declaring: "The National Ocean Industries Association (NOIA) is writing to urge your prompt
consideration of the Convention on the Law of the Sea . . . . The NOIA membership includes companies engaged in all aspects
of the Outer Continental Shelf oil and natural gas exploration and production industry. This membership believes it is imperative
for the Senate to act on the treaty if the U.S. is to maintain its leadership role in shaping and directing international maritime
policy."

\(^2\)On May 24, 2001, the Outer Continental Shelf (OCS) Policy Committee adopted the following recommendation:
"[T]he OCS Policy Committee recommends that the Administration communicate its support for ratification of UNCLOS to the
United States Senate . . . ."

\(^3\)See the statement of Ms. Genevieve Laffly Murphy on behalf of the American Petroleum Institute at the recent oceans
forum of the Center for Oceans Law and Policy, Oct. 1, 2003. Ms. Murphy stressed the energy security interest of the American
petroleum industry both in access to the continental shelf beyond 200 miles and in protection of navigational freedom. See also
the letter from the president of the American Petroleum Institute to the Chairman of the Senate Committee on Foreign Relations
of October 1, 1996, which states: "The American Petroleum Institute wishes to express its support for favorable action by the
America⁴, The Center for Seafarers' Rights⁵, the Chemical Manufacturers Association⁶, and the congressionally established National Commission on Ocean Policy.⁷ This testimony will briefly explore reasons for United States adherence to the Convention. First, however, it will set out a brief overview of the Nation's oceans interests and history of the Convention.

**Background of the Convention**

As the quote by Thomas Jefferson illustrates, the United States, surrounded by oceans and with the largest range of oceans interests in the world, has a vital national interest in the legal regime of the sea. Today those interests include naval mobility, navigational freedom for commercial shipping, oil and gas from the

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⁴ In a letter to the Chairman of the Senate Foreign Relations Committee of May 26, 1998, the president of the Chamber of Shipping of America writes: "[T]he Chamber of Shipping represents 14 U.S. based companies which own, operate or charter oceangoing tankers, container ships, and other merchant vessels engaged in both the domestic and international trades. The Chamber also represents other entities which maintain a commercial interest in the operation of such oceangoing vessels. Over the past quarter century, the Chamber has supported the strong leadership role of the United States in the finalization of the UN Convention on the Law of the Sea (UNCLOS) into its final form, including revision of the deep seabed mining provision. We believe the United States took such a strong role due to its recognition that UNCLOS is of critical importance to national and economic security, regarding both our military and commercial fleets. ... Mr. Chairman, we appreciate your consideration of these issues and strongly urge you to place the ratification of UNCLOS on the agenda of your Committee. The United States was a key player in its development and today, is one of the few industrialized countries who have not yet ratified this very important Convention. The time is now for the United States to reiterate its position of leadership."

⁵ On May 26, 1998, the Director of the Center for Seafarers' Rights wrote the following in a letter addressed to the Chairman of the Senate Foreign Relations Committee: "The 1982 United Nations Convention on the Law of the Sea creates a legal framework that addresses a variety of interests, the most important of which is protecting the safety and well-being of the people who work and travel on the seas. I urge you to support ratification of the 1982 United Nations Convention on the Law of the Sea."

⁶ In a July 17, 1998 letter to the Chairman of the Senate Foreign Relations Committee, the President of the Chemical Manufacturers Association wrote the following: "The Law of the Sea Convention promotes the economic security of the United States by assuring maritime rights of passage. More importantly, the Convention establishes a widely-accepted, predictable framework for the protection of commercial interests. The United States must be a full party to the Convention in order to realize the significant benefits of the agreement; and to influence the future implementation of UNCLOS at the international level. On behalf of the U.S. chemical industry, I strongly encourage you to schedule a hearing on UNCLOS, and favorably report the Convention for action by the Senate."

⁷ On November 14, 2001, the National Commission on Ocean Policy adopted a resolution -- its first on any subject -- providing: "The National Commission on Ocean Policy unanimously recommends that the United States of America immediately accede to the United Nations Law of the Sea Convention. Time is of the essence if the United States is to maintain its leadership role in the ocean and coastal activities. Critical national interests are at stake and the United States can only be a full participant in upcoming Convention activities if the country proceeds with accession expeditiously."
Urgent Unfinished Business

continental margin, fishing, freedom to lay cables and pipelines, environmental protection, marine science, mineral resources of the deep seabed, and conflict resolution. Consistent with these broad interests the United States has been resolute in protecting its ocean freedoms. Indeed, the Nation has fought at least two major wars to preserve navigational freedoms; the War of 1812 and World War I. In point II of his famous 14 Points at the end of World War I, Woodrow Wilson said we should secure "[a]bsolute freedom of navigation upon the seas . . . alike in peace and in war." And the Seventh Point of the Atlantic Charter, accepted by the Allies as their "common principle" for the post World War II world, provided "such a peace should enable all men to traverse the high seas and oceans without hindrance."

In the aftermath of World War II the United States provided leadership in the First and Second United Nations Conferences to seek to protect and codify our oceans freedoms. The first such conference, held in 1958, resulted in four "Geneva Conventions on the Law of the Sea" which promptly received Senate Advice and Consent. One of these, the Convention on the Continental Shelf, wrote into oceans law the United States innovation from the 1945 Truman Proclamation -- that coastal nations should control the oil and gas of their continental margins. During the 1960's a multiplicity of illegal claims threatening United States navigational interests led to a United States initiative to promote agreement within the United Nations on the maximum breadth of the territorial sea and protection of navigational freedom through straits. This, in turn, led some years later, and with a broadening of the agenda, to the convening in 1973 of the Third United Nations Conference on the Law of the Sea. In this regard it should be clearly understood that the United States was a principal initiator of this Conference, and it was by far the preeminent participant in shaping the resulting Convention. Make no mistake; the United States was not participating in this Conference out of some fuzzy feel good notion. Its participation was driven at the highest levels in our Government by an understanding of the critical national interests in protecting freedom of navigation and the rule of law in the world's oceans. Today we understand even more clearly from "public choice theory," which won the Nobel Prize in economics, why our choice to mobilize in a multilateral setting all those who benefited from navigational freedom was a sound choice in controlling individual illegal oceans claims. And the result was outstanding in protecting our vital

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8 The reason supporting this is most easily understood as the high cost of organization of those affected by illegal oceans claims; claims which were externalizing costs on the international community. A multilateral strategy of response to such
Urgent Unfinished Business

Navigational and security interests. Moreover, along the way we solidified for the United States the world's largest offshore resource area for oil and gas and fishery resources over a huge 200 nautical mile economic zone, and a massive continental shelf going well beyond 200 miles.  

Despite an outstanding victory for the United States on our core security and resource interests a lingering dispute remained with respect to the regime to govern resource development of the deep seabed beyond areas of national jurisdiction. Thus, when the Convention was formally adopted in 1982, this disagreement about Part XI of the Convention prevented United States adherence. Indeed, during the final sessions of the Conference President Reagan put forth a series of conditions for United States adherence, all of which required changes in Part XI. Following adoption of the Convention without meeting these conditions, Secretary Rumsfeld served as an emissary for President Reagan to persuade our allies not to accept the Convention without the Reagan conditions being met. The success of the Rumsfeld mission set the stage some years later for a successful renegotiation of Part XI of the Convention. In 1994, Part XI, dealing with the deep seabed regime beyond national jurisdiction, was successfully renegotiated meeting all of the Reagan conditions and then some. Subsequently, on October 7, 1994, President Clinton transmitted the Convention to the Senate for advice and consent.  

Since that time no Administration, Democratic or Republican, has opposed Senate advice and consent – and United States ratification.

Illegal claims, far from being simply a fuzzy effort at cooperation, effectively enabled coordination of nations to promote the common interest against such illegal claims. Counter to the perception of some that a unilateral U.S. response is always the best strategy, a multilateral forum was indeed the most effective forum for controlling such threats to our navigational freedom. Moreover, since a majority of coastal nations are completely “zone locked,” that is, they have no access to the oceans without traversing the 200 mile economic zones of one or more neighboring states, a multilateral strategy continues to offer an important forum for rebutting illegal unilateral oceans claims threatening navigational freedom. The fact is, because of this “zone locked” geography, a majority of nations should never either favor extending national jurisdiction beyond 200 nautical miles nor permitting interference with navigational freedom in the 200 nautical mile economic zone.


At present the Convention is in force; and with 143 states parties it is one of the most widely adhered conventions in the world. Parties include all permanent members of the Security Council but the United States, and all members of NATO but the United States, Denmark and Canada – and Canada is expected to join in the immediate future as soon as the European Union formally adopts an important fisheries agreement implementing the 1982 Convention. The Convention unequivocally and overwhelmingly meets United States national interests – indeed, it is in many respects a product of those interests.

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

Why should the United States give advice and consent to the Law of the Sea Convention? I will summarize the most important reasons under three headings:
Urgent Unfinished Business

I. Restoring United States Oceans Leadership

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

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

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

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

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

- The United States will be able to participate fully in the annual meeting of States Parties that has become an important forum for ongoing development of oceans law. Of particular concern, United States presence as a mere observer in this forum has in recent years led to efforts by some to roll back critical navigational freedoms hard won in the LOS negotiations where we were a leader in the negotiations and our presence was powerfully felt; and

- The United States will be far more effective in leading the continuing struggle against illegal oceans claims through our participation in specialized agencies such as the International Maritime Organization; in bilateral negotiations such as those with the archipelagic states; in acceptance by other states of our protest notes and our ability to coordinate such notes with others; and generally in organizing multilateral opposition to threats to our oceans interests and the rule of law in the oceans.

II. Protecting United States Oceans Interests

A second set of important reasons for United States adherence to the Law of the Sea Convention relate to the particularized protection of United States oceans interests. Some of the more important and immediate of these include:

- More effectively engaging in the continuing struggle to protect our naval mobility and commercial navigational freedom. Protecting the ability of the United States Navy to move freely on the world's oceans and the ability of commercial shipping to bring oil and other resources to the United States and for us to participate robustly in international trade overwhelmingly carried in ships is the single most important
oceans interest of the United States. This interest, however, is also the single most threatened interest; the continuing threat being the historic pattern of unilateral illegal oceans claims. As of June 22, 2001, there were at least 136 such illegal claims.\textsuperscript{11} This struggle has been the key historic struggle for the United States over the last half century and gives every indication of continuing. Adhering to the Convention provides numerous ways for the United States to engage more effectively in protecting these interests. An immediate and important effect is that we are able on ratifying the Convention to attach a series of crucial "understandings" under Article 310 of the Convention as to the proper interpretation of the Convention, as have many other nations - too many of which have made erroneous interpretations as yet unrebutted by United States statements.\textsuperscript{12} Moreover, as a party we will be far more effective in multiple fora in protecting the many excellent provisions in the Convention supporting navigational freedom. Indeed, much of the struggle in the future to protect our vital oceans interests will be in ensuring adherence to the excellent provisions in the Convention. Having won in the struggle to protect these interests within UNCLOS we now have a substantial advantage in the continuing struggle -- we need only insist that others abide by the nearly universally accepted Convention. Obviously, that is an advantage largely thrown away when we ourselves are not a party. And for our commercial shipping we will be able to utilize the important Article 292 to obtain immediate International Tribunal engagement for the release of illegally seized United States vessels and crew. It should be emphasized that the threat from these illegal claims is that of death from a thousand pin pricks rather than any single incident in response to which the United States is likely to be


\textsuperscript{12} United States "understandings" under Article 310 could either be formulated and attached to the Convention by the Executive Branch at the time the United States ratifies the Convention or they could be attached to the Resolution of Senate Advice and Consent. I believe the second of these alternatives would have the greatest effect in the ongoing "struggle for law" as to the correct interpretation of the Convention. Given the highly technical nature of these understandings I would be pleased to work with the Committee to provide a draft of understandings for your consideration. It should be clearly understood that these are not "reservations" altering the correct legal meaning of the Convention. Such reservations or exceptions are barred by Article 309 of the Convention except as specifically permitted by the Convention, as, for example, in Article 298 of the Convention concerning optional exceptions to the compulsory dispute settlement provisions.
Urgent Unfinished Business

willing to employ the military instrument. Moreover, some of the offenders may even be allies of the United States, our NATO partners, or even over zealous officials in our own country who are unaware of the broader security interests of the Nation;

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

- More rapid development of the oil and gas resources of the United States continental shelf beyond 200 nautical miles. The United States oil and gas industry is poised in its technology to begin development of the huge continental shelf of the United States beyond 200 miles (approximately 15% of our total shelf). But uncertainties resulting from U.S. non-adherence to the Convention will delay the substantial investment necessary for development in these areas. Moreover, U.S. non-adherence is causing the United States to lag behind other nations, including Russia, in delimiting our continental shelf. Delimitation of the shelf is an urgent oceans interest of the United States;¹³

¹³ For a state-of-the-art assessment of the extent of the United States continental shelf beyond the 200 mile economic zone see the work of Dr. Larry Mayer, the Director of the Center for Coastal and Ocean Mapping at the University of New Hampshire. As but one example indicating the great importance of performing this delimitation of the shelf well - and the importance of the United States participating in the resulting approval process in the Commission on the Limits of the Continental Shelf - Dr. Mayer's work shows that sophisticated mapping and analysis of the shelf would enable the United States to claim an additional area off New Jersey within the lawful parameters of Article 76 of the Convention of approximately 500 square kilometers just by using a system of connecting seafloor promontories. The work of Dr. Mayer has been funded in part
Reclaiming United States deep seabed mineral sites now virtually abandoned. United States firms pioneered the technology for deep seabed mining and spent approximately $200 million in claiming four first-generation sites in the deep seabed for the mining of manganese nodules. These nodules contain attractive quantities of copper, nickel, cobalt and manganese and would be a major source of supply for the United States in these minerals. Paradoxically, "protecting" our deep seabed industry has sometimes been a mantra for non-adherence to the Convention. Yet because of uncertainties resulting from U.S. non-adherence these sites have been virtually abandoned and most of our nascent deep seabed mining industry has disappeared. Moreover, it is clear that without U.S. adherence to the Convention our industry has absolutely no chance of being revived. I believe that as soon as the United States adheres to the Convention the Secretary of Commerce should set up a working group to assist the industry in reclaiming these sites. This working group might then recommend legislation that would deal with the industry problems in reducing costs associated with reacquiring and holding these sites until deep seabed mining becomes economically feasible;

Enhancing access rights for United States marine scientists. Access for United States marine scientists to engage in fundamental oceanographic research is a continuing struggle. The United States will have a stronger hand in negotiating access rights as a party to the Convention. As one example of a continuing problem, Russia has not honored a single request for United States research access to its exclusive economic zone in the Arctic Ocean from at least 1998, and the numbers of turn-downs for American ocean scientists around the world is substantial. This problem could become even more acute as the United States begins a new initiative to lead the world in an innovative new program of oceans exploration;

Facilitating the laying of undersea cables and pipelines. These cables,
carrying phone, fax, and internet communications, must be able to transit through ocean jurisdictions of many nations. The Convention protects this right but non-adherence complicates the task of those laying and protecting cables and pipelines; and

- **It should importantly be noted in protecting United States oceans interests that no U.S. oceans interest is better served by non-adherence than adherence.** This is an highly unusual feature of the 1982 Convention. Most decisions about treaty adherence involve a trade off of some interest or another. I am aware of no such trade off with respect to the 1982 Convention. United States adherence is not just on balance in our interest – it is broadly and unreservedly in our interest.

### III.

**Enhancing United States Foreign Policy**

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

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

- **United States allies, almost all of whom are parties to the Convention, would welcome U.S. adherence as a sign of a more effective United States foreign policy.** For some years I have chaired the United
Urgent Unfinished Business

Nations Advisory Panel of the Amerasinghe Memorial Fellowship on the Law of the Sea in which the participants on the Committee are Permanent Representatives to the United Nations from many countries. Every year our friends and allies ask when we will ratify the Convention and they express their puzzlement to me as to why we have not acted sooner. In my work around the world in the oceans area I hear this over and over -- our friends and allies with powerful common interests in the oceans are astounded and disheartened by the unilateral disengagement from oceans affairs that our non-adherence represents;

- **Adherence would send a strong signal of renewed United States presence and engagement in the United Nations, multilateral negotiation, and international relations generally.** At present those who would oppose United States foreign policy accuse the United States of “unilateralism” or a self-proclaimed “American exceptionalism.” Adhering to the Law of the Sea Convention will demonstrate that America adheres to those multilateral Conventions which are worthy while opposing others precisely because they do not adequately meet community concerns and our national interest;

- **Efforts to renegotiate other unacceptable treaties would receive a boost when an important argument now used by other nations against such renegotiation with us was removed.** This argument, now used against us, for example in the currently unacceptable International Criminal Court setting, is: “[W]hy renegotiate with the United States when the LOS renegotiation shows the U.S. won't accept the Treaty even if you renegotiate with them and meet all their concerns?”; and finally

- **The United States would obtain the benefit of third party dispute settlement in dealing with non-military oceans interests.** The United States was one of the principal proponents in the law of the sea negotiations for compulsory third party dispute settlement for resolution of conflicts other than those involving military activities. We supported such mechanisms both to assist in conflict resolution
generally and because we understood that third party dispute resolution was a powerful mechanism to control illegal coastal state claims. Even the Soviet Union, which had traditionally opposed such third party dispute settlement, accepted that in the law of the sea context it was in their interest as a major maritime power to support such third party dispute settlement.\textsuperscript{14}

\textit{Conclusion}

Senate advice and consent to the 1982 Convention on the Law of the Sea is strongly in the national interest of the United States. There are powerful reasons supporting United States adherence to the Convention; reasons rooted in restoring U.S. oceans leadership, protecting U.S. oceans interests, and enhancing U.S. foreign policy. I would urge the Senate to support advice and consent to the 1982 Convention at the earliest possible time.

\footnotesize\textsuperscript{14} The 1994 submission of the LOS Convention to the Senate recommended that the United States accept "special arbitration for all the categories of disputes to which it may be applied and Annex VII arbitration [general arbitration] for disputes not covered by ... [this]," and that we elect to exclude all three categories of disputes excludable under Article 298." See U.S. Department of State Dispatch IX (No. 1 Feb. 1995).
About John Norton Moore

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

UNITED STATES SECURITY INTERESTS

Prepared Testimony of

John Norton Moore

Before the Senate Committee on Armed Services
April 8, 2004
SENATE ADVICE AND CONSENT
TO THE LAW OF THE SEA CONVENTION

Prepared Testimony of

John Norton Moore

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

George Washington to Lafayette, November 15, 1781

Chairman Warner and Honorable Members of the Armed Services Committee –

Mr. Chairman, you have long been a leader in protecting United States security interests in the oceans. Your service as Under Secretary of the Navy, then as Secretary of the Navy, and currently as Chairman of this Committee, sets a sterling record of achievement for our Navy and our Nation. You led our country in negotiating the important Incidents at Sea Agreement\(^1\) with the former Soviet Union, signed with you by Admiral Sergei G. Gorshkov, the Commander-in-Chief of the Soviet Navy. You were of great assistance to me, in my role as an Ambassador and Deputy Special Representative of the President for the Law of the Sea Negotiations, in ensuring that those negotiations served United States security interests. Indeed, your earlier service as the Representative of the Secretary of Defense to the Law of the Sea Negotiations in Geneva established the framework for the successful Convention you now have before this Committee.

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

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

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

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

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

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

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

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

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

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

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

II.
General Security Considerations

Some general security considerations include the following:

- The greatest single threat to our oceans interests throughout the history of the Nation has been threats to navigational freedom. But navigational freedom is not protected solely by a strong navy. The first line of defense is a strong legal regime. This nation achieved that in this Convention and it will be tragic if, through continued disengagement, we permit that regime so favorable to our security interests to erode. To an extent not remotely appreciated by those not
on the oceans firing line for the United States, this struggle for law is an ongoing process in which we are severely handicapped by not being a party to the Convention. This has meant, not just in speculation but in reality, that the natural role of the United States as the leader in oceans issues has been put on hold. We cannot simply shoot our way in when we have disagreements with our NATO allies; nor is such a response at all realistic in the real-world challenge to navigational freedom from a thousand pinpricks;

- Given the price of gasoline today, surely there is broad agreement that the United States needs to get on with the task of developing the oil and gas of our continental margins beyond 200 miles. Without adherence to the Convention that is unlikely to happen for years to come. The large investments that must be made to drill in deep water simply will not be made without legal certainty and security of tenure. Further, the United States has a crucial interest in protecting navigational freedom for the oil and gas brought to the United States that is so crucial for our economy. About 44% of U.S. maritime commerce concerns petroleum and its products. To put this in further perspective, offshore oil and gas is now the world's largest marine industry, with oil production alone in the range of $300 billion per year. For these and other reasons of relevance to our security interest in oil and gas, and the interests of our oil and gas industry, Mr. Paul L. Kelly, speaking on behalf of the American Petroleum Institute, the International Association of Drilling Contractors, and the National Ocean Industries Association, testified before the Senate Foreign Relations Committee and the Senate Environment and Public Works Committee that “the U.S. oil and natural gas industry supports Senate ratification of the Convention at the earliest date possible;”

- The opportunity to attach important United States understandings, as have been formulated for the Senate Resolution of Advice and Consent, is a crucial opportunity for the United States finally to have its official interpretations of the Convention on the record. Many countries intent on undermining the security interests of the United States have already provided erroneous statements with no response from the United States. Such a response from the nation with the
Security Interests

largest oceans interests in the world is of great importance and is overdue;

- The United States needs to reengage in deep seabed mining. U.S. firms spent more than $200 million in leading the world in the technology of deep seabed mining and in obtaining four first-generation deep ocean mine sites. Continued United States non-adherence to the Convention has not served our industry – rather it has effectively killed our industry. Only one company now retains mine sites, the other companies are now out of the business, and two of the U.S. mine sites simply lie abandoned. This while seven licenses have been issued to competitors from countries that are parties to the Treaty. As soon as the United States adheres to the Convention, I would urge the Secretary of Commerce to put together an industry working group to see what might be done to remove any domestic legal obstacles preventing our industry from resuming its previous leadership in deep seabed mining. The access to the copper, nickel, cobalt and manganese from these sites is of considerable economic interest to the United States. But today investment will not be made in deep seabed mining without a license from the International Seabed Authority. Thus, it is clear that continued United States non-adherence will be a death knell for our industry;

- For the United States to refuse to adhere to a Convention even after the rest of the world met every single one of our demands for changes to the Convention will severely impact the ability of the United States to negotiate international agreements. I believe this will have a particularly serious effect on our security interests, many of which depend on mobilizing our allies. Certainly, as a sovereign nation, we have every right to negotiate a treaty and then decide not to ratify, but in this instance, where we specified the changes necessary for United States support that were then agreed to by the rest of the world, even some of our closest friends have difficulty understanding our behavior in not moving forward to date. A failure to ratify at this point will have adverse effects for our foreign relations with even some of our closest allies. We are the world’s most powerful military power, but we still need the understanding and support of our friends – and we
Security Interests

need to act with consistency and reliability in our foreign policy;

- The United States has an important national interest in a stable and efficient rule of law in the world’s oceans. We have achieved that in this Convention and only risk losing it by continued non-adherence. Power alone cannot replace law in providing stable expectations and a check on irresponsible unilateral actions; and

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

III.
The Core Security Threat

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

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

- Historic Bay (15) & Baselines (27+)
- Territorial Sea Breadth – 13
The Law of the Sea Convention is a key weapon in this struggle for our oceans' freedom. The United States won through the negotiations the core elements of that freedom. To abandon that win is the legal equivalent of unilateral disarmament for the United States in the struggle for freedom of the seas. The price we will pay through time for any such error in judgment will be high. In essence the critics who would have us abandon a rule of law in the world's oceans may effectively be asking American servicemen and women someday to pay with their lives for the absence of such a rule of law. This is not mere hyperbole; already disputes about the oceans regime have cost American lives. Thus, an American aircraft in lawful overflight of the high seas was forced down by Peru in asserting an illegal claim over an extended area of the seas. More recently, harassment by Chinese fighters brought down a United States aircraft engaged in lawful activities under the 1982 Convention. And, at minimum, the economic cost of new naval configurations designed to get around a creeping loss of freedom – possibly with required pay-offs to coastal states – could be considerable.

IV.
A Few Specific Examples of Security Issues Supporting United States Adherence

A few specific examples, among many, of provisions of the Law of the Sea
Security Interests

Convention serving United States security interests and supporting accession are:

- For the first time in the history of oceans law, and quite in contrast to the 1958 Conventions to which we are now a party, the 1982 Convention provides full protection for navigation and overflight through international straits. This means that United States submarines can go through straits submerged and without having to reveal their location, that our aircraft can overfly, and that military and commercial vessels can go through without fearing harassment from coastal states. Maintaining the secrecy of our SSBN submarines, as this Committee knows so well, is an essential element in the effectiveness of our strategic deterrent;

- The maximum breadth of the territorial sea is restricted to 12 nautical miles, thus blocking the more expansive claims of nations which would interfere with our military and commercial mobility by promulgating territorial seas out to 200 miles;

- The Convention provides for full high seas navigational freedom beyond the territorial sea. This includes the Exclusive Economic Zone of up to 200 nautical miles, areas of the continental shelf under coastal state control beyond that, and all areas seaward of national jurisdiction. The core trade-off in the Convention was a good one for us on both sides of the trade; that is, an extension of coastal state jurisdiction over the fish stocks and oil and gas resources off our coasts in return for full navigational freedom in the areas of extended coastal state resource and economic jurisdiction around the world;

- There is a much improved regime of "innocent passage" in the territorial sea even outside of international straits. Among other important changes the vague regulatory competence of the coastal state, reflected in Article 17 of the relevant 1958 Geneva Convention, has been clarified in Article 21 of the Convention in a balanced fashion accommodating both coastal state concerns and navigational rights. There are now new obligations not to "[i]mpose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage" and not to "[d]iscriminate in
form or in fact against the ships of any State or against ships carrying
cargoes to, from or on behalf of any State." As this Committee
knows, allies of the United States, including Israel, have in the past
found their shipping a victim of discrimination, in turn triggering
international tensions and conflict;

• The Convention contains a new provision mandating cooperation “in
  the suppression of illicit traffic in narcotic drugs . . .”;

• The Convention contains new provisions, significant in reducing
  potential conflicts with other nations and in protecting our citizens,
  that prohibit other nations from inflicting corporal punishment on
  American fishermen and merchant seamen, and prohibit or severely
  limit their imprisonment;

• Article 76 of the Convention massively extends the continental shelf
  resource jurisdiction of the United States to include the oil and gas
  deposits of the continental margin and provides a workable standard
  for delimiting United States national jurisdiction, in contrast with the
  relevant 1958 Convention which does neither. This clear legal regime
  permitting the United States to get on with development of its oil and
  gas resources is a substantial security interest of the United States;

• Whenever deep seabed mining does occur, United States adherence
  and taking its seat on the Council of the Seabed authority will give us
  the ability to exercise an effective veto over critical issues. This
  would include the ability to veto the adoption of inappropriate rules
  and regulations or revenue sharing with the PLO or similar
  organizations. Until we accede, the United States will not have this
  effective veto power; and

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

V.
Misperceptions

Misperceptions about the Convention include the following:

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

has sovereignty, to provide security of tenure to mine sites, without which mining will not occur;

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

- **Myth: The Convention is harmful to the Proliferation Security Initiative (PSI).** Again, this is false. The Proliferation Security Initiative has already been negotiated explicitly in conformance with the Convention; and not surprisingly so, since the nations with which we are coordinating in that initiative are parties to the Convention. This charge apparently rests on the false belief that if the United
States does not adhere to the Convention it will be free from any constraints in relation to oceans law. Again, a false assumption; we are today a party to the 1958 Geneva Conventions that are, if anything on this issue, more restrictive than the 1982 Convention now before the Senate. This charge is also misguided in failing to understand the critically important interest we have in protecting navigational freedom on the world's oceans. The Convention allows our vessels to get on station which is essential before any issue even arises about boarding. Moreover, we emphatically do not want a legal regime that would permit any nation in the world to seize United States commercial vessels anywhere in the world's oceans. The Proliferation Security Initiative was carefully constructed with parties to the 1982 Convention, using the flag state, port state and other jurisdictional provisions of the 1982 Convention precisely to avoid this problem. Nor is this charge at all realistic in failing to note that nothing in the Law of the Sea Convention trumps our legal rights to individual and collective defense;

- **Myth: The Convention would interfere with the operations of our intelligence community.** Having chaired the eighteen Agency National Security Council Interagency process that drafted the United States negotiating instructions for the Convention, I found this charge so bizarre that I recently checked with the Intelligence Community to see if I had missed something. The answer that came back was that they, too, were puzzled by this charge, and there was no truth to it. I am confident that there is no provision in the Law of the Sea Convention which will, or has, added constraints on the operations of our intelligence community. Indeed, remember in this connection that the United States is already bound by the 1958 Conventions and that since 1983, pursuant to President Reagan's order, we have been operating under the provisions of the 1982 Convention, other than for deep seabed mining in part XI. And since 1994 we have accepted the revised Part XI;

- **Myth: Freedom of navigation is only challenged from "[t]he Russian navy [that] is rusting in port [and] China has yet to develop a blue water capability . . ."** The implication here is that the
principal challenge to navigational freedom comes from major power war or conflict and we do not really have any national concerns at this time about preserving freedom of navigation. But the 1982 Convention deals with the law of peace, not war. Thus this argument misses altogether the serious and insidious challenge, which, again, is what the LOS Treaty is designed to deal with; that is, repeated efforts by coastal states to control navigation, many from allies and trading partners of the United States, which through time add up to death from a thousand pin-pricks. That is the so-called problem of "creeping jurisdiction" that remains the central struggle in preserving navigational freedom for a global maritime power. After years of effort we have won the legal regime to control this "creeping jurisdiction" in the Law of the Sea Convention. To unilaterally disarm the United States from asserting what we won in the Convention against illegal claimants is folly;

• **Myth: The Convention would mandate technology transfer and contains other fundamentally non-free market provisions with respect to deep seabed mining in Part XI.** This charge seems to stem from a failure to understand that a series of flawed provisions in Part XI of the 1982 Convention, including mandatory transfer of technology, were renegotiated at the courageous insistence of President Reagan. Today, the Convention, as so modified, provides for first come rights to mine the deep seabed under a joint venture arrangement providing guaranteed access rights to deep seabed minerals. And the renegotiated Part XI even goes beyond the Reagan conditions in adopting the important pro-free-market GATT principle against subsidization of seabed miners. The mining regime adopted by the Authority may well be even more flexible than what we have here at home. But whatever imperfections there may be in the deep seabed regime, it is a certainty that United States non-adherence has to date, and will permanently, kill all hope of a United States seabed mining industry. Bankers simply will not loan the billion dollars plus required for a deep sea mining operation without an unchallengeable legal title to the resource;
Security Interests

- Myth: We do not need to adhere to the Convention because it already represents customary international law binding on the United States. This argument is that our navigational interests are already protected. Curiously, those who advance this argument fail to note that if the United States is already bound to the Convention as customary international law it is also bound by provisions they may object to in the Convention. The critics cannot have it both ways. More importantly, the argument misses the reality that the United States is legally disenfranchised as a non-adherent and will not fully receive the benefits of the Convention without acceding to it;

- Myth: “[T]he Law of the Sea Convention was a grand scheme to create ‘an oceanic Great Society’ . . .” It is true that one motivation of developing countries in the UNCLOS negotiations more than three decades ago, played out in the negotiation for Part XI, was an exaggerated hope of riches from deep seabed mining. It is also true that the “new international economic order” played a harmful role in the negotiation of Part XI on deep seabed mining. The motivation of the United States and other major powers, however, was to protect navigational freedom, end the out-of-control coastal state grab for the oceans, extend our jurisdiction fully to the fish stocks and oil and gas off our coasts and achieve international agreement on a mechanism providing security of tenure for deep seabed mining in areas beyond national jurisdiction. It was these other non-Part XI issues that were the real core of the UNCLOS negotiations, as attested by the fact that heads of delegation largely ignored Committee I, where Part XI was being negotiated, and spent their efforts in Committees II and III, where more critical national security issues were at stake. The United States and other major developed nations coordinated closely together on these crucial navigational and resource issues in the “Group of Five.” Moreover, the interest of certain land-based producers of nickel and copper, including developed nations, in preventing competition from deep seabed minerals, was probably a more important factor in the negotiating difficulties in Part XI than the “new international economic order.” The renegotiation of Part XI pursuant to the Reagan conditions solved this latter problem by
abolishing the "production limitations" that the land-based producers had written into the original agreement;

- **Myth: The Convention "is designed to place fishing rights, deep-sea mining, global pollution and more under the control of a new global bureaucracy..."** This is so in error as to be humorous if it were not seriously advanced in a respected national newspaper. The Executive Branch that led U.S. negotiations on the Convention and that is supporting Senate Advice and Consent would have supported a Nobel Peace prize for Osama bin Laden before agreeing to any such nonsense. The International Seabed Authority deals with mineral resources beyond national jurisdiction, not with fishing, not with global pollution and not with navigation – or even activities in the water column. It is necessary in order to create stable rights to mine sites not owned by any nation as required if United States mining firms are ever to mine the deep seabed. The United States is already party to hundreds of specialized international organizations. The Seabed Authority would add an unremarkable one more. Indeed, one more that even after ten years of operation today still has a staff of only 37 dealing with deep seabed exploration in 70% of the earth's surface.

- **Myth: United States military activities will be subject to a world court.** There was strong feeling in the UNCLOS negotiations that military activities should be exempted from dispute settlement. Accordingly, Article 298 of the Convention permits nations to opt out of the dispute settlement provisions for military activities, and under the President's submission, as embodied in the Senate draft resolution of advice and consent, this option is unmistakably exercised for the United States. Further, the scope of dispute settlement is severely cabined in general. For example, none of the decisions of the United States in relation to access by foreign fishermen to our fish stocks are subject to dispute settlement. In addition, under the President's submission, as embodied in the Senate draft resolution, the United States will be accepting "special arbitration" as our preferred modality of dispute settlement rather than the International Court of Justice (the
Security Interests

World Court). The United States is already a party to literally hundreds\(^\text{11}\) of international agreements, including more than 85 submitting disputes to the International Court of Justice, that provide for compulsory dispute resolution. As a result of these agreements, remedies are often available when the rights of the United States or its citizens are violated by other countries. In this connection, compulsory dispute settlement is particularly useful in controlling illegal interference with navigation. Indeed, because of its importance in constraining these illegal claims, even the former Soviet Union was persuaded of the importance of compulsory dispute settlement in the Law of the Sea Convention, despite its longstanding general opposition to compulsory dispute settlement. The severely cabined dispute settlement procedures in the Law of the Sea Convention are far more restrictive than in most of the other dispute resolution provisions already binding on the United States. Moreover, as noted above, in the Law of the Sea Convention we have chosen special arbitration rather than the International Court of Justice;

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

- **Myth: There has been inadequate consideration of the Law of the Sea Treaty and we need more time to study it.** Nonsense! Those who espouse this view fail to note that this is the second round of Senate hearings on the Convention. The first round was held in 1994 when the Convention was initially submitted to the Senate. The Senate, and the Country, has had a decade to study the Convention, and for several decades, since 1983, we have lived under the legal regime of everything but Part XI. I have an especially hard time in
Security Interests

finding any sympathy for this position urging delay when it comes from spokesmen who were not heard calling for more consideration of the Convention for the full decade while the treaty languished before the Senate Foreign Relations Committee. Rarely has any Convention come before the Senate that is more fully understood in its impact and stakes for our Nation, and that has been more fully studied and debated – and, in real effect, lived under; and

- **Myth: President Bush is urging Senate advice and consent to the Convention for little better than "go-along, get-along multilateralism."** Give me a break! Among Presidents prepared to take the heat internationally for actions they believe in, as Afghanistan and Iraq surely demonstrate, this President is near the top. Is it too much to understand that after lengthy and careful review this President has urged Senate advice and consent because it is in the national interest of the United States? Further, does anyone really believe Ronald Reagan was a “go-along, get-along” President?

**Conclusion**

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

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

Rarely has the Senate faced such an easy choice in consideration of a major Convention. No United States oceans, security, or foreign policy interest is served by continued non-adherence, and our security interests are powerfully served by adherence. Not only Senator Lugar, as Chairman of the Senate Foreign Relations Committee, but also Senator Stevens, as the senior Senator from the most affected state in the United States, Alaska, have recently sent a letter to their Senate
Security Interests

colleagues urging prompt advice and consent to the Convention. Every industry and oceans interest group that has addressed the issue has supported prompt advice and consent, including the one most affected economically, the United States oil and gas industry. *Who do the critics speak for?* The United States Navy and the Joint Chiefs have never wavered in their support. Our allies have supported United States adherence. Both Republican and Democratic Presidents have recommended Senate advice and consent. And most recently the Congressionally established United States Commission on Ocean Policy, broadly representative of United States oceans interests and chaired by Admiral Watkins, has unanimously recommended accession. I concur wholeheartedly in the statement of the Commission that:

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


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


4 Data is approximate as of June 22, 2001.

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

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

It is further noteworthy that Mr. Gaffney, in his reference to “what could be billions of dollars worth of ocean-related commerce,” id. at 3, is, at least by implication from his overall testimony, not remotely placing seabed mining in relation to the economic and security interests of the United States. Every careful review by the United States government has placed our security interest in navigation as the most important oceans interest of the United States. A close second is the United States interest in oil and gas development, where, again contrary to the implications of Mr. Gaffney’s testimony, the oil and gas sediments off the United States coast, within and beyond 200 miles, are placed under exclusive United States resource jurisdiction.
The abundant fish stocks of the United States are a third critical interest. Deep Seabed Mining with its access to copper, nickel, cobalt and manganese, is important, or I would not have urged President Reagan to require a renegotiation on this issue. But it is far down the list of overall United States oceans interests. No such mining has yet taken place and it is not known at what time any such mining may take place in the future. Another critic, Mr. Doug Bandow, places seabed mining better in context by noting in an article in *The Weekly Standard* of March 15th, 2004, that: "There is no guarantee that seabed mining will ever be commercially viable." *Id.* at 16. Most importantly, were Mr. Gaffney’s advice to be accepted it would mean the permanent death of any United States deep seabed mining industry, whatever its ultimate value.

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

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

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

No one accepts a loss of United States sovereignty. At the same time, one of our most important sovereign rights is our legal ability to enter into agreements – just as individual citizens in our own country have a right to agree to contract with one another. In fact, it is only children and the mentally incompetent who have no right to contract – thus truly losing some of their “sovereignty.” Moreover, I do not disagree with critics who observe that in recent years we have sometimes signed treaties that were not in our interest. I attribute that to a poor job of
Security Interests

negotiating or bad judgment by our leaders. The solution is to elect better leaders and demand that our negotiators do a better job of looking out for our interests. It is not to give up our sovereign right to make agreements and to distinguish good deals from bad ones.

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


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

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

The Center for Oceans Law and Policy, which he directs, led the UNCLOS Commentary project, which has provided the most authoritative article-by-article analysis of the 1982 Convention. This six-volume Commentary is I-VI M. Nordquist (ed.) 1982 United Nations Convention on the Law of the Sea, A Commentary (Center for Oceans Law and Policy, 2002).
THE SENATE SHOULD GIVE IMMEDIATE ADVICE AND CONSENT TO THE LAW OF THE SEA CONVENTION:

WHY THE CRITICS ARE WRONG

BY

JOHN NORTON MOORE & WILLIAM L. SCHACHTE JR.
The Senate Should Give Immediate Advice and Consent to the Law of the Sea Convention: Why the Critics are Wrong

By

John Norton Moore* & William L. Schachte Jr.**

I.
Introduction

As national security professionals who have spent much of our lives working on oceans and security issues, we believe that Senate advice and consent to ratification of the Law of the Sea Convention is strongly in the national interest of the United States. Elsewhere we have each testified at length as to why advice and consent is urgently needed.¹ This short paper, which supplements our earlier testimony, is motivated by our mutual concern that arguments being spread against the treaty are simplistic and erroneous.

Not only are specific arguments advanced against the treaty wrong, but even more importantly, the critics ignore the powerful reasons for United States adherence, including that the 1982 Convention supersedes the far less favorable 1958 Conventions currently in force for the United States. This response will first briefly summarize a few of the broader issues ignored by the critics and will then address erroneous arguments or “myths” being advanced against the Convention.

We respect the privilege of all Americans to disagree with their elected officials. It is only through a full exchange of views that truth emerges. And some

² See Admiral William L. Schachte Jr.’s testimony before the Senate Foreign Relations Committee (October 14, 2003); testimony before the Senate Committee on Armed Services: Senate Advice and Consent to the Law of the Sea Convention (April 8, 2004); testimony before the Senate Select Committee on Intelligence: Senate Advice and Consent to the Law of the Sea Convention: U.S. Accession to the Law of the Sea Convention (June 8, 2004).
of the critics are personal friends. Perhaps, as Churchill said, we should “not resent criticism, even when, for the sake of emphasis, it parts for the time with reality.” Nevertheless, the critics are wrong in their opposition to the Law of the Sea Convention and we cannot stand idly by while myths are advanced against a treaty of the utmost importance for the national security of this Great Nation.

II.

The Broadest Context Ignored by the Critics

As we have testified elsewhere there are powerful affirmative reasons rooted in restoring United States oceans leadership, protecting United States oceans interests, and enhancing United States foreign policy, which strongly support United States adherence to the Convention. For example, we will be in a stronger position to respond to illegal oceans claims such as the People’s Republic of China harassment of the Navy’s ocean survey ship USNS Bowditch. And we will be able to move forward more rapidly with development of oil and gas resources beyond 200 nautical miles (approximately 15 percent of our continental shelf), require United States approval of any transfer of seabed revenues, and reclaim for the United States prime deep seabed mining sites now abandoned. Further, adhering to the Convention will finally give the United States an opportunity to officially declare its views as to the correct operation of the Convention. This will end the more than decade long self-imposed silence of the United States in the face of vocal efforts by extremist opponents to roll back gains achieved in the Convention.

The critics show no understanding of the continuing struggle of the United States as a major maritime state for the protection of navigational freedom. Yet controlling unilateral coastal state claims against United States shipping, both military and commercial, is a core oceans issue truly at stake for the United States. In this respect, the Convention is the most important achievement for the protection of our critical naval and commercial shipping interests in the history of the nation. For example, the new provisions for protection of straits transit passage and archipelagic sea lanes passage, and the improved provisions for innocent passage in the territorial sea are of the utmost importance for United States naval mobility. The United States negotiating team achieved a great victory for our nation in these provisions that the critics seem not to understand. By second guessing our naval experts, the critics would have us snatch defeat from the jaws of victory. Paradoxically, by opposing the Convention, they would be reinforcing the views of Third World nations the United States defeated in the negotiations. We must also never forget that thousands of military men and women of the United States who have volunteered to go in harm’s way depend on the navigation
and overflight provisions guaranteed in the Convention. As General Richard B. Myers, the Chairman of the Joint Chiefs of Staff, recently unequivocally stated “The Convention remains a top national security priority.” See Annex II.

The critics show little understanding of the realities of achieving and protecting the rule of law in the world’s oceans. They simplistically seem to believe that American interests will be protected by just shooting our way around the oceans rather than developing a stable and favorable rule of law that provides the basis for our naval and air operations that we are then prepared to defend with force if necessary. The United States is simply not going to shoot our way to acceptable resolution of oceans disputes with Canada, Chile, Brazil, India, Italy and other democracies. Nor is it in the slightest realistic to ignore the effect of law and agreement in our interaction with others. It is simply hubris to believe we can ignore the law without consequences for the behavior of other nations in turn ignoring the law and affecting our interests in important ways. Ironically, at a time when the President of the United States is urging others toward the rule of law as a core foreign policy interest of the United States, the critics voice only disdain for that principle.

The critics present a simplistic view of the Convention as a Soviet Third World conspiracy for the redistribution of wealth or for first steps in world government. The United States and the Soviet Union both sought new provisions on protection of navigation through straits to protect strategic interests in naval mobility long before any Third World interest in a deep seabed mining “common heritage of mankind.” And the Soviets, as a major maritime power, supported the United States – and opposed the “Group of 77” Third World states – on almost every major issue in the negotiation. Deep seabed mining, which briefly encouraged Third World dreams of ocean riches, was only one among many critical oceans issues in the negotiations, including navigational freedom, fisheries, oil and gas, telecommunications, ocean surveys, scientific research and environmental protection. Almost all of the issues were decided on bottom line national interests, such as whether a nation was a distant water or coastal fishing nation, or did or did not have a large continental shelf off its coast, rather than on Third World “New Economic Order” principles. True, the original deep seabed mining negotiations in the 1970s did reflect this Third World view, although the protectionist interests of land-based mineral producers were at least equally important in this difficult negotiation. But when the Reagan Administration refused to accept a deep seabed mining regime tainted with the “New Economic Order” it was renegotiated to reflect market principles – and the renegotiation, concluded in 1994, met every one of the Reagan conditions and then some. There was no mystery in this renegotiation; the world simply changed in the aftermath of the collapse of the Soviet Union and the damage done to developing countries by the double oil shock of the 1970s. Even more laughable is the charge of a conspiracy for world government. For the reality was a Convention expanding national sovereign rights more than any international agreement in history. The
central thrust of the Convention is an expansion of coastal nation resource and economic rights in a vastly expanded exclusive economic zone and continental shelf while also fully protecting sovereign rights in navigational freedom. No, the corridors of the law of the sea negotiation were predominantly filled with thoughts of nationalism rather than internationalism. And ironically, in their attack against the Convention, the critics join extreme internationalists who have been the principal opponents of the Convention because of its focus on national sovereign rights.

The critics complain of provisions requiring submarines to surface and show their flag in the territorial sea, limiting rights to board foreign flag ships, and similar provisions. But apparently out of ignorance they never disclose that such provisions are already binding on the United States pursuant to the 1958 Geneva Conventions ratified with the advice and consent of the Senate almost a half-century ago and with which we have lived since. Nor do the critics note the reciprocal nature of the law. Provisions protecting against overly broad boarding are there precisely to protect the sovereignty of America’s flag ships on the high seas. And do the critics really want Chinese submarines submerged off the beaches of New York or Los Angeles? Most importantly, the critics fail to note that the 1982 Convention has powerfully improved the 1958 Law of the Sea Conventions to meet current United States resource and strategic needs. Arguments against the Convention that ignore the 1958 Conventions as treaty obligations of the United States effectively are arguments to keep the now outdated 1958 Conventions and to forego the new strategic rights of transit passage through straits, archipelagic sea lanes passage, the improved regime of innocent passage, and many other issues critical to U.S. national security and ocean interests.

The critics fail to acknowledge that the Convention deals with the peacetime law of the oceans. It is the law concerning the inherent right of self-defense or the law of war that applies to actions against terrorists. Quite apart from any provision of the Law of the Sea, the right of self-defense under international law would, of course, always permit the United States to intercept a shipment of weapons of mass destruction on the way to a terrorist group for use against the United States.

The critics fail to understand that the negotiations leading to the 1982 Convention were an enormous success for the United States. The United States was by far the most influential player in the negotiations, not the Soviets or the Third World, and every strategic objective of the United States was met in the original 1982 Convention except the regime governing deep seabed mining, which was met in the 1994 renegotiation enabling United States support. The critics would set aside one of the most important United States negotiating successes of the twentieth century – achieved in many cases over the very Third World objections said by the critics to underlie the convention.
The critics evince little knowledge of international law or oceans law and as a result sometimes make arguments contrary to U.S. interests. For example, some have argued that the provision in Article 88 of the Convention limiting use of the high seas for "peaceful purposes" would constrain United States warships or prevent military activities on the high seas. But in making this argument they are unknowingly adopting the "old" Soviet line – no longer even embraced by Russia – and which was never supported by the United States. During the Law of the Sea negotiations the United States representative accurately described the "peaceful purposes" language when he said:

The term "peaceful purposes" did not, of course, preclude military activities generally. The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement.

Indeed, in their zeal to come up with complaints about the Convention, the critics are promoting an interpretation of this language that may be cited by opponents of U.S. space-based missile defense programs in years ahead. Thus, the implication of the critic's argument beyond law of the sea would be to ban space-based ballistic missile defense systems for the United States because of our adherence to the Outer Space Treaty that contains the same "peaceful purposes" language. And the most simple comparison against the yardstick of the real world refutes this argument made by the critics by showing warships of every major power freely navigating the world's oceans despite the Convention being in force for 148 nations. Moreover, the Senate Text of the Resolution of Advice and Consent to Ratification approved by the Foreign Relations Committee specifically provides: "The advice and consent of the Senate under section 1 is subject to the following . . . understandings: (1) The United States understands that nothing in the Convention, including any provisions referring to 'peaceful uses' or 'peaceful purposes,' impairs the inherent right of individual or collective self-defense or rights during armed conflict." But never mind that this argument of the critics is nonsense on stilts and rooted in ignorance of law, if it sounds plausible in a smokescreen of charges against the Convention, make it! Yet another critic asserts based on ignorance of law that the language in Article 301 that Parties "should refrain from any threat or use of force against the territorial integrity or political independence of any state" would prevent the United States from taking the defensive actions it took in Afghanistan following the September 11, 2001, attacks or taking action in a future defense of Korea or Taiwan. This argument not only fails to understand that Article 301 simply paraphrases an obligation under Article 2(4) of the United Nations Charter already binding on every nation in the world, but it also implicitly and erroneously agrees with America's most extreme critics.
that such perfectly lawful defensive actions are illegal. Again, such an interpretation is nonsense!

The critics seem to suggest that if only the United States would refuse to adhere, the Convention will go away. But the Convention is already in force for 148 nations, is acknowledged by the United States as a reflection of customary law, and is the core of modern ocean law. United States continued non-adherence would not, for example, end the International Seabed Authority, but would merely disenfranchise the United States and remove our veto over potential distribution of seabed mining revenues. Every major developed nation is a party. All other NATO members except Turkey are parties. And all other permanent members of the Security Council are parties. Only the United States, among major maritime nations, is not yet a party.

The critics sometimes advance “conspiracy” or “personality” theories that the president has been hoodwinked by Vice President Cheney, military holdovers from the Clinton Administration, or unnamed “special interests.” But such charges ignore the reality of what is almost certainly one of the most careful processes for determining United States national interests in any area of foreign policy: United States negotiating instructions during the Nixon and Ford Administrations were developed by an eighteen agency task force specially set up within the National Security Council by presidential order to ensure full vetting of national interests. And this process included an almost 100 member private sector advisory committee representing every oceans interest of the United States as well as representatives of the Senate. A similar methodology was employed by subsequent administrations. Indeed, there has probably never in the history of the nation been a process for as thorough vetting of the national interests on any complex issue of foreign policy as was the case under the NSC Interagency Task Force on the Law of the Sea. Subsequently, the Reagan Administration conducted a multi-year full interagency review which concluded that the provisions of the Convention other than those on seabed mining were in the national interest. The Clinton Administration then conducted a review before submitting the Convention, with its renegotiated part XI on deep seabed mining, to the Senate in 1994. And, most recently, the Bush Administration conducted careful reviews before twice recommending the Convention to the Senate on its top priority list of treaties for Senate approval. This Bush Administration review included an exhaustive Defense Department review of every objection raised by anyone, no matter how remote the risk, and careful interagency review of recommended United States statements for the proposed Senate resolution of advice and consent. For more than a quarter century the Joint Chiefs of Staff and the Navy, fully understanding our strategic needs for naval mobility, have been among the strongest supporters of the Convention. We also note that recently high-level Administration officials have strongly supported United States’ accession to the Convention. These officials have included Condoleezza Rice, in her confirmation hearing as Secretary of State, and John Bellinger, in his confirmation hearing as Legal Adviser of the
Department of State. Further, even John Bolton, in his confirmation hearing as United States Ambassador to the United Nations, testified that he supports the Administration’s decision to make accession to the Convention a priority.

The critics urge that the Convention will turn the world’s oceans over to the United Nations. To the contrary, the Convention establishes coastal nations’ control over the principal resources of the oceans while protecting freedom of navigation. The United Nations has no decision authority over any oceans issue under the Convention and no organization created is a branch of the United Nations. Rather, the three strictly limited organizations created report to the States parties to the treaty, not the United Nations. As with many arms control agreements of the United States, the negotiations proceeded under United Nations auspices. It was individual nations, however, who developed the Convention, not the United Nations. And the negotiations leading to the Convention were supported by the United States precisely because of its strategic and resource interests in the oceans. The real threat to United States ocean interests has been out-of-control coastal state “unilateralism” sometimes referred to as “creeping jurisdiction.” This is a threat for which multilateral negotiations provided the best forum for protecting core U.S. oceans interests – and the great success of the United States in this negotiation bore this out.

The effort of the critics, if even erroneously, to “tar” the treaty through equating it with the United Nations is also a simplistic argument in relation to United States interests toward the United Nations. The United Nations, of course, has serious deficiencies and lapses, the now-repealed infamous “Zionism as Racism” resolution is one such example. But in other respects the United Nations has served United States interests well, supporting United States actions in the Korean and Gulf Wars, delimitation of the boundary between Iraq and Kuwait after the Gulf War and substituting Canadian for United States forces in Haiti after the United States went into Haiti. The availability of the United Nations facilities for negotiating law of the sea issues – and rebutting out-of-control coastal state unilateralism threatening U.S. navigational interests – unequivocally served United States national interests.

The totality of argument from the critics is a denigration of law: they seem implicitly to urge that any international agreement is an unwelcome infringement of sovereignty of the United States. But to the contrary agreements are an exercise of sovereignty of this Great Nation. President George Washington regarded the Jay Treaty with Great Britain as the most important achievement of his administration. No one accepts a loss of United States sovereignty. At the same time, one of our most important sovereign rights is our legal ability to enter into agreements – just as individual citizens in our own country have a right to agree to contract with one another. In fact, it is only children and the mentally incompetent who have no right to contract – thus truly losing some of their “sovereignty.” To deny our government the right to enter into agreements with other nations would deprive it of one of the most fundamental rights of sovereignty and leave us with
few options short of expending the lives of our armed forces to establish and enforce our rights. It should also be understood that under the Constitution of the United States national sovereignty, meaning our national freedom of action, can never be lost through an international agreement. It is well-accepted foreign relations law of the United States that a subsequent act of Congress can override a prior international agreement for purposes of national law. Further, the critics fail to mention that precisely because we do always retain our national sovereignty the United States remains free to withdraw from the Convention.

The critics argue that the Convention has not had adequate consideration by the Senate. But again this ignores a process of Senate, and even House consideration, far beyond that for most treaties, including the SALT I arms control treaty, and the four 1958 law of the sea treaties currently binding on the United States. Thus the Senate Foreign Relations Committee held a full committee hearing on the Convention in 1994 even before it was submitted by the President to the Senate. And last year, after a decade in which the Convention was before the Senate, full committee hearings were held on the Convention before the Senate Foreign Relations Committee, the committee of principal jurisdiction. All members of the Senate Foreign Relations Committee then supported the Convention unanimously by a vote of 19-0. The Senate Committee on Environment and Public Works, the Senate Armed Services Committee, the Senate Select Committee on Intelligence, and even the House International Relations Committee (which has no role in treaty advice and consent) also held full committee hearings. The argument for more hearings is in fact a transparent tactic urged by critics of the Convention to kill it through delay. They correctly understand that whenever the Convention is taken to a Senate vote it will be overwhelmingly approved.

Finally, the critics brush aside the consensus among affected oceans interests and knowledgeable oceans experts in the United States in favor of their own judgment as persons admittedly lacking expertise in international law or the operational aspects of oceans policy of the United States and representing no United States oceans interest. Indeed, almost no conventions have been so unanimously supported by knowledgeable experts and affected interests. Support includes every president of both parties who has considered the Convention subsequent to the successful renegotiation of Part XI on deep seabed mining in 1994, every Chairman of the Joint Chiefs from the Nixon Administration to today, all military services from the Nixon Administration until today, all of the Combatant Commanders, every Secretary of State from the Nixon Administration until today, every affected American oceans interest from the oil and gas industry, fisheries interests, shipping, oceanic cables, marine scientists, and environmentalists. Most recently, the congressionally established United States Oceans Commission and the new Bush Administration Oceans Interagency Task Force each unanimously recommended Senate advice and consent. As Senators consider advice and consent they might want to ask who they trust more for
national security advice – every Chairman of the Joint Chiefs, the Combatant Commanders of our united geographic commands and the consistent view of the Navy since the Nixon Administration, or those few who admittedly are not naval, oceans, or international law experts. Further, how can the totality of United States agencies, military departments and private sector oceans industries and interests constitute a "special interest" as charged by the critics? By what criteria are the most vocal critics not special interests?

III.

Setting the Record Straight:
Specific Myths Advanced Against the Convention

A. MYTHS CONCERNING NATIONAL SOVEREIGNTY

• Myth: The United States is giving up sovereignty to a new international authority that will control the oceans. Nothing could be further from the truth. The United States does not give up an ounce of sovereignty in this Convention. Rather, as just noted, the Convention solidifies a truly massive increase in resource and economic jurisdiction of the United States, not only to 200 nautical miles off our coasts, but to a broad continental margin in many areas even beyond that. The new International Seabed Authority created by this Convention, which, as noted, has existed for a decade and will continue to exist regardless of United States actions, deals solely with the mineral resources of the deep seabed beyond national jurisdiction. It has nothing to do with the water column above the seabed. The deep seabed is an area in which we not only have no sovereignty but also in which we and the entire world have consistently opposed extension of national sovereignty claims. Moreover, to mine deep seabed minerals requires security of tenure for the billion dollar plus costs of such an operation. Our industry has emphatically told us that they can not mine under a "fishing approach" in which everyone simply goes out to seize the minerals as the critics seem to suggest. Rather, they must have both exclusive rights to mine sites – and international recognition of titles to the minerals recovered – requirements that led to a limited international agency to provide security of tenure and title for mineral resources.

2 A list of myths (with page reference to the specific myth and response) is appended to this paper (Annex I).
of the seabed beyond national jurisdiction and otherwise owned by no one. The Authority was a necessary specialized agency, of strictly limited jurisdiction, to deal with this need for security of tenure and stable property rights so that investors may securely amortize their debt. Quite contrary to the recent testimony of one critic before the Senate Committee on Environment and Public Works, the Seabed Authority would not have “the exclusive right to regulate what is done, by whom, when and under what circumstances in subsurface international waters and on the sea-floor.” Rather, the Authority is a small, narrowly mandated specialized international agency that, emphatically, has no ability to control the water column and only has functional authority over the mining of the minerals of the deep seabed beyond national jurisdiction. Again, this is a necessary requirement for seabed mining, in an area beyond where any nation has sovereignty, to provide security of tenure to mine sites, without which mining will not occur. Without adherence to the treaty America will simply lose its deep seabed mine sites, the best in the world, and our seabed mining industry will be permanently deep sixed.

- **Myth: U.S. adherence will entail history’s biggest voluntary transfer of wealth and surrender of sovereignty.** To the contrary, the Convention enhances not only sovereignty of United States military ships and aircraft, but also bolsters our resource jurisdiction over a vast area off the coasts of the United States. In fact, the Convention supports the sovereign rights of the United States over extensive maritime territory and natural resources off its coast, including a broad continental shelf that in many areas extends well beyond the 200-nautical mile limit. The area of resource jurisdiction confirmed under national control of the United States by this Convention is approximately equal to that of the continental United States and exceeds the area of the Louisiana purchase, the purchase of Alaska or any other addition to United States sovereignty in American history. It is also the most extensive of any nation in the world. The mandatory technology transfer provisions of the deep seabed mining part of the original Convention, an element of the Convention that the United States objected to, were eliminated in the 1994 Agreement. Any transfer of funds to nations from deep seabed mining revenues, or oil and gas development beyond 200 miles, is subject to a United States veto. As such, we not only have a veto over where revenue from our seabed mining would go, but also from that of all other nations in the world. This new power is simply lost if we fail to adhere.
B. MYTHS CONCERNING THE UNITED NATIONS

• Myth: The Convention would turn the oceans over to the United Nations. Completely and utterly false. Not a drop of oceans water nor an ounce of oceans resources would be turned over to the United Nations. To the contrary, the Convention disappointed extreme internationalists who believed in “blue helmet” solutions to oceans issues. It placed all coastal resources of the water column and the continental shelf under coastal nation rather than international jurisdiction. And it maintained and strengthened freedom of navigation on the world’s oceans. These critical issues in the negotiation, by far the most important at stake, both hugely strengthened national sovereign rights. Even the International Seabed Authority that the Convention creates is an independent international authority, supported by the United States, as necessary to provide stability of property rights to deep seabed minerals not owned by any nation. Without such an authority providing exclusive property rights to seabed mine sites of the deep ocean floor, seabed mining, including U.S. mining in the oceans, would never be realized. And remember that this body is limited to the mineral resources of the deep seabed beyond national jurisdiction that have yet to be mined, in contrast with the billions of dollars in economic value in the fisheries and oil and gas of the continental margins, all placed under national jurisdiction.

• Myth: The Convention “is designed to place fishing rights, deep-sea mining, global pollution and more under the control of a new global bureaucracy . . .” This is so erroneous as to be humorous if it were not so seriously and repeatedly advanced by the critics. The Executive Branch that led U.S. negotiations on the Convention and that is supporting Senate Advice and Consent would never have supported such nonsense. The International Seabed Authority deals solely with mineral resources beyond national jurisdiction, not with fishing, not with global pollution and not with navigation – or even activities in the water column. It is necessary in order to create enforceable rights to mine sites not owned by any nation as required if United States mining firms are ever to mine the deep seabed. The United States is already party to hundreds of specialized international organizations. The Seabed Authority would add an unremarkable one more. Indeed, one more that even after ten years of operation today still has a staff of only thirty-five.
• Myth: The Convention gives the United Nations its first opportunity to levy taxes. False. The Convention does not provide for or authorize taxation of individuals or corporations. It does include modest revenue sharing provisions for oil/gas activities on the continental shelf beyond 200 miles after the first five years of production and certain fees for deep seabed mining operations. The oil/gas fees are less than the royalties paid to foreign countries for drilling off their coasts and none of the revenues go to the U.N. These de minimus revenues, averaging between two and four percent over the projected life of a well, were a small price to pay for enlarging the U.S. continental shelf by 15 percent — an area larger than the state of California. This is a major benefit to the U.S. oil and gas industry so strongly supports the Convention. With respect to deep seabed mining U.S. companies applying for deep seabed mining licenses would pay the application fee directly to the Seabed Authority; no implementing legislation would be necessary. U.S. consent — that is its veto would be applicable — would be required for any transfer of such revenues. With respect to deep seabed mining, because the United States is a non-party, U.S. companies currently lack the ability to engage in such mining under U.S. authority. Becoming a Party will give our firms such ability and will open up new revenue opportunities for them when deep seabed mining becomes economically viable. The alternative is no deep seabed mining for U.S. firms, except through other nations who are Convention parties. When the Interior Department charges royalties to American oil companies for development of the oil and gas from our continental shelf it is not exercising a “taxing power,” rather it is selling access to an asset. Similarly, royalties paid for access rights to deep sea mineral resources are not a “tax” on the American taxpayers anymore than such royalties paid by U.S. miners to Chile or Indonesia to mine resources there are such a “tax.” Perhaps most importantly, until the United States accedes to the Convention it will not be able to exercise its veto over distribution of revenues from every other nation in the world generated by these provisions. And when we do accede we not only have veto rights over distribution of revenues from U.S. mines but also from all other seabed mines. As such, these provisions greatly expand United States influence over financial aid decisions.
C. MYTHS CONCERNING NATIONAL SECURITY

- **Myth: The Convention is harmful to the Proliferation Security Initiative (PSI).** Again, this is false. The Proliferation Security Initiative has already been negotiated explicitly in conformance with the Convention; and not surprisingly so, since the nations with which we are coordinating in that initiative are parties to the Convention. This charge apparently rests on the false belief that if the United States does not adhere to the Convention it will be free from any constraints in relation to oceans law. Again, a false assumption; we are today a party to the 1958 Geneva Conventions that are much more restrictive than the 1982 Convention now before the Senate. This charge is also misguided in failing to understand the critically important interest we have in protecting navigational freedoms on, in and above the worlds oceans. The Convention allows our vessels to get on station, a capability that is essential before any issue even arises about boarding. Moreover, we emphatically do not want a legal regime that would permit any nation in the world to seize United States commercial vessels anywhere in the worlds oceans. *That* would be a massive loss of U.S. sovereignty! The Proliferation Security Initiative was carefully constructed with parties to the 1982 Convention, using the flag state, port state and other jurisdictional provisions of the 1982 Convention precisely to avoid this problem. Nor is this charge at all realistic in failing to note that nothing in the Law of the Sea Convention could or does trump our inherent rights to individual and collective self-defense. Most recently, we note, Under-Secretary of State John Bolton, a principal architect of the PSI, has testified to the Senate that adhering to the Convention will not harm the PSI.

- **Myth: The Convention would interfere with the operations of our intelligence community.** Having either chaired or participated in the eighteen agency National Security Council interagency process that drafted the United States negotiating instructions for the Convention, we found this charge so bizarre that we recently checked with the Intelligence Community to see if we had missed something. The answer that came back was that they, too, were puzzled by this charge, and there was absolutely no truth to it. We are confident that there is no provision in the Law of the Sea Convention which will, if approved by the Senate, add constraints on the operations of our intelligence community. Indeed, remember in this connection that the United States is already bound by the 1958 Conventions and that since 1983, pursuant to President Reagan's
order, we have been operating under the provisions of the 1982 Convention, other than for deep seabed mining in part XI.

- **Myth: Freedom of navigation is only challenged from "[t]he Russian navy [that] is rusting in port [and] China has yet to develop a blue water capability...."** The implication here is that the principal challenge to navigational freedom comes from major power war or conflict and we do not really have any national concerns at this time about preserving freedom of navigation. But the 1982 Convention deals with the law of peace, not war, or self-defense. Thus this argument misses altogether the serious and insidious challenge, which, again, is what the LOS Convention is designed to deal with; that is, repeated efforts by coastal nations to control navigation, many from allies and trading partners of the United States, which through time add up to death from a thousand pin-pricks. That is the so-called problem of "creeping jurisdiction" that remains the central struggle in preserving navigational freedom for a global maritime power. After years of effort we have won in the Law of the Sea Convention the legal regime that supports our operators in our efforts to control this "creeping jurisdiction." To unilaterally disarm the United States from asserting what we won in the Convention against illegal claimants is folly and undermines our national security.

- **Myth: U.S. adherence to the Convention is not necessary because navigational freedoms are not threatened (and the only guarantee of free passage on the seas is the power of the U.S. Navy).** Wrong. It is not true that our navigational freedoms are not threatened. There are more than one hundred illegal, excessive claims around the globe adversely affecting vital navigational and overflight rights and freedoms. The United States has utilized diplomatic and operational challenges to resist the excessive maritime claims of other countries that interfere with U.S. navigational rights as reflected in the Convention. On occasion these operations can entail a certain amount of risk — e.g., the Black Sea bumping incident with the former Soviet Union in 1988. Being a party to the Convention would significantly enhance our efforts to roll back these claims by, among other things, putting the United States in a far stronger position to assert our rights and affording us additional methods of resolving conflict and aligning expectations of behavior at sea.
• Myth: Friendly relations with the few states that sit astride sea lanes are more likely to protect U.S. navigational rights than an abstract multilateral treaty to ensure passage. This myth simply does not understand oceans policy. There are not simply a “few” states that “sit astride” sea lanes, rather there are more than 100 straits used for navigation overlapped by a twelve-mile territorial sea. Our difficulties in working with bordering “straits” states shows we were far better off as a party to an international agreement that articulates these rights in a multilateral negotiation in which we would mobilize the major maritime powers of the world against extreme straits states demands. The implication that bilaterally negotiated agreements with straits states is a better way to protect U.S. ocean interests is fundamentally wrong – indeed it is the path to a rapid loss of our sovereign rights to freedom of navigation. This was our bitter experience concerning the Persian Gulf and our reliance on the Shah of Iran to provide stability. Finally, there is nothing “abstract” about the Convention, it protects our navigational rights with greater clarity than ever before in our history.

• Myth: The Convention was drafted before – and without regard to – the war on terror and what the United States must do to wage it successfully. An irrelevant canard. It is true that the Convention was drafted before the war on terror. However, the Convention enhances, rather than undermines, our ability to successfully wage the war on terror. Maximum maritime naval and air mobility that is assured by the Convention is essential for our military forces to operate effectively. The Convention provides the necessary stability and framework for our forces, weapons, and materiel to get to the fight without hindrance – and ensures that our forces will not be hindered in the future. Thus, the Convention supports our war on terrorism by providing important stability for navigational freedoms and overflight. It preserves the right of the U.S. military to use the world’s oceans to meet national security requirements. It is essential that key sea and air lanes remain open as an international legal right and not be contingent upon approval from nations along the routes. A stable legal regime for the world’s oceans will support global mobility for our Armed Forces.

• Myth: Obligatory technology transfers will equip actual or potential adversaries with sensitive and militarily useful equipment and know-how (such as anti-submarine warfare technology). Bunk! No technology transfers are required by the
Convention. Mandatory technology transfers were eliminated by Section 5 of the Annex to the Agreement amending Part XI of the Convention. Further, Article 302 of the Convention explicitly provides that nothing in the Convention requires a party to disclose information the disclosure of which is contrary to the essential interests of its security.

- **Myth:** As a nonparty, the U.S. is allowed to search any ship that enters our EEZ to determine whether it could harm the United States or pollute the marine environment. Under the Convention, the U.S. Coast Guard or others would not be able to search any ship until the United Nations is notified and approves the right to search the ship. Absurdly false! Under applicable treaty law – the 1958 conventions on the law of the sea – as well as customary international law, no nation has the right to arbitrarily search any ship that enters its EEZ to determine whether it could harm that nation or pollute its marine environment. Nor would we want countries to have such a blanket “right,” because it would fundamentally undermine the freedom of navigation that benefits the United States more than any other nation. Thus, the descriptions of both the status quo and the Convention’s provisions are incorrect and seriously misleading. Adhering to the Convention will make no change in our existing ability or authority to search ships entering our EEZ with regard to security or protection of the environment. And under the Convention, the UN has no role at all, much less a role in deciding when and where a foreign ship may be boarded.

- **Myth:** The Convention would place restriction on antisubmarine sonars to protect whales. This is false. The Convention’s provisions concerning the environment do not apply to warships that enjoy complete immunity under the Convention. The environmental measures the United States applies to its own warships remain a matter of national law.

- **Myth:** The PRC asserts that the Convention entitles it to exclusive economic control of the waters within a 200 nautical-mile radius of its artificial islands - including waters transited by the vast majority of Japanese and American oil tankers en route to and from the Persian Gulf. Wrong again on both facts and law. The United States Government is not aware of any claims by China to a 200-mile economic zone around its artificial islands. Any claim that artificial islands generate a territorial sea or EEZ would be illegal under the Convention. The Convention specifically provides
that artificial islands do not have the status of islands and have no territorial sea or EEZ of their own.

**D. MYTHS CONCERNING PART XI ON SEABED MINING**

- **Myth:** The Convention would mandate technology transfer and contains other fundamentally non-free market provisions with respect to deep seabed mining in Part XI. This charge seems to stem from a failure to understand that a series of flawed seabed mining provisions in Part XI of the 1982 Convention, including mandatory transfer of technology, were successfully renegotiated at the courageous insistence of President Reagan. Today, the Convention, as so modified, provides for first-come rights to mine the deep seabed under a joint venture arrangement providing guaranteed access rights to deep seabed minerals. And the renegotiated Part XI even goes beyond the Reagan conditions in adopting the important pro-free-market GATT principle against subsidization of seabed miners. The mining regime adopted by the Authority may well be even more flexible than what we have here at home. But whatever imperfections there may be in the deep seabed regime, it is a certainty that United States non-adherence has to date, and if continued will permanently, kill all hope of a United States seabed mining industry. Bankers simply will not lend the billion dollars plus required for a deep sea mining operation without an unchallengeable legal title to the resource.

- **Myth:** The problems identified by President Reagan in 1983 were not remedied by the 1994 Agreement relating to deep seabed mining. Wrong. Each objection was addressed and remedied. Among other things, the 1994 Agreement provides for access by U.S. industry to deep seabed minerals on the basis of non-discriminatory and reasonable terms and conditions; overhauls the decision-making rules to accord the United States critical influence, including veto power over the most important future decisions that would affect U.S. interests; restructures the regime to comport with free-market principles, including the elimination of the earlier mandatory technology transfer provisions and all production controls. The unique, and singular, veto awarded the United States in this renegotiation is of enormous precedential importance to the United States. This is worth repeating: the United States has been singled out in the renegotiation as *the only nation in the world to be given a permanent veto over critical decisions of the Authority.* By
non-adherence we turn our back on this highly favorable development.

- **Myth: The International Seabed Authority has the power to regulate seven-tenths of the earth’s surface, impose international taxes, etc.** Nothing could be further from the truth. The Convention does address seven-tenths of the earth’s surface, but primarily to affirm coastal nation sovereign rights over resources and freedoms of all nations. However, the International Seabed Authority (ISA) does not apply to seven-tenths of the earth’s surface. The authority of the ISA is strictly limited to administering mining of minerals in seafloor areas of the deep seabed beyond national jurisdiction, generally more than 200 miles from the shore of any country. At present, and in the foreseeable future, such deep seabed mining is economically unfeasible. The ISA has no other role and has no general regulatory authority over the uses of the oceans, including freedom of navigation and overflight. The ISA has no authority or ability to levy taxes.

- **Myth: The United States might end up without a vote in the ISA.** Not possible unless we follow the critics’ advice and refuse to participate. The Council is the main decision-making body of the ISA. The United States would have a permanent seat on the Council, by virtue of its being the State with the largest economy in terms of gross domestic product on the date of entry into force of the Convention, November 16, 1994. (1994 Agreement, Annex Section 3.15(a)) This would give us a uniquely influential role on the Council, the body that matters most. This is a unique international precedent – to provide the United States and only the United States with a permanent seat in the Seabed Authority. It would be folly to reject this precedent.

E. MYTHS CONCERNING DISPUTE SETTLEMENT

- **Myth: United States military activities will be subject to a world court.** There was consensus in the UNCLOS negotiations that military activities should be exempted from dispute settlement. Accordingly, Article 298 of the Convention permits nations to opt out of the dispute settlement provisions for military activities, and under the president’s submission, as embodied in the Senate draft resolution of advice and consent, this option is unmistakably
exercised for the United States. Further, the scope of dispute settlement is severely cabined in general. For example, none of the decisions of the United States in relation to access by foreign fishermen to our fish stocks are subject to dispute settlement. In addition, under the president’s submission, as embodied in the Senate draft resolution, the United States will be accepting “special arbitration” as our preferred modality of dispute settlement rather than the International Court of Justice (the World Court) or the International Tribunal for the Law of the Sea. The United States is already a party to literally hundreds of international agreements, including more than eighty-five submitting disputes to the International Court of Justice, that provide for compulsory dispute resolution. Recently, the Senate of the United States approved the 1995 agreement implementing certain fisheries provisions of the LOS Convention; an agreement strongly supported by American fishing interests and which contains the dispute resolution procedures decried by the critics. As a result of these agreements concerning dispute resolution, remedies are often available when the rights of the United States or its citizens are violated by other countries. In this connection, compulsory dispute settlement is particularly useful in controlling illegal interference with navigation. Indeed, because of its importance in constraining these illegal claims, even the former Soviet Union was persuaded of the importance of compulsory dispute settlement in the Law of the Sea Convention, despite its longstanding general opposition to compulsory dispute settlement. The severely cabined dispute settlement procedures in the Law of the Sea Convention are far more restrictive than in most of the other dispute resolution provisions already binding on the United States. Moreover, as noted above, in the Law of the Sea Convention we would choose special arbitration rather than the International Court of Justice or the International Tribunal for the Law of the Sea.

• **Myth: The Convention mandates a tribunal to adjudicate the ocean disputes of the United States.** The Convention does establish the International Tribunal for the Law of the Sea. However, Parties are free to choose other methods of dispute settlement. The United States has stated that it will choose two forms of arbitration rather than the Tribunal. While the limited area of U.S. mining of the deep seabed would be subject to the Sea-bed Disputes Chamber if deep seabed mining ever takes place, the proposed Resolution of Advice and Consent makes clear that the Sea-bed Disputes Chamber’s decisions “shall be enforceable in the territory of the United States.
only in accordance with procedures established by implementing legislation and that such procedures shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States.” Importantly, the Chamber’s authority extends only to disputes involving the mining of minerals from the deep seabed; no other activities, including operations in the water column or on the surface of the oceans, are subject to it.

- **Myth:** The International Law of the Sea Tribunal has already asserted, in the MOX case involving a UK nuclear plant, that it will determine its own competence, or scope and jurisdiction, even in the face of other extant treaties designed to address the issue at hand. The MOX case was brought by Ireland against the UK. The Tribunal, in a setting in which the UK had failed to assert its right to invoke exceptions under Article 297 of the Convention, and in dealing solely with “provisional measures,” focused its analysis on the highly technical question regarding the relationship among a series of different treaties the UK had accepted, all of which provided for compulsory jurisdiction, but in different fora. Upon the completion of its analysis, the Tribunal denied Ireland’s request for intrusive provisional restraints on the UK’s activities. Then the Tribunal simply recommended that the parties cooperate, and dropped out of the case. An arbitral panel had been selected by Ireland and the UK, and that panel also suspended proceedings (which have not been resumed) pending litigation in the European Court of Justice pursuant to European law. Impliedly that these facts should be portrayed as an example of the Tribunal grabbing jurisdiction away from other courts is wrong.

**F. MYTHS CONCERNING THE NEGOTIATING PROCESS**

- **Myth:** “[T]he Law of the Sea Convention was a grand scheme to create ‘an oceanic Great Society’. . . .” It is true that one motivation of developing countries in the UNCLOS negotiations more than three decades ago, played out in the negotiation for Part XI, was an exaggerated hope of riches from deep seabed mining. It is also true that the concept of the “New International Economic Order” played a harmful role in the negotiation of Part XI on deep seabed mining. The motivation of the United States and other major powers, however, was to protect navigational freedom, end the out-of-control coastal state grab for the oceans, extend our jurisdiction
fully to the fish stocks and much of the oil and gas off our coasts and achieve international agreement on a mechanism providing security of tenure for deep seabed mining in areas beyond national jurisdiction. It was the other non-Part XI issues that were the real core of the UNCLOS negotiations, as attested by the fact that heads of delegation did not focus on Committee I, where Part XI was being negotiated, and spent their efforts in Committees II and III, where more critical national security issues were at stake. The United States and other major developed nations coordinated closely together on these crucial navigational and resource issues in the “Group of Five.” Moreover, the interest of certain land-based producers of nickel and copper, including developed nations, in preventing competition from deep seabed minerals, was probably a more important factor in the negotiating difficulties in Part XI than the “New International Economic Order.” The renegotiation of Part XI pursuant to the Reagan conditions solved this latter problem by abolishing the “production limitations” that the land-based producers had written into the original agreement.

- Myth: The Convention is an effort by the radical left to move toward world government. The reality is the opposite! The Convention works a massive extension of national sovereign rights over the most important oceans resources, including fish stocks and oil and gas, while protecting national sovereign rights in freedom of navigation for all nations. As such, it is a direct repudiation of radical claims, urged by some, for an international agency to control the oceans. Only seabed mineral resources beyond a broadly extended area of coastal state resource control are placed under limited control of an international authority – and this was necessary to establish the exclusive property rights needed by mining firms for minerals otherwise owned by no nation. Further, the International Seabed Authority, as renegotiated, adopts free market principles as its core and is itself a rejection of the “New International Economic Order.” And the negotiations rejected any effort to stray into arms control as urged by some. In reality the Convention is a triumph for both national sovereign rights and free market principles.

G. MYTHS CONCERNING THE NATIONAL DECISION PROCESS AND THE VIEWS OF PRESIDENT REAGAN

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

- Myth: If the Convention is a treaty about the Navy’s conflict
mobility and national security, why is the ratification effort
being led by State Department environmentalists? This
disingenuous statement simply ignores the reality that the United
States Navy and the Joint Chiefs have been the principal proponents
of the Convention since negotiations began in the 1970s. When the
Convention sat before the Senate Foreign Relations Committee for a
decade because of opposition from the then Chairman of the
Committee it was the Chiefs and the Navy who worked tirelessly to
move the Convention. This statement further ignores the strong
support of every United States ocean agency, all United States
oceans industry (e.g. oil and gas, fishing, etc.), and the unanimous
support of the Congressionally established United States
Commission on Ocean Policy. Further, the United States position on
law of the sea reflected in this Convention, was developed in an
eighteen agency interagency task force under the White House National Security Council mechanism.

- **Myth: There has been inadequate consideration of the Law of the Sea Treaty and we need more time to study it.** Nonsense! Those who espouse this view fail to note that this is the second round of Senate hearings on the Convention. The first round was held in 1994 just before the Convention was initially submitted to the Senate. The Senate, and the Country, has had a decade to study the Convention, and for several decades, since 1983, we have lived under the legal regime of everything but Part XI. We have an especially hard time in finding any sympathy for this position urging delay when it comes from spokesmen who were not heard calling for more consideration of the Convention for the full decade while the treaty languished before the Senate Foreign Relations Committee. Rarely has any Convention to come before the Senate been more fully studied and debated — and, in real effect, lived under.

- **Myth: President Bush is urging Senate advice and consent to the Convention for little better than "go-along, get-along multilateralism."** Give us a break! Among presidents prepared to take the heat internationally for actions they believe in, as Afghanistan and Iraq surely demonstrate, this president is near the top. Is it too much to understand that after lengthy and careful review this president has urged Senate advice and consent because it is in the national interest of the United States? Further, does anyone really believe Ronald Reagan was a "go-along, get-along" president?

**H. MYTHS CONCERNING LEGAL EFFECTS**

- **Myth: Other Parties will reject the U.S. “military activities” declaration as a reservation.** The U.S. declaration is consistent with the Convention and is not a reservation. It is an option explicitly provided by Article 298 of the Convention. Other parties to the Convention that have already made such declarations exercising this option include the United Kingdom, Russia, France, Canada, Mexico, Argentina, Portugal, Denmark, Ukraine, and Norway.

- **Myth: The 1994 Agreement doesn’t even pretend to amend the Convention; it merely establishes controlling interpretive
provisions. Nonsense! The Convention could only have been formally “amended” if it had already entered into force. The 1994 Agreement was negotiated as a separate agreement in order to ensure that the Convention did not enter into force with Part XI in its flawed state. The 1994 Agreement made explicit, legally binding changes to the Convention and has the same legal effect as if it were an amendment to the Convention itself. Indeed, the International Seabed Authority has been operating under the changes for a decade and has incorporated them article-by-article into the treaty in its compilation of basic documents. See “The Law of the Sea: Compendium of Basic Documents,” 48-89, 206-226 (International Seabed Authority, 2001). A letter personally endorsed by all living former Legal Advisers of the U.S. Department of State, representing both Republican and Democratic Administrations, confirms the legally binding nature of the changes to the Convention effected by the 1994 Agreement. Their letter states that “[T]he Reagan Administration’s objection to the LOS Convention, as expressed in 1982 and 1983, was limited to the deep seabed mining regime. The 1994 Implementing Agreement that revised this regime, in our opinion, satisfactorily resolved that objection and has binding legal effect in its modification of the LOS Convention.” Moreover, the proposed resolution of advice and consent does not simply accept the 1982 Convention but rather the Convention with the 1994 Agreement implementing Part XI (Section 1 of the Text of Resolution of Advice and Consent to Ratification).

- **Myth: Most of the benefits are available without the treaty.** A major error in this assertion is that it misses altogether the ongoing struggle for navigational freedom in the world’s oceans – a struggle requiring active United States engagement and leadership. Such engagement and leadership is simply not possible if we are the only permanent member of the Security Council not to adhere to the Convention. It also fails to address the cost to the United States of being excluded from the principal institutions created by the Convention – including the loss of a U.S. veto over major decisions concerning deep seabed mining. And it is wrong in ignoring the permanent loss of a U.S. deep seabed mining industry that would be a cost of non-adherence. And, among other reasons, it further ignores the cost to the United States and its international negotiating credibility of holding out requests for renegotiation of a major international agreement – having those requirements met – and then turning our back on the renegotiated agreement that met all of our stated requirements.
• Myth: We do not need to adhere to the Convention because it already represents customary international law binding on the United States. This argument urges that our navigational interests are already protected. Curiously, those who advance this argument fail to note that if the United States is already bound to the Convention as customary international law it is also bound by provisions they may object to in the Convention. The critics cannot have it both ways. More importantly, the argument misses the reality that the United States is legally disenfranchised as a non-adherent and will not receive the full benefits of the Convention without acceding to it. Further, customary international law is subject to change, which can be abrupt, such as how the customary international law of outer space was changed overnight when Sputnik was launched.

I. MISCELLANEOUS MYTHS

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

• Myth: The Convention purports to govern claims of rising sea level and melting ice caps. More nonsense! These issues are neither dealt with in the Convention nor were they featured in the negotiations.
IV. Are There Accurate Reasons to Oppose the Law of the Sea Convention?

While we strongly support immediate Senate advice and consent — and seek to rebut false arguments being made against senate advice and consent — we present below a list of arguments against advice and consent we do not support — but which are at least accurate in stating the effect of non-adherence. Thus, you should oppose Senate advice and consent:

- If you favor a gradual loss of United States’ sovereign rights over naval and commercial navigation on the world’s oceans;

- If you believe the United States should substitute the lives of service men and women for the stability of the rule of law;

- If, at this time of high oil prices, you want to greatly delay development of the oil and gas on the United States continental margin beyond 200 nautical miles with its associated jobs in the United States;

- If you want to kill the United States seabed mining industry, permanently lose U.S. mine sites staked out as the best in the world, and prevent the development of seabed mining jobs in the United States;

- If you do not want American fishermen and merchant mariners to have legal protection against corporal punishment and imprisonment in jails around the world;

- If you do not want the United States to participate in assessing continental margin claims, such as that of Russia in the Arctic Ocean;

- If you believe it wrong for the Convention to confirm for the United States the most extensive exclusive economic zone in the world;

- If you oppose stable expectations and the rule of law in the world’s oceans;
• If you believe that the United States should have a diminished voice in protecting our oceans interests worldwide;

• If you believe that providing a guaranteed permanent seat and veto right for the United States on the Governing Council of the Seabed Authority – the only guaranteed seat for any nation – is a bad precedent;

• If you oppose protection of fish stocks and the ocean environment;

• If you believe the United States should no longer lead in the development of oceans law and policy; and

• If you believe that advice from non-Law of the Sea experts on oceans security issues is more reliable than that from the Joint Chiefs of Staff, the Navy, presidents of both parties, all United States oceans industries, and the unanimous opinion of the Congressionally established U.S. Commission on Ocean Policy.
ANNEX I

LIST OF MYTHS
(WITH PAGE NUMBERS FOR MYTHS AND RESPONSE)

A. MYTHS CONCERNING NATIONAL SOVEREIGNTY

Myth: The United States is giving up sovereignty to a new international authority that will control the oceans. ......................... 9

Myth: U.S. adherence will entail history's biggest voluntary transfer of wealth and surrender of sovereignty...................................... 10

B. MYTHS CONCERNING THE UNITED NATIONS

Myth: The Convention would turn the oceans over to the United Nations .................................................................................. 11

Myth: The Convention "is designed to place fishing rights, deep-sea mining, global pollution and more under the control of a new global bureaucracy . . ." ................................................................. 11

Myth: The Convention gives the United Nations its first opportunity to levy taxes................................................................. 12

C. MYTHS CONCERNING NATIONAL SECURITY

Myth: The Convention is harmful to the Proliferation Security Initiative (PSI) ............................................................................ 13

Myth: The Convention would interfere with the operations of our intelligence community ......................................................... 13

Myth: Freedom of navigation is only challenged from "[T]he Russian navy [that] is rusting in port [and] China has yet to develop a blue water capability . . ." ................................................................. 14

Myth: U.S. adherence to the Convention is not necessary because navigational freedoms are not threatened (and the only guarantee of free passage on the seas is the power of the U.S. Navy). ................................................................. 14
MYTH: FRIENDLY RELATIONS WITH THE FEW STATES THAT SIT ASTRIDE SEA LANES ARE MORE LIKELY TO PROTECT U.S. NAVIGATIONAL RIGHTS THAN AN ABSTRACT MULTILATERAL TREATY TO ENSURE PASSAGE. ........................................15

MYTH: THE CONVENTION WAS DRAFTED BEFORE AND WITHOUT REGARD TO THE WAR ON TERROR AND WHAT THE UNITED STATES MUST DO TO WAGE IT SUCCESSFULLY. .................................................................................15

MYTH: OBLIGATORY TECHNOLOGY TRANSFERS WILL EQUIP ACTUAL OR POTENTIAL ADVERSARIES WITH SENSITIVE AND MILITARILY USEFUL EQUIPMENT AND KNOW-HOW (SUCH AS ANTI-SUBMARINE WARFARE TECHNOLOGY). ..........................................................................................15

MYTH: AS A NONPARTY, THE U.S. IS ALLOWED TO SEARCH ANY SHIP THAT ENTERS OUR EEZ TO DETERMINE WHETHER IT COULD HARM THE UNITED STATES OR POLLUTE THE MARINE ENVIRONMENT. UNDER THE CONVENTION, THE U.S. COAST GUARD OR OTHERS WOULD NOT BE ABLE TO SEARCH ANY SHIP UNTIL THE UNITED NATIONS IS NOTIFIED AND APPROVES THE RIGHT TO SEARCH THE SHIP. .........................................................16

MYTH: THE CONVENTION WOULD PLACE RESTRICTION ON ANTI-SUBMARINE SONARS TO PROTECT WHALES. .........................................................................................................................16

MYTH: THE PRC ASSERTS THAT THE CONVENTION ENTITLES IT TO EXCLUSIVE ECONOMIC CONTROL OF THE WATERS WITHIN A 200 NAUTICAL-MILE RADIUS OF ITS ARTIFICIAL ISLANDS - INCLUDING WATERS TRANSITED BY THE VAST MAJORITY OF JAPANESE AND AMERICAN OIL TANKERS EN ROUTE TO AND FROM THE PERSIAN GULF. ..........16

D. MYTHS CONCERNING PART XI ON SEABED MINING

MYTH: THE CONVENTION WOULD MANDATE TECHNOLOGY TRANSFER AND CONTAINS OTHER FUNDAMENTALLY NON-FREE MARKET PROVISIONS WITH RESPECT TO DEEP SEABED MINING IN PART XI. .........................17

MYTH: THE PROBLEMS IDENTIFIED BY PRESIDENT REAGAN IN 1983 WERE NOT REMEDIED BY THE 1994 AGREEMENT RELATING TO DEEP SEABED MINING .................................................................................................17

MYTH: THE INTERNATIONAL SEABED AUTHORITY HAS THE POWER TO REGULATE SEVEN-TENTHS OF THE EARTH’S SURFACE, IMPOSE INTERNATIONAL TAXES, ETC. .............................................................................................18

MYTH: THE UNITED STATES MIGHT END UP WITHOUT A VOTE IN THE ISA. ...............................................................................................................................18
F. Myths Concerning Dispute Settlement

Myth: United States military activities will be subject to a world court ................................................................. 18

Myth: The Convention mandates a tribunal to adjudicate the ocean disputes of the United States ................................................................. 19

Myth: The International Law of the Sea Tribunal has already asserted, in the MOX case involving a UK nuclear plant, that it will determine its own competence, or scope and jurisdiction, even in the face of other extant treaties designed to address the issue at hand ................................................................. 20

F. Myths Concerning the Negotiating Process

Myth: "[T]he Law of the Sea Convention was a grand scheme to create 'an oceanic Great Society' ..." ................................................................. 20

Myth: The Convention is an effort by the radical left to move toward world government ................................................................. 21

G. Myths Concerning the National Decision Process and the Views of President Reagan

Myth: President Reagan would oppose moving forward with this Convention ................................................................. 21

Myth: If the Convention is a treaty about the Navy's conflict mobility and national security, why is the ratification effort being led by State Department environmentalists? ................................................................. 22

Myth: There has been inadequate consideration of the Law of the Sea Treaty and we need more time to study it ................................................................. 23

Myth: President Bush is urging Senate advice and consent to the Convention for little better than "go-along, get-along multilateralism." ................................................................. 23

H. Myths Concerning Legal Effects

Myth: Other Parties will reject the U.S. "military activities" declaration as a reservation ................................................................. 23
Myth: The 1994 Agreement doesn't even pretend to amend the Convention; it merely establishes controlling interpretive provisions.................................................................23

Myth: Most of the benefits are available without the treaty..............................................24

Myth: We do not need to adhere to the Convention because it already represents customary international law binding on the United States.................................................................25

I. Miscellaneous Myths

Myth: Adhering to the Convention will come with substantial financial obligations.................................................................25

Myth: The Convention purports to govern claims of rising sea level and melting ice caps.................................................................25
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Opportunity On the Oceans
America Wins With the Law of the Sea Treaty

By Lawrence S. Eagleburger and John Norton Moore
Monday, July 30, 2007; A15

Foreign policy concerns, as the Israeli-Palestinian dispute shows, are like the Energizer bunny; they generally go on and on. When we have an opportunity for a decisive foreign policy win, it should not be missed. One such opportunity has arisen with the Law of the Sea Convention, and in contrast to what Jack Goldsmith and Jeremy Rabkin have argued on this page ["A Treaty the Senate Should Sink," op-ed, July 2], the convention should be approved.

The convention is strongly supported by our military leaders and aids our national security in crucial ways. It provides legal certainty for U.S. naval vessels navigating the world's oceans, the largest maneuver space in the world. It assists the Coast Guard and facilitates crucial oil and gas development on our offshore continental margin, reducing the need for Middle Eastern oil. Indeed, in its 200-mile economic zone, it extends U.S. resource control into the oceans in an area greater than the land area of the nation, giving the United States the largest economic zone in the world.

The United States would hold the only permanent seat on the Counsel of the Seabed Authority. This new functional entity permits U.S. firms to develop critically needed deposits of copper, nickel, cobalt and manganese from ocean-floor sites. But the delay in U.S. adherence to the convention has already meant the loss of one of four original U.S. mine sites, and the other three are at risk. Meanwhile, China, Russia, India, Japan and others have moved to obtain exploration licenses to their deep-seabed sites.

Not surprisingly, the Navy; the Coast Guard; and our fishing, shipping, undersea cable, mining, and oil and gas industries all support ratification, as do environmentalists. The congressionally established Ocean Policy Commission voted unanimously for U.S. accession to the convention as its first official act. There are also important foreign policy reasons to adhere, as Deputy Secretary of State John Negroponte and Deputy Defense Secretary Gordon England wrote in an op-ed in June.

In sharp contrast to the Kyoto treaty, the United States led the world in negotiating the Law of the Sea Convention and achieved a historic negotiating success -- a success that probably could not be replicated today. Moreover, when President Ronald Reagan subsequently determined that Part XI of the convention, on seabed mining, required major revision, the world expressly met his conditions before the convention went into effect.

Today the convention is in force for 154 nations, including all the permanent members of the U.N. Security Council but the United States. Failure to adhere diminishes the voice of the United States in protecting our interests worldwide; it excludes America from the new functional
organizations created by the convention, such as the Commission on the Limits of the Continental Shelf; and it sends a signal of American isolationism.

Why then has the convention, which was successfully renegotiated in 1994, not yet received a vote in the Senate? Sadly, ideologically driven opponents have purveyed a web of distortions. They assert that the convention would give our sovereignty away, but the reality would be enhanced protection of our ships on the seas and the greatest expansion of resource jurisdiction in U.S. history, greater in area than that of the Louisiana Purchase and the acquisition of Alaska combined. They assert that the International Seabed Authority, which after a quarter-century of operation has 35 employees and a budget of less than $12 million, is both a U.N. agency (it's not) and a stalking horse for world government. The agency also has no power to tax Americans.

Opponents assert that Ronald Reagan deep-sixed the convention, when instead he set requirements for renegotiation of Part XI, which were successfully achieved, and he directed that we follow the remainder of the convention, which has been U.S. oceans policy now through four presidencies. They assert that the convention harms President Bush's Proliferation Security Initiative (PSI), when the Joint Chiefs of Staff state flatly that the convention "strengthens the coalition" and "supports" PSI.

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 and when the rest of the world has specifically accommodated America's request for renegotiation. If the Senate misses this opportunity, our allies and adversaries alike will note that U.S. foreign policy has been diminished by an ideological extreme. The Senate should follow the president's leadership on this important issue.

Lawrence S. Eagleburger was secretary of state under President George H.W. Bush. John Norton Moore, director of the Center for Oceans Law & Policy at the University of Virginia, was U.S. ambassador for the Law of the Sea Convention under Presidents Richard Nixon and Gerald Ford and was a Reagan appointee to the National Advisory Committee on Oceans and Atmosphere.

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Summary

On October 31, 2007, the Senate Foreign Relations Committee voted to recommend Senate advice and consent to U.S. adherence to the 1982 U.N. Convention on the Law of the Sea and the 1994 Agreement Relating to Implementation of Part XI of that Convention. This followed the statement by President Bush on May 15, 2007, urging “the Senate to act favorably on U.S. accession” to the Convention. CRS Issue Brief IB95010, The Law of the Sea Convention and U.S. Policy, serves as a basic CRS source for discussion of issues related to the United States and the Convention and Agreement, whereas this short report focuses on events and issues that emerged since October 2003.1 It summarizes the committee’s proposed resolution of advice and consent in 2004 and presents some of the issues raised in support of and in opposition to U.S. adherence. This report will be updated periodically.

Introduction


Joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable natural resources they contain. Accession will promote U.S. interests in the environmental health of the oceans. And

1 A copy of the Issue Brief is available from this author.
it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted.2

On February 25, 2004, the Senate Committee on Foreign Relations, by a vote of 19 to 0, had recommended that the Senate give its advice and consent to U.S. accession to the 1982 U.N. Convention on the Law of the Sea and ratification of the 1994 Agreement Relating to the Implementation of Part XI of the Convention.3 The committee on October 14 and 21, 2003, held hearings on the Convention package, which was transmitted to the Senate on October 7, 1994.4 The Senate did not consider the treaty, which was returned to the committee at the end of the Congress. It was not considered in the 109th Congress.

Background

The Convention established a legal regime governing activities on, over, and under the world’s oceans. In December 1982, when the Convention was opened for signature, the United States and some other industrialized countries did not sign the Convention, maintaining that important changes were needed to the parts that dealt with deep seabed resources beyond national jurisdiction. After consultations, an agreement relating to Part XI of the Convention was adopted on July 28, 1994. The Convention entered into force on November 16, 1994, and the Agreement, on July 28, 1996. As of October 26, 2007, the Convention had 155 parties and the Agreement, 131 parties.

Issues Since October 2003 — and the Senate Response

The issues raised in the 1982-1994 period dealt primarily with the regime and international organization associated with the deep seabed area beyond national jurisdiction. Much of the debate during and since the October 2003 hearings related to more traditional law of the sea topics.5 They included use of the military activities exemption in application of the mandatory dispute settlement machinery; protection of U.S. security interests in the face of current terrorist threats; delimitation of the continental shelf beyond 200 nautical miles; and a concern that continued absence by the United States in the bodies6 set up by the Convention and Agreement will act negatively against the interests of the United States.

The Senate Foreign Relations Committee fashioned a resolution of advice and consent that included in section 2, declarations under Articles 287 and 298 of the Convention regarding settlement of disputes; in section 3, 24 declarations or

2 Available at [http://www.whitehouse.gov/news/releases/2007/05/print/20070515-2.html]


4 Treaty Document 103-39; a link to this text is available at [http://lugar.senate.gov/sfrc/sea.html].

5 In addition to the Senate Foreign Relations Committee, hearings were held by the Senate Environment and Public Works Committee on March 23, 2004 (S. Hrg. 108-498); the Senate Armed Services Committee on April 8, 2004 (published in 2005); the Senate Select Committee on Intelligence on June 8, 2004; and the House International Relations Committee on May 12, 2004 (Serial No. 108-136).

6 The International Seabed Authority and its Councils, the Commission on the Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea.
understandings under Article 310 of the Convention; and in section 4, five paragraphs that dealt with amendment of the Convention.

Article 287 (1) of the Convention allows for a declaration on the dispute settlement machinery a State Party chooses to use in disputes concerning the interpretation or application of articles of the Convention. Under the committee-recommended resolution, the United States would choose a special arbitral tribunal under Annex VIII in disputes relating to “fisheries, protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and by dumping.” The United States would choose an arbitral tribunal under Annex VII for the settlement of disputes not covered in the above list.

Article 298 (1) of the Convention provides that a State may declare it does not accept any of the procedures for dispute settlement in any of three types of disputes. Under section 2 of the recommended resolution of advice and consent, the United States would submit a declaration exempting itself from all three categories of disputes — those concerning the interpretation or application of Article 15 on the territorial sea, Article 74 on the exclusive economic zone and Article 83 on the continental shelf relating to boundary delimitations or those involving historic bays or titles; disputes concerning military activities and disputes concerning certain law enforcement activities; and disputes in which the United Nations Security Council is exercising its U.N. Charter functions. The U.S. declaration would also state the U.S. understanding that under Article 298 (1)(b), “each State Party has the exclusive right to determine whether its activities are or were ‘military activities’ and that such determinations are not subject to review.”

Article 310 provides that a State may make declarations or statements aimed at harmonizing its laws and regulations with the Convention, provided that these declarations or statements do not “purport” to exclude or to modify the legal effect of the Convention’s provisions in their application to that State. Section 3 of the recommended resolution set out declarations or statements of understanding in 24 separate paragraphs. Some of these reiterated Convention language to emphasize this country’s understanding and interpretation of that language. These included such topics as the right of innocent passage; transit passage defined; high seas freedoms in the exclusive economic zone; marine scientific research; the sovereign right of a State to impose and enforce conditions for entry of foreign vessels into its ports, rivers, harbors, and so forth; a coastal State’s exclusive right to determine the allowable catch of living resources in its exclusive economic zone; and “Sanitary laws and regulations” in Article 33 to protect human health from pathogens being introduced to the territorial sea.

Section 4 listed five paragraphs of conditions, all related to the amendment process for the Convention, requiring the President to provide copies of proposed amendments to the Senate Committee on Foreign Relations and to consult with the committee in certain circumstances. Two conditions would be included in the U.S. instrument of accession, to the effect that the President shall submit all amendments to the Senate for its advice and consent and that the United States shall take necessary steps to ensure that certain amendments are adopted in conformity with the treaty clause of the Constitution.
Other Issues of Concern to Congress

Since the committee vote, numerous expressions of opposition to and support for U.S. adherence to the Convention and Agreement have been published. During his March 23, 2004, statement to the Senate Environment and Public Works Committee, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs John F. Turner set forth Administration responses to numerous opposing arguments.\(^7\)

Proponents raised at least two sets of arguments to support “prompt” Senate approval of the convention/agreement package. They maintained that U.S. adherence to and participation in the Convention would protect U.S. interests during considerations of the Commission on the Limits of the Continental Shelf and enable the United States to submit its own limits, with extensive supporting data, and would provide an effective U.S. role for the submission and consideration of proposed amendments to the Convention.

Commission on the Limits of the Continental Shelf

The mandate of the Commission is to examine and make recommendations on coastal State extensions of their continental shelf beyond 200 nautical miles. The Convention gives the coastal State sovereign jurisdiction over the resources, including oil and gas, of its continental shelf. Under Article 76 of the Convention, a coastal State with a broad continental margin may establish a shelf limit beyond 200 miles, subject to its submission of the particulars of the limit and supporting scientific and technical data to the Commission for review and recommendations. The Commission reviews the intended limits and supporting documentation, referring to criteria set forth in Article 76, and makes recommendations to the submitting State. While the “coastal State is not bound to accept these recommendations,” Article 76, paragraph 8, stipulates that the “limits established by a coastal State on the basis of these recommendations shall be final and binding.”\(^8\) In this way, the Convention process would contribute to the goal of preventing and reducing the possibility of “dispute and uncertainty.” Eight submissions have been made since December 2001.\(^9\)

The Amendment Process

The Convention’s provisions delayed the possibility of amendment until ten years after its entry into force, that is until November 2004. Articles 312 through 316 deal with amendment, with a special process set forth in Articles 314 and 316, paragraph 5, for any

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\(^7\) See [http://www.state.gov/g/oes/rls/rm/2004/30723pf.htm]. See also statements before the Senate Armed Services Committee on April 8, 2004, by William H. Taft IV, Admiral William L. Schachte, and John Norton Moore, all of which contain responses to opposition comments.

\(^8\) See Treaty Document 103-39, pages 56-57 (in report by the State Department).

Convention provisions relating exclusively to activities in the Area, defined as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.

For amendments to provisions not relating to activities in the Area, the Convention sets forth two procedural options leading to adoption after a proposed amendment is sent by a State Party to the U.N. Secretary-General:

- proposal of amendment (s), with a request that a conference be held to consider and adopt the proposed amendment. The convening of such a conference would require favorable responses from at least half of the States Parties within 12 months of the request. (Article 312)
- proposal of amendment (s), with a request for adoption by a "simplified procedure" without convening a conference. If, within 12 months of this request, “a State Party objects to the proposed amendment or to ... its adoption by the simplified procedure, the amendment shall be considered rejected.” If, however, within the same time period, there has been no objection, the proposed amendment “shall be considered adopted.” (Article 313)

In either case, entry into force of an amendment after adoption requires ratification or accession by two-thirds or by 60 States Parties, whichever is the greater number.

Amendments to provisions relating to activities in the Area require a different procedure. Proposed amendments are to be sent to the Secretary-General of the International Seabed Authority (ISA). The proposed amendment must be approved by the ISA Assembly after prior approval (by consensus) by the ISA Council. Once approved, the proposed amendment “shall be considered adopted.” Entry into force of any adopted amendment requires ratification or accession by three fourths of States Parties, after which it “shall enter into force for all [emphasis added] States Parties.”

The United States would need to be a Party to the Convention in order to block what it might consider objectionable amendments in two of the three approaches discussed. Under the conference option, it might, as an observer, muster sufficient influence on some States Parties to affect a proposed amendment.

**U.S. National Security Interests**

Some opponents to U.S. adherence to the treaty package have suggested that such adherence is contrary to U.S. national security interests, especially in a post-September 11 world. They maintained that under the treaty the United States would not be able to carry out counter-terrorism programs such as the Proliferation Security Initiative (PSI) under which shipments of weapons of mass destruction (WMD), etc., would be interdicted. Referring to Articles 92 and 110 of the Convention, they stated that the treaty does not explicitly guarantee a right to board or interdict when evidence of terrorist intentions through WMD is involved.10

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10 The Proliferation Security Initiative was started by President Bush May 31, 2003, and framed in a Statement of Interdiction Principles, September 4, 2003. PSI participating states undertake (continued...)
Legal Adviser William H. Taft IV during April 8, 2004, hearings before the Senate Armed Services Committee addressed the relationship between the Convention and PSI. “The Convention will not affect our efforts under the PSI to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction.” He added,

The Convention recognizes numerous legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction, for example, exclusive port and coastal State jurisdiction in internal waters and national air space; coastal State jurisdiction in the territorial sea and contiguous zone; exclusive flag State jurisdiction over vessels on the high seas (which the flag State may, either by general agreement in advance or approval in response to a specific request, waive in favor of other States); and universal jurisdiction over stateless vessels. Further, nothing in the Convention impairs the inherent right of individual or collective self-defense (a point which is reaffirmed in the proposed Resolution of Advice and Consent).

The United States has concluded PSI ship boarding agreements with seven nations.11

Among other statements made by Convention opponents were the following: “The treaty effectively prohibits two functions vital to American security: collecting intelligence in, and submerged transit of, territorial waters.” AND “The treaty’s Articles 19 and 20 attempt explicitly to regulate intelligence and submarine activities in what are defined as ‘territorial’ seas. These are activities vital to U.S. security that we should ensure remain unrestricted at all costs.”12

Taft stated that Articles 19 and 20 do not prohibit intelligence activities or “submerged transit” in the territorial sea of other States. He continued,

The Convention’s provisions on innocent passage are very similar to article 14 in the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party. (The 1982 Convention is in fact more favorable than the 1958 Convention....) A ship does not...enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act in the territorial sea aimed at collecting information to the prejudice of the defense or security of the coastal State, but such activities are not prohibited by the Convention. In this respect, the Convention makes no change in the situation that has existed for many years and under which we operate today.

In summary, the question of whether the Senate will consider the Convention in 2007 depends on whether the committee considers and possibly recommends it for positive action. The President’s statement on May 15, 2007, may be a factor in the Senate’s considerations. If the treaty is not considered or withdrawn, it will remain pending in the committee.

10 (...continued)
effective measures for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the U.N. Security Council. See Department of State at [http://www.state.gov/t/np/c10390.htm].

11 The seven are Liberia, Marshall Islands, and Panama in 2004; Croatia, Cyprus, and Belize in 2005; and Malta in 2007.

The Law of the Sea Convention and U.S. Policy

Updated May 12, 2006

Marjorie Ann Browne
Foreign Affairs, Defense, and Trade Division
CONTENTS

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS

The Convention and U.S. Interests
  Naval Power and Maritime Commerce Interests
  Coastal State Interests
  Protection of the Marine Environment
  Marine Scientific Research
  Dispute Settlement

Part XI and the 1994 Agreement: Deep Seabed Mining
  ISA Decisionmaking
  Review Conference
  Technology Transfer
  Obstacle to Development
  Adherence to the Agreement and the Convention

Issues for the Senate
  Is the Convention Really “Fixed”? Compulsory Dispute Settlement
  Convention and U.S. Law
  Common Heritage
  Provisional Application
  Commitments
  Funding

CONGRESSIONAL HEARINGS, REPORTS, AND DOCUMENTS

CHRONOLOGY

FOR ADDITIONAL READING
The Law of the Sea Convention and U.S. Policy

SUMMARY


The United States had provisional membership in the International Seabed Authority (ISA) and its organs and bodies through November 16, 1998. The opportunity for provisional membership, providing time for adherence to the convention and agreement, ended on November 16. Since the Senate had not given its advice and consent to U.S. adherence, the President could not bring those documents into force for the United States. Since November 16, 1998, the United States has observer status at the ISA.

The major part of the 1982 Law of the Sea Convention had been supported by U.S. Administrations, beginning with President Reagan, as fulfilling U.S. interests in having a comprehensive legal framework relating to competing uses of the world’s oceans. However, the United States and many industrialized countries found some of the provisions relating to deep seabed mining in Part XI and Annexes III and IV of the Convention contrary to their interests and would not sign or act to ratify the Convention. Among the unacceptable elements were a decision-making process in the ISA Council and Assembly that would not give the United States or other Western industrialized countries influence commensurate with their interests; “Review Conference” provisions that would allow Convention amendments to enter into force without express U.S. approval; stipulations relating to mandatory transfer of private technology; provisions that would deter rather than promote future development of deep seabed mineral resources by incorporating economic principles inconsistent with free market philosophy; and the absence of assured access to future deep seabed mineral resources. The Clinton Administration maintained that the provisions of the 1994 Agreement and Annex correct the objectionable elements in the Convention on deep seabed issues.

A number of questions face the Senate as it considers the Convention/Agreement package. Does the Agreement sufficiently resolve opposing concerns expressed above about the deep seabed mining provisions? Are the compulsory dispute settlement provisions and the U.S. declaration acceptable to the Senate? What is the impact of U.S. adherence on current U.S. statutes? What changes must be made by legislation? What precedent does U.S. acceptance of the Convention/Agreement definition of the common heritage of mankind concept establish? Were the provisional application procedures used for the 1994 Agreement a good or bad precedent for the U.S. treaty process? What is the nature of U.S. commitments undertaken in decisions of the ISA Council? Should Congress have a role and under what circumstances? What authority should Congress exert over the expenses of another international organization (the ISA)?
MOST RECENT DEVELOPMENTS

As of May 12, 2006, the 1982 U.N. Convention on the Law of the Sea and its 1994 Agreement remained pending before the Senate Committee on Foreign Relations. On December 17, 2004, the President had urged “Congress to provide its advice and consent to this treaty as early as possible in the 109th Congress.” The United States currently participates, as an observer, in meetings of the International Seabed Authority (ISA).

BACKGROUND AND ANALYSIS

The U.N. Convention on the Law of the Sea, which was open for signature between December 1982 and December 1984, established a legal regime governing activities on, over, and under the world’s oceans. The Convention resulted from the third U.N. Conference on the Law of the Sea, which met for a total of 93 weeks between December 1973 and December 1982. The United States and other industrialized countries, however, while supporting most of the treaty, did not sign the Convention or announced they could not ratify the Convention without important changes to the parts that dealt with deep seabed resources beyond national jurisdiction. In 1990, U.N. Secretary-General Javier Perez de Cuellar initiated consultations among interested governments aimed at achieving universal participation in the Convention. From late 1992 on, pressures mounted to revise or amend what were viewed as unacceptable parts of the Convention. Factors contributing to this renewed pressure included the desire for universal participation in a convention that in most respects was acceptable worldwide, improvements in the international political climate, changes in economic ideology that meant greater acceptance of free market principles, and the steady increase in the number of ratifications toward the 60 required to bring the convention into force.

In April 1993, the Clinton Administration announced it would actively participate in these consultations on the outstanding issues in the deep seabed portions of the Convention. On November 16, 1993, receipt by the U.N. Secretary-General of the 60th instrument of ratification/accession marked the start of the one-year waiting period after which the Convention would enter into force. The consultations led to adoption, on July 28, 1994, by the U.N. General Assembly of Resolution 48/263 (http://www.un.org/documents/ga/res/48/a48r263.htm), opening for signature an Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. The vote was 121 in favor (including the United States) to 0 against, with 7 abstentions (Colombia, Nicaragua, Panama, Peru, Russian Federation, Thailand, Venezuela) and 36 nations absent. The Agreement amended various seabed-related parts of the Convention.

On November 27, 2001, Ambassador Sichan Siv, U.S. Representative on the U.N. Economic and Social Council, made the following statement in the U.N. General Assembly:

The United States has long accepted the UN Convention on the Law of the Sea as embodying international law concerning traditional uses of the oceans. The United States played an important role in negotiating the Convention, as well as the 1994 Agreement that remedied the flaws in Part XI of the Convention on deep seabed mining. Because the rules of the Convention meet U.S. national security, economic, and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the Convention.

On April 8, 2002, in remarks at a U.N. meeting, U.S. ambassador Mary Beth West reiterated Administration support for U.S. accession to the Convention, noting "we intend to work with the U.S. Senate to move forward on becoming a party." (USUN Press Release 49). During hearings before the Senate Foreign Relations Committee, in October 2003, Administration witnesses supported U.S. adherence to the treaty, maintaining that "becoming a party to the convention represents a highest priority of the United States international oceans policy." (see Taft in S.Exec.Rept. 108-10, [http://lugar.senate.gov/sfr/seareport.pdf], p. 91.)


As of April 28, 2006, 149 entities (147 independent States, the Cook Islands, and the European Community) were parties to the 1982 Convention. At the same time, 123 entities (including the Cook Islands) were parties to the 1994 Agreement. (The Cook Islands are a self-governing dependency of New Zealand, not an independent state.) Current information on status of the Convention and Agreement may be obtained on the Internet at [http://www.un.org/Depts/los/index.htm].

A primary issue in 2006 continues to be the lack of U.S. action. This country did not adhere to the convention/agreement package by November 16, 1998, and thus no longer participates as a member of the International Seabed Authority. The United States lost its seats in the four bodies of the ISA. Although the Foreign Relations Committee reported favorably the treaty package on February 25, 2004, it was not taken up by the Senate and was returned to the Committee at the end of the 108th Congress. Among the questions to be considered are the following: will the amendments offered in the Agreement sufficiently alter the direction of the Convention's deep seabed mining provisions to make it acceptable to those who oppose U.S. ratification? What will be the Senate's response to the Administration's statements of support for U.S. accession because it meets "U.S. national security, economic, and environmental interests"? For details on the Committee's 2004

**The Convention and U.S. Interests**

The Law of the Sea Convention and the 1994 Agreement are extensive, complex documents touching on a wide range of policy issues and U.S. interests. From the perspective of the United States, some of the most significant areas addressed by the Convention deal with naval power and maritime commerce, coastal State interests, marine environment protection, marine scientific research, and international dispute settlement. The Agreement focuses on deep seabed mining issues, revising and nullifying key provisions of the Convention.

**Naval Power and Maritime Commerce Interests.** United States interests as a naval power provided the initial impetus for U.S. policymakers to promote law of the sea negotiations. The increasing number of claims made by other States over offshore high seas areas — such as territorial sea, fishing zones, economic zones — were expected to limit freedom of navigation to an unacceptable extent and increase the likelihood of international disputes over access to the world’s oceans. The Convention sets a 12-nautical mile territorial sea limit and a 200-nautical mile exclusive economic zone (EEZ), thereby establishing limits to areas over which States may claim jurisdiction. Equally important for freedom of navigation, the Convention protects high seas freedoms throughout the zone and innocent passage through the territorial sea, so long as such activities are not “prejudicial to the peace, good order or security of the coastal State.” The Convention lists 12 categories of activity viewed as non-innocent or prejudicial. Armed warships that do not engage in “prejudicial” activities are guaranteed the same right of innocent passage through the territorial sea as other ships. Submarine and other underwater craft are required, however, to navigate on the surface and show their flags.

The Convention further adopts an innovative concept — transit passage — for movement through straits used for international navigation that lie within the territorial seas of the adjoining States. Over 135 straits that may have been closed by the expansion of the territorial sea limit to 12 miles would be open to transit under this provision, benefitting both naval and commercial navigation. The United States conditioned its support of the 12-mile territorial sea limit on the inclusion of transit passage. Under this provision, all ships and aircraft may navigate or overfly for the purpose of continuous and expeditious transit of the strait. Since the Convention does not contain language specifically requiring submarines to surface, submarines may transit such straits submerged. States bordering straits may designate sea lanes and prescribe traffic separation schemes to promote safe passage of ships. All ships also have a right of innocent passage through archipelagic waters.

Opponents to U.S. adherence to the overall Convention argue that the United States already benefits from the Convention’s navigational provisions, on the basis of customary international law. The United States has already declared a 12-mile territorial sea limit and a 200-mile EEZ and is exercising its rights through a Freedom of Navigation Program, using diplomatic protests, operational challenges, and bilateral agreements to promote adherence to the naval and maritime obligations established in the Convention. It is therefore
unnecessary, say some critics, to adhere to the Convention to protect these interests. Proponents of the Convention maintain that adherence is a more effective and less costly way of preserving the obligations and rights set forth in the Convention under naval power and maritime commerce interests.

**Coastal State Interests.** As a coastal State, the United States has required assurances of access to both living and non-living resources in the offshore areas. The 1945 Truman Proclamation, claiming U.S. jurisdiction over U.S. continental shelf resources, has been viewed as the initial salvo in the explosion of claims made by coastal States around the world extending territorial seas and fisheries and economic zones in the years since. During the early years of the Conference, U.S. congressional attention revolved around efforts to establish a 200-mile U.S. fisheries zone, as adopted in the 1976 Fishery Conservation and Management Act, while at the same time seeking, internationally, to respond to the concerns of U.S. long-distance fishers.

The Convention provides that each coastal State may claim a 200-mile EEZ, in which it has "sovereign rights" over exploring, exploiting, conserving, and managing the natural resources — whether living or non-living — of the waters superjacent to the sea-bed and its subsoil. In the EEZ, the coastal State also has jurisdiction to regulate the establishment and use of structures for economic purposes, marine scientific research, and protection of the marine environment, within the EEZ. Military activities, recognized as high seas uses, are permitted in the EEZ beyond the 12-mile territorial sea, but other States should have "due regard" for coastal State resource and other rights in the zone.

**Protection of the Marine Environment.** The world’s oceans cover nearly 71% of the earth’s surface, contain 97% of the world’s water, and produce one-third to one-half of the global oxygen. The Convention has been called “the strongest comprehensive environmental treaty now in existence.” (Stevenson and Oxman, *The Future of the United Nations Convention on the Law of the Sea*, p. 496.) Under the Convention, States are to take measures to deal with all sources of pollution of the marine environment: a) from land-based sources, from or through the atmosphere, or by dumping; b) from vessels; c) from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil; and d) from other installations or devices operating in the marine environment (Article 194).

For land-based sources, which account for 80% of marine pollution, the Convention requires States to adopt laws and regulations to prevent, reduce, and control such pollution, taking into account internationally agreed rules, standards, and recommended practices and procedures. Rather than rely solely on flag States for enforcement of vessel source pollution rules, the Convention charges coastal States and port States, as well as flag States, to act against vessels suspected of violation of anti-pollution regulations within territorial or EEZ waters. Coastal State regulations, especially within the EEZ, must be in accordance with generally accepted international standards, specifically under the International Maritime Organization (IMO). Compliance with environmental standards under the Convention is subject to compulsory arbitration or adjudication. According to two former U.S. negotiators, “the coupling of compulsory arbitration and adjudication with environmental obligations ... is an ... advance over past practices.” (Stevenson and Oxman, *The Future of the United Nations Convention on the Law of the Sea*, p. 495.)
**Marine Scientific Research.** The Convention grants the coastal State jurisdiction over marine scientific research conducted within its EEZ and on its continental shelf and requires coastal State consent for the conduct of such research. As a result, some claimed that the prospects for U.S. marine scientists to gain increased access to other nations' offshore areas — the location of some of the most useful marine scientific research — would be limited. The Convention, however, includes certain obligations on the coastal State that, under normal circumstances, will grant consent for research by other States or competent international organizations. Such consent may not be delayed or denied unreasonably. The Convention includes an "implied consent" rule to promote prompt coastal State responses to requests for consent. Under this rule, work on a marine scientific research project may proceed six months after detailed information on the project has been provided by the foreign State or international organization unless, within four months of receipt of the information, the coastal State has informed the research project that, 1) it has withheld consent; 2) the information provided does not conform with the facts; 3) additional information is required; or 4) outstanding obligations exist from previous research projects.

**Dispute Settlement.** A number of legal experts believe that U.S. interests in a stable law of the sea are strengthened by the comprehensive compulsory dispute settlement provisions in the Convention. According to Professor Louis Sohn, this was the first time that such a conference "agreed to provide for the access of individuals and corporations to an international tribunal in their disputes with a state or international organization." The goal of the Convention is to promote compliance with its provisions and ensure that disputes are settled by peaceful means. It provides for the settlement of disputes that may arise from the interpretation or application of the Convention; it also includes a supplementary system for the settlement of disputes arising under Part XI of the Convention relating to deep seabed mining. The underlying principle in the Convention is that parties to a dispute can select by agreement any dispute settlement procedure they desire.

Compulsory dispute settlement, however, might be viewed as a two-edged sword. On the one hand, the United States may choose to use the process to resolve a particular dispute over application or interpretation of the Convention and thus force or encourage compliance with the Convention. On the other hand, other States might take the United States to the arbitral process over a dispute with U.S. interpretation or application of the Convention.

**Part XI and the 1994 Agreement: Deep Seabed Mining**

Sections of the Convention dealing with deep seabed mining include Part XI (The Area) and Annexes III (Basic Conditions of Prospecting, Exploration and Exploitation) and IV
(Statute of the Enterprise). Part XI sets forth a regime and international organizational structure to regulate a future use of the international ocean area beyond national jurisdiction. While various mining consortia have invested in exploration activities and prototype technology for deep seabed mining, economic viability is not yet sufficient to warrant commercial recovery from deep seabed mining anytime soon. Thus, the international regime and institutions provided for in the Convention/Agreement package apply to an international activity not yet taking place.

The concept underlying the regime is called the “common heritage of mankind,” a phrase used by the Convention when referring to this area and its resources. Under this concept, no State may claim or exercise sovereignty or sovereign rights over any part of the area or its resources and all rights in the resources of the area are vested in mankind as a whole.

The International Seabed Authority (ISA), composed of all States parties to the Convention, may administer the seabed mining regime. The Convention establishes three principal organs of the Authority: the Assembly, Council, and Secretariat. The Assembly is the plenary body composed of all ISA members; it elects the Council and Secretary-General, assesses contributions, gives final approval to the rules and regulations of the Authority, approves the budget, and decides on sharing of mining revenues received by the Authority. The Council, made up of 36 members, is the executive body of the ISA and has primary responsibility for administering the regime.

As negotiations on the Convention were concluded and treaty language was finalized in the spring of 1982, the U.S. Administration decided that Part XI and Annexes III and IV were contrary to U.S. interests in many important ways:

- the decisionmaking process of the ISA Council and Assembly would not give the United States or other western industrialized countries influence commensurate with their interests;
- the “Review Conference” provisions would allow Convention amendments to enter into force without express U.S. approval;
- provisions required the mandatory transfer of private technology;
- some provisions would deter rather than promote future development of deep seabed mineral resources by incorporating economic principles inconsistent with free market philosophy;
- absent were guarantees for assured access to future qualified deep seabed mineral resources; and
- some provisions set undesirable precedents for international organizations.

As a result of consultations conducted by the U.N. Secretary-General since 1990, an agreement responding to the objections made by the United States and other industrialized countries was negotiated. The 1994 Agreement relating to implementation of Part XI of the United Nations Convention, and its accompanying Annex, is considered an integral part of the Convention package that entered into force on November 16, 1994. In the event of inconsistencies, the Agreement and Annex language take precedence over Convention language. The Annex contains the substantive changes to Part XI and Annexes III and IV of the Convention, while the Agreement defines the legal relationship between the Convention and Agreement, explains the ways in which States may consent to be bound by
the Agreement, and sets the terms of entry into force of the Agreement and its provisional application.

A major concern of nations agreeing to international conventions in the 1990s is that newly created international bureaucracies be kept small and that costs be kept to a minimum. This is especially important for the ISA whose primary reason for existing — deep seabed mining — does not yet take place. The Annex begins by stating that the principle of cost-effectiveness shall govern all organs and subsidiary bodies, including the frequency, duration, and scheduling of meetings. The second principle stated in the Annex is that the establishment and functioning of the Authority shall be based on an evolutionary approach, taking into account the functional needs of the organs and bodies concerned.

Application of these principles in the Annex can be illustrated with three examples. In keeping with the need to track closely the financial implications, the Annex sets up a 15-member Finance Committee, which must include representatives of the five largest financial contributing nations to the ISA administrative budget. This Committee will consider any financial or budgetary issues and, operating by consensus, make recommendations to the Council and Assembly. Second, the Annex provides that an Economic Planning Commission (EPC), set up by the Convention with functions that assumed mining was occurring, will not come into being until the Council decides so sometime in the future. The EPC functions were delegated in the interim to the Legal and Technical Commission, set up under the Convention. Finally, the Annex provided that the ISA would adopt the “rules, regulations and procedures necessary for the conduct of activities in the Area as they progress.” Such rules “shall take into account the terms of this Agreement, the prolonged delay in commercial deep seabed mining and the likely pace of activities in the Area.”

**ISA Decisionmaking.** Among the issues thought to be objectionable in the Convention, as originally adopted, was the lack of adequate influence by the United States and other industrialized countries over the decisions taken by the ISA Assembly and Council and the absence of language guaranteeing the United States a seat on the Council. The Annex provides that all substantive decisions of the Assembly shall be taken only upon recommendation of the Council and/or Finance Committee; if the Assembly does not accept the Council’s recommendation, the matter is returned to the Council for further consideration. The United States is now guaranteed a seat on the Council, in perpetuity. Further, the Annex changes the decision-making structure of the Council to ensure that industrialized States can make up a blocking vote.

**Review Conference.** Section 4 of the Annex eliminated the Review Conference language in the Convention, providing instead that States parties may decide to review the Convention at any time, rather than after 15 years, and that any amendments resulting from
that review will be subject to the normal procedures for amendment set forth in the Convention. The special Review Conference language would have enabled entry into force for all parties of amendments after ratification by only three-fourths of the parties.

**Technology Transfer.** Section 5 of the Annex states that the mandatory technology transfer provisions in Article 5 of Annex III of the Convention "shall not apply." Section 5 replaces those provisions with a set of general principles on the issue of technology transfer.

**Obstacle to Development.** Concerns that the Convention would deter rather than promote future development of deep seabed mineral resources and that assured access to mining by qualified entities would be denied are addressed in the Annex at Sections 2, 6, and 8, respectively, which

- terminates the provision on production limits of seabed-based mining in order to protect land-based production;
- replaces elaborate and expensive (including an annual fixed fee of $1 million) financial terms of contract, with a set of principles, and reduces the $500,000 application fee to $250,000; and
- modifies Annex IV of the Convention so that the Enterprise would become operational only upon a decision of the Council. The Enterprise would be subject to the same obligations applicable to other miners, and the Enterprise would conduct its initial operation through joint ventures. The special privileges accorded to the Enterprise under the Convention are eliminated.

**Adherence to the Agreement and the Convention**

The Agreement was open for signature for a 12-month period, ending July 28, 1995. After that date, any ratification, formal confirmation of, or accession to the Convention is automatic consent to be bound by the Agreement. Since the Agreement's purpose is to promote universal participation in the Convention, the Agreement used several ways to achieve consent to the Agreement. At the same time, consent language also had to respond to the legal requirements of the 60-plus States that had already ratified or acceded to the Convention as well as to those States that had not ratified or acceded to the Convention. The Agreement had to take effect as the Convention entered into force so as to maintain the integral link between the two. The link required use of provisional application as a procedure for operation of the Agreement.

The Agreement was applied provisionally between November 16, 1994 and July 28, 1996, when it entered into force. For each country, provisional application was "in accordance with ... national or internal laws and regulations." Provisional application of the Agreement terminated when it entered into force on July 28, 1996. States that had not ratified the Agreement by July 28, could continue membership in the ISA on a provisional basis (1) through November 16, 1996, if they notified the U.N. of their intention to participate in the ISA as a member on a provisional basis; and (2) through November 16, 1998, if a request for extension of membership in ISA on a provisional basis beyond 1996 is approved by the ISA Council. Thereafter, if a provisional member fails to pay its assessed contributions or to comply with its other obligations, its membership on a provisional basis shall be terminated (see Agreement, Annex, Section 1, para. 12).
The United States announced, when it signed the Agreement on July 29, 1994, that “it intends to apply the agreement provisionally. Provisional application by the United States will allow us to advance our seabed mining interests by participating in the International Seabed Authority from the outset to ensure that the implementation of the regime is consistent with those interests.” On July 17, 1996, the United States notified the U.N. of “its intention...to continue to participate as a Member of the International Seabed Authority on a provisional basis....” This notification was followed by a U.S. request to the ISA Council for an extension of its provisional membership in the Authority until November 16, 1998. The diplomatic note continued, “The United States wishes to inform the Council and the Authority that it will continue to make good faith efforts to become a Party to the Agreement and the Convention.”

Issues for the Senate

A number of issues may arise during any Senate consideration of the 1982 Convention. Fundamental is the question of whether the 1994 Agreement “fixes” the deep seabed portions of the Convention that were at the core of opposition to the original document. Other issues likely to draw Senate attention include:

- the dispute settlement process set forth in the Convention and the U.S. declarations on dispute settlement;
- the relationship between U.S. law and various parts of the Convention regarding use of the world’s oceans;
- U.S. acceptance of the Convention/Agreement interpretation and application of the common heritage of mankind concept;
- the provisional application procedures as a precedent in the U.S. treaty process;
- the nature of U.S. commitments undertaken by a decision of the ISA Council: what does a Council decision commit the U.S. government to do;
- should Congress have a role and if so, under what circumstances? and the cost and financing of the ISA and U.S. participation therein, now and in the future.

Is the Convention Really “Fixed”? The Clinton Administration maintained that the Agreement eliminates or modifies the institutional and economic and commercial objections of the United States and other industrialized nations to the Convention’s deep seabed provisions. The burden of proof that the Convention is “fixed” would appear to reside with the Administration and with those like-minded experts from the various interest groups affected by the Convention. The Clinton Administration suggested that only active U.S. participation in the Convention/Agreement and in the organs and bodies established by them would ensure that the protections and understandings established by the Agreement/Annex are applied and strengthened.

Some critics, however, still contend that the Convention is not “fixed,” especially to the extent it still represents a “giveaway” to developing nations. In countering this view, proponents would cite a number of changes made in the Agreement:
• financing of Enterprise mining efforts would no longer be subsidized by mining States;
• specific mandatory requirements for transfer of technology to the Enterprise or to developing nations have been removed;
• specific requirements protecting land-based minerals producers (mostly developing countries) are no longer applicable; and
• onerous fees for mining by non-Enterprise entities are no longer required.

Opponents, however, would point to other provisions that remain. For example, the Convention contains language directing that, as a matter of policy, activities in the international Area should take into “particular” consideration the interests and needs of developing States (Article 140, para. 1). Article 140 of the Convention urges promoting the participation of developing States in activities in the Area. Article 150, on policies relating to activities in the Area, seeks to ensure the expansion of opportunities for participation in deep seabed mining, participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States, and protection of developing countries from adverse effects on their economies (Article 150 (c), (d), (g), and (h)). Section 5, para. 1(b) of the Agreement urges contractors and their respective sponsoring States to cooperate with the ISA in facilitating access to technology by the Enterprise or its joint venture, or by the developing State. In addition, the Agreement provides for establishment of an economic assistance fund for those developing countries suffering serious adverse effects to their land-based production of minerals due to seabed mining operations (Section 7). Opponents argue that the combined effect of these provisions is to preserve a special status for developing States, at the expense of the United States and other industrialized nations and their companies.

**Compulsory Dispute Settlement.** The Senate has sometimes been reluctant to accept broad compulsory dispute settlement language in treaties pending before it. For example, after nearly 15 years of off-and-on debate, the Senate, in 1935, rejected U.S. adherence to the 1920 Statute of the Permanent Court of International Justice (PCIJ), the judicial arm of the League of Nations. In 1946, when the Senate gave its advice and consent to U.S. ratification of the Statute of the International Court of Justice (ICJ) and acceptance of the compulsory jurisdiction of the Court (under Article 36, paragraph 2 of the Statute), it added the words “as determined by the United States” (the Connally reservation) to indicate the United States would determine whether a question was within its domestic jurisdiction and thus beyond the jurisdiction of the World Court. (This Article 36 declaration was withdrawn, effective April 1986, by the executive branch.) In May 1960, the Senate considered the four 1958 Law of the Sea Conventions and an Optional Protocol providing for the compulsory jurisdiction of the ICJ in disputes over the interpretation or application of the conventions. The Senate rejected the Optional Protocol.

This concern that the United States maintain control over what actions might be taken against it, internationally, was reenforced during the last months of 1994, during congressional consideration of the Uruguay Round GATT agreements, the World Trade Organization, and its dispute settlement procedures. As a potential complaining party, the United States wanted a strengthened and expedited process; however, as a potential subject of a complaint, the United States wanted to protect its sovereign control over its own enacted laws and interests.
The 1982 Law of the Sea Convention was, in 1982, considered unusual in international law for providing a comprehensive compulsory dispute settlement system. At the same time, the system’s flexibility of fora available for States parties to use makes it more acceptable to the United States. The Administration recommended submitting a written declaration choosing special arbitration under Annex VIII as the means for settling disputes concerning the interpretation or application of the Convention relating to fisheries, protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and by dumping. Under Annex VIII, each party to the dispute appoints two members of a special five-member arbitral tribunal and the parties to the dispute agree to the fifth member of the tribunal who serves as President. For disputes not covered by Annex VIII, the Administration recommended acceptance of an arbitral tribunal under Annex VII, that provides that each party to the dispute appoint one member of a five-person arbitral tribunal and that the remaining three be appointed by agreement between the disputants. In both these options, the United States would have some flexibility in determining those involved as tribunal members.

The Administration also recommended the United States opt out of the three binding dispute settlement procedures where exclusion is permissible: disputes concerning maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes under consideration by the U.N. Security Council, under the U.N. Charter. The Administration seems to have recognized the tendency of the Senate to protect what it considered as encroachments over U.S. sovereignty by recommending a course of action that would give the United States the greatest degree of flexibility in accepting compulsory dispute settlement.

**Convention and U.S. Law.** In the interim period between 1994 and 2003, questions concerning the relationship between the various parts of the Convention and the body of current U.S. law appear to have been worked out. Two pieces of legislation — the Fishery Conservation and Management Act and the Deep Seabed Hard Mineral Resources Act — had been enacted as interim measures prior to entry into force of a Law of the Sea Convention. Secretary of State Warren Christopher, in his 1994 letter to the President, noted that “the Department, along with other concerned agencies, stands ready to work with Congress toward enactment of legislation necessary to carry out the obligations assumed under the Convention and Agreement and to permit the United States to exercise rights granted by the Convention” (Treaty Document 103-39, [http://lugar.senate.gov/sfrc/presidentialmessage.pdf], p. xi). Correspondence from Secretary Christopher to the Committee in 1996 indicated that a review of existing laws had led to a “determination that implementing legislation is not necessary before United States accession.” In October 2003, the State Department’s Legal Adviser, William Taft, stated that that circumstance had not changed (S.Exec.Rept. 108-10, [http://lugar.senate.gov/sfrc/seareport.pdf], p. 176 and p. 22).

**Common Heritage.** If it becomes a party to the Convention, the United States accepts that “The Area and its resources are the common heritage of mankind.” At issue is how the Convention, as modified by the Agreement, defines and interprets that concept, as applied against the deep seabed beyond national jurisdiction. The State Department position is that “the Agreement, by restructuring the seabed mining regime along free market lines, endorses the consistent view of the United States that the common heritage principle fully comports with private economic activity in accordance with market principles” (Treaty Document 103-39, [http://lugar.senate.gov/sfrc/presidentialmessage.pdf], p. 61). Opponents
to the Convention, in particular deep seabed mining interests, might argue that in the absence of a complete restructuring of Part XI to eliminate the Enterprise and even, perhaps, the Authority, mining under the common heritage concept as defined in the Convention/Agreement package is still impossible.

**Provisional Application.** Provisional application is a major vehicle for the incorporation of the Agreement into the Convention package and for the Agreement's operation pending its entry into force. While provisional application is not a new procedure, it is not commonly used. Article 25 of the 1969 Vienna Convention on the Law of Treaties recognizes the procedure. A 2001 Senate study observes,

> In the United States, provisional application of a treaty may be subject to question especially if it gives temporary effect to a treaty prior to its receiving the advice and consent of the Senate. An agreement to apply a treaty provisionally is in essence an executive agreement to undertake temporarily what the treaty may call for permanently. (Treaties and Other International Agreements: The Role of the United States Senate, S.Prt. 106-71, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf], 2001, pp. 113-114.)

Thus, provisional application of the agreement and U.S. participation in the International Seabed Authority, including the funding for such participation, might be viewed as bypassing or circumventing the role of the Senate in giving its advice and consent to U.S. adherence to a treaty.

Opponents have cited the provisional application process in this instance as one through which the United States has “committed ... to the terms of the Law of the Sea Treaty for up to four years — even if the Senate never ratifies the Treaty. This may violate the State Department Basic Authorities Act of 1956 (22 U.S.C. § 2672).” (Representative Fields, Current Status of the Convention on the Law of the Sea, Hearings, August 11, 1994, p. 5.) The State Department cites Section 5(a) of the same Act, as amended, as authorizing U.S. participation in “international activities ... for which provision has not been made by ... treaty”, with the proviso that such authority is not granted for more than one year without approval of Congress. The Department further states that section 5(a) “has been construed to allow participation on a provisional basis in succeeding years if the Congress approves a budget submission containing a line item covering the activity in question for each such year.”

**Commitments.** An issue raised in Congress, and particularly in the Senate, revolves around the extent to which U.S. participation in a decision of a U.N. body — in this case the U.N. Security Council and its votes on U.N. peacekeeping — might commit the United States to expend funds and provide personnel for an action not approved by Congress. Some in Congress might want to institute consultations and reporting requirements on the decisions taken in the International Seabed Authority and its organs and bodies, especially its Council.

**Funding.** Another vehicle for congressional tracking of the International Seabed Authority and the operation of the Convention/Agreement deep seabed regime is through funding the U.S. contribution to the ISA. U.S. policy between December 1982 and Fiscal Year 1994 was to withhold the proportionate (25%) share of the U.N. regular budget that financed the cost of the Preparatory Commission (PrepComm) and Secretariat support for
the PrepComm. If the overall cost of Convention implementation remains modest, as seems to be the intent in the Agreement/Annex, Section 1, funding a future U.S. contribution might not be onerous. Any significant increases might signal increases in bureaucracy and infrastructure that Congress might wish to investigate or at least question the executive branch.

The cost of Convention implementation, including the ISA, was budgeted at $776,000 for the period November 16, 1994-December 31, 1995. The ISA budgets for 1996 and 1997 were funded from the U.N. regular budget. The 1998 budget of $4.7 million was the first to be financed from the assessed contributions of its members, including any provisional ISA members. Congress did not provide the $1,225,000 requested for FY1998, for calendar 1998 assessments, on the basis that the United States had not adhered to the convention. On September 14, 1998, the State Department submitted to Congress a reprogramming request for the transfer of $1,224,975 in FY1998 funds from the State Department Contributions to International Organizations (CIO) account to the Diplomatic and Consular Programs account. The chairman of the House State Department Appropriations subcommittee, on September 27, 1998, rejected this request on the grounds that "it is difficult to rationalize payment of funds for provisional membership in an organization in which the U.S. is not likely to become a member." The Administration was unsuccessful in its request of $1.5 million for 1999 calendar year assessments in the FY1999 State Department budget submission and did not include funds in its future requests. However, the U.S. contribution for calendar year 1998 assessments was paid to the ISA in September 2002.

During testimony in October 2003, State Department officials indicated that the annual U.S. contributions to the Convention’s institutions would be “about three million dollars, paid to the Law of the Sea Tribunal and the International Seabed Authority from the … Department’s Contributions to International Organizations account.” Legal Adviser William H. Taft specified that the U.S. contribution to the 2003-2004 biennial budget of the ISA would be “just over $1 million” and the 2004 assessment for the International Tribunal would be “a little less than $2 million (24% of the total budget) and 22% of the total for the 2005-2006 budget years.” (S.Exec.Rept. 108-10, [http://lugar.senate.gov/sfrc/seareport.pdf], pp. 86, 94)

Since the Senate did not give its advice and consent to U.S. adherence to the Convention/Agreement package, the United States did not ratify or accede to the treaty before November 16, 1998. On that date, when provisional membership ended, the United States became an Observer state to the Authority. This meant loss of the seats it held on the ISA Council, Legal and Technical Commission, and Finance Committee, as well as the Assembly. These were seats secured as a result of the 1994 Agreement amendments and considered among the major issues of U.S. concern regarding the Convention. When the ISA convened in August 1999, Italy was elected to replace the United States on the Council.
CONGRESSIONAL HEARINGS, REPORTS, AND DOCUMENTS


CHRONOLOGY

06/08/04 — The Senate Select Committee on Intelligence held a hearing on the Law of the Sea Convention.

05/12/04 — The House International Relations Committee held hearings on the U.N. Convention on the Law of the Sea.

03/23/04 — The Senate Environment and Public Works Committee held hearings on the Law of the Sea Convention.

04/08/04 — The Senate Armed Services Committee held hearings on the military implications of the U.N. Law of the Sea Convention.


09/02/99 — President Clinton signed a proclamation expanding the U.S. contiguous zone from 12 to 24 nautical miles, thereby increasing the area within which U.S. authorities can enforce customs, fiscal, immigration, and sanitary laws and regulations.
05/05/98 — Four Senators (John McCain, Olympia Snowe, John Chafee, and Frank H. Murkowski) in a letter to Chairman Jesse Helms "urged favorable consideration of the Convention on the Law of the Sea by the Senate Committee on Foreign Relations as soon as possible."

10/01/96 — The International Tribunal for the Law of the Sea became operational, with the 21 judges being formally sworn in on October 18, 1996.

07/28/96 — The 1994 Agreement entered into force.

06/00/96 — The International Seabed Authority became fully operational, having come into existence on November 16, 1994.

10/07/94 — President Clinton sent Convention/Agreement package to the Senate (Treaty Doc. 103-39).


11/16/93 — The 60th instrument of ratification was received by the United Nations, thereby triggering entry into force one year later.

12/27/86 — President Reagan extended the U.S. territorial sea from three to 12 nautical miles.

03/10/83 — President Reagan established a U.S. Exclusive Economic Zone extending 200 nautical miles beyond the coasts and issued an oceans policy statement relating to the United States and the U.N. Convention.

12/10/82 — The U.N. Convention on the Law of the Sea was opened for signature until December 9, 1984, and signed by 119 entities. The United States signed only the Final Act of the Conference.

04/30/82 — The Conference voted 130 in favor and 4 (Israel, Turkey, United States, and Venezuela) against, with 17 abstentions, to adopt the Convention.

12/03/73 — First session of the Third U.N. Conference on the Law of the Sea convened, starting a process that ended nine years later, on December 10, 1982.

FOR ADDITIONAL READING

Available at [http://www.cato.org/pub_display.php?pub_id=5124].


http://www.cato.org/testimony/ct-db040408.html

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before the
United States Senate
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The Law of the Sea Treaty: Inconsistent With American Interests

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More than two decades of negotiation culminated in 1982 when the Third United Nations Conference on the Law of the Sea (UNCLOS) approved the Law of the Sea Treaty. The U.S. was not among the 117 nations (and two other delegations) that penned their approval of the treaty. American opposition was not without effect, however: the LOST failed to gain the 60 ratifications necessary to take effect. Even the Soviet Union, which had proudly proclaimed its solidarity with the developing nation lobby pushing the treaty, did not formally bind itself.

What is the LOST?

The genesis of the treaty was President Truman's 1945 proclamation asserting U.S. jurisdiction over America's continental shelf, and similar extensions of national control by other states. The First UNCLOS was opened in 1958; it drafted conventions dealing with resource jurisdiction and fishing. UNCLOS II convened in 1960 to take up unresolved fishing and navigation issues. Soon thereafter the possibility of seabed mining led the United Nations to declare the seabed to be the "common heritage of mankind." A Seabed Committee was established, eventually leading to UNCLOS III, which first met in 1973. Nine years and eleven sessions later a treaty was born.

The LOST, which runs 175 pages and contains 439 articles, covers seabed mining, navigation, fishing, ocean pollution, marine research, and economic zones. Much of the treaty is unobjectionable, or at least unimportant when in error; the navigation sections are a modest plus. But not so Part 11, as the Orwellian provisions governing seabed mining are called. So flawed was this section that it could be fixed only by tearing it up.

The LOST's fundamental premise is that all unowned resources on the ocean's floor belong to the people of the world, meaning the United Nations. The U.N. would assert its control through an International Seabed Authority, ruled by an Assembly, dominated by poorer nations, and a Council (originally on which the then-U.S.S.R. was granted three seats), which would regulate deep seabed mining and redistribute income from the industrialized West to developing countries. The Authority's chief subsidiary would be the Enterprise, to mine the seabed, with the coerced assistance of Western mining concerns, on behalf of the Authority.

Any extensive international regulatory system would likely inhibit development, depress productivity, increase costs, and discourage innovation, thereby wasting much of the benefit to be gained from mining the oceans. But the byzantine regime created by the LOST is almost unique in its perversity. Unfortunately, the amendments made in 1994, which I discuss below, do not change the essential character of the treaty.

For instance, as originally written, the treaty was explicitly intended to restrict, not promote, mineral development. Among the treaty's objectives were "rational management," "just and stable prices," "orderly and safe development," and "the protection of developing countries from the adverse effects" of minerals
production. The LOST explicitly limited mineral production, authorizing commodity agreements (rather like OPEC). Further, the treaty placed a moratorium on the mining of other resources, such as sulphides, until the Authority adopted rules and regulations -- which could be never.

The process governing mining reflected this anti-production bias. A firm had to survey two sites and turn one over gratis to the Enterprise even before applying for a permit, in competition with the favored Enterprise and developing states. The Authority could deny an application if the firm would violate the treaty's antitrust and antimonopoly provisions, aimed at U.S. operators. And the Authority's decisions in this area were to be set by the Legal and Technical Commission, the membership of which could be stacked, and the 36-member Council, which would be dominated by developing states, making access for American firms dependent upon the whims of countries that might oppose seabed mining for economic or political reasons.

Who Would Want to Bid?

Indeed, it is not clear that a firm would have wanted to bid even if it thought it could win approval. The convention required that private entrepreneurs transfer their mining technology to the Authority, for use by the Enterprise and developing states. The term technology was so ill-defined that the Authority might be able to claim engineering and technical skills as well as equipment, yet the treaty imposes no effective penalties for improper disclosure or misuse of transferred technology. Miners would also have to pay their overseer, the Authority, and competitor, the Enterprise: $500,000 to apply, $1 million annually, plus a royalty fee. The sponsoring country would be responsible if a firm failed to pay; moreover, the industrialized West would have to provide interest-free loans and loan guarantees, for which Western taxpayers would be liable in the event of a default, to the U.N.'s mining operation.

All told, the Enterprise would enjoy free mine site surveys, transferred technology, and Western subsidies. The Enterprise also, naturally, would be exempt from Authority taxes and royalty payments. Also favored are developing states and 105 "land-locked and geographically disadvantaged" countries.

Even this attenuated right to mine the seabed could have been dropped at the Review Conference to be held to assess the LOST 15 years after the commencement of commercial operations if three-fourths of the member states so decided. The mere possibility of Third World states effectively confiscating potentially enormous investments made over more than a decade would have discouraged potential private entrepreneurs. That, in turn, would have given the well-pampered Enterprise and likely state-subsidized firms of developing states a further advantage.

Admittedly, such practical objections might seem of little import since the promise of seabed mining is far less bright today than it was when UNCLOS convened, but operations might still become economically feasible later this century, especially as technological innovation makes the mining process less expensive. But even if no manganese nodules are ever likely to be lifted commercially from the ocean's floor, the LOST remains unacceptable because of its coercive, collectivist underpinnings.

The New International Economic Order

UNCLOS III was held in a different era, a time when communism reigned throughout much of the world, Third World states were proclaiming socialism to offer the true path to progress and prosperity, and international organizations were promoting the "New International Economic Order," or NIEO, to engineer massive wealth redistribution from the industrialized to the underdeveloped states. Indeed, much of the LOST, particularly regarding seabed mining, was dictated by the so-called Group of 77, the developing states' lobby.

These nations saw the LOST as the leading edge of a campaign that included treaties covering Antarctica and outer space, expanded bilateral and multilateral aid programs, and a veritable gallery of UN alphabet-soup agencies -- CTC, ILO, UNCTAD, WHO, and WIPO. Commented former Malian U.N. Ambassador Arvid Pardo, who coined the phrase, "common heritage of mankind," American acceptance of the sea treaty
"however qualified, reluctant, or defective, would validate the global democratic approach to decision making."

Economic reality eventually hit many poorer states. Developing states began to adopt market reforms and the NIEO disappeared from international discourse, along with any mention of the LOST.

Although American ratification of the LOST would not be enough to resurrect the NIEO, it would nevertheless enshrine into international law some very ugly precedents. One is that the nation states (not peoples) of the world collectively own "all the unclaimed wealth of this earth," in the words of former Malaysian prime minister Mahathir Min Mohamad. Granting ownership and control to petty autocracies with no relationship to the resource and nor any ability to contribute to their development makes neither moral nor practical sense. The LOST raises to the status of international law self-indulgent claims of ownership to be secured through an oligarchy of international bureaucrats, diplomats, and lawyers. And the treaty's specific provisions, mandating global redistribution of resources, creating a monopolistic public mining entity, restricting competition, and requiring the transfer of technology, reflect the sort of statist panaceas that were discredited by the historical wave that swept away Soviet-style communism and lesser socialist variants around the globe.

**Countervailing Benefits?**

Some observers acknowledged the treaty's failings, but nevertheless contended that it had more than enough positive benefits to warrant signing. However, gains in other areas are limited at best. Many of the non-seabed provisions are marginally beneficial, while a number are somewhat harmful. Sections governing fishing and maritime research, for instance, make few changes in current law; the boundary-setting process strips some resources away from the U.S.; the pollution provisions restrict America's ability to control some emission sources; and the U.S. might eventually have to share oil revenues from development of the outer-continental shelf. The treaty's authorization of 200-mile exclusive economic zones (EEZs) merely reflects what has become customary international law.

Perceived as far more important are the navigation provisions. A number of officials at both the Departments of State and Defense have argued that the document is vital to guarantee American naval rights. Yet Washington's refusal to sign the LOST left critics predicting chaos and combat on the high seas two decades ago -- since then we have witnessed not one incident as a result of America's failure to join the LOST.

Nor is the treaty unambiguously favorable to transit rights. The document introduces some new limitations on navigation involving the EEZs, territorial seas, and water surrounding archipelagic states. At other times the LOST's language is ambiguous -- regarding transit rights for submerged submarines, for instance -- limiting the value of the treaty guarantee. International law analyst Gary Knight even argues that "the difficulty of establishing our legal right to EEZ navigation and submerged straits passage would be no more difficult under an existing customary international law argument than under the convoluted text of the proposed UNCLOS." In short, there is only modest theoretical advantage in this area for which to trade away the mining provisions.

Moreover, any LOST legal protections offer little by way of real practical gain. Few nations are likely to interfere with commercial shipping because they have far more to gain economically from allowing unrestricted passage. Where countries perceive their vital national interests to be at stake -- Great Britain in World War I and Iran and Iraq during their war throughout the 1980s -- they are not likely to allow juridical niceties to stop them from interdicting or destroying international commerce. Even unambiguous rights under international law did not protect American vessels and aircraft when North Korea seized the USS Pueblo and China held the EP-3 surveillance plane. Most coastal nations will make policy based on perceived national interest more than abstract legal norms.

Indeed, LOST membership has not prevented Brazil, China, India, Malaysia, North Korea, Pakistan, and others from making ocean claims deemed excessive by some. In testimony last October Adm. Mullen warned
that the benefits he believed to derive from treaty ratification did not "suggest that countries' attempts to restrict navigation will cease once the United States becomes a party to the Law of the Sea Convention."

As for military transit, with or without the LOST, America needs to concentrate on maintaining good relations with the handful of strategically-placed countries. The prowess of the U.S. Navy, not the LOST, will remain the ultimate guarantor of America's ability to roam the seas. Of course, even with friendly states Washington would prefer not "to have to use muscle to exercise our rights," observed former LOST negotiator Elliot Richardson. But the treaty is likely to matter only where countries have neither the incentive nor the ability to interfere with U.S. shipping. Moreover, in a world in which the U.S.S.R. has disappeared, the Red Navy is rusting in port, China has yet to develop a blue water navy, and Third World conflicts no longer threaten America through their connection to the Cold War, Washington is rarely going to have to send its fleet where it is not wanted.

Another concern is the impact of LOST on the President's Proliferation Security Initiative. Although treaty advocates suggest that the LOST would provide an additional forum through which to advance the PSI, it seems more likely that adherence to LOST would constrain Washington's ability to intercept weapons shipments which are problematic, even if legal under international law, including the treaty. After all, any anti-proliferation policy treats nations differently based upon a subjective assessment of the stability and intention of a particular regime. The LOST makes no such distinctions. At best, the treaty is ambiguous regarding the seizure of WMD shipments. Adopting such ambiguity probably does not strengthen Washington's position.

Further, treaty advocates contend that whatever the faults of LOST, only participation in the treaty can prevent future damaging interpretations, amendments, and tribunal decisions. However, there is no guarantee that interpretations under the LOST would not impinge upon U.S. military activities. In his Senate testimony last fall, State Department legal adviser William H. Taft IV noted the importance of conditioning acceptance "upon the understanding that each Party has the exclusive right to determine which of its activities are 'military activities' and that such determination is not subject to review." Whether other members will respect that claim is not so certain. Adm. Michael G. Mullen, the Vice Chief of Naval Operations, acknowledges the possibility that a LOST tribunal could assert jurisdiction and rule adversely, impacting "operational planning and activities, and our security."

Moreover, American friends and allies, both in Asia and Europe, have an incentive to protect American navigational freedom. So long as the U.S. maintains good relations with them -- admittedly a more difficult undertaking because of strains in the aftermath of the war in Iraq -- it should be able to defend its interests indirectly through surrogates. If the nations which most benefit from American navigational freedom are unwilling to aid the U.S. while Washington is outside the LOST, they are unlikely to prove any more steadfast if Washington is inside the LOST.

Collectivism or Chaos?

The final argument on behalf of the LOST is that no matter how unfavorable it may be for international mining, it is better than nothing. Without some security of tenure to deep sea mining sites, it is said, companies will not invest the millions necessary to begin operations. Certainly firms will not take the potentially enormous risks of such a new venture if they might face conflicting claims under a competing treaty and regulatory regime.

However, most businessmen understand that it makes little difference whether or not, say, Zimbabwe recognizes their right to harvest manganese nodules in the Pacific. Indeed, given the dynamics of seabed mining, it probably doesn't even matter if other industrialized nations, with firms capable of mining the ocean floor, recognize one's claim. The seabed's irregular geography and surplus of nodules make "poaching" uneconomical -- it would make more sense to develop a new site rather than attempt to overrrun someone else's. The dynamics of other resource development vary to some degree, but in general it would have been quite simple to build a simple alternative to the LOST.
In 1980 the U.S. passed unilateral legislation, The Deep Seabed Hard Minerals Act, to provide interim protection for American miners until implementation of the LOST. The Act could have been amended to create a permanent process for recording seabed claims and resolving conflicts. Such legislation could then have been coordinated with that of the other leading industrialized states through a formal treaty. No international bureaucracy was ever necessary.

In the end, a bad treaty is worse than no treaty. Back when the LOST was a major political issue, the American Mining Congress observed:

While the best of all worlds would be a comprehensive, universally acceptable treaty, a treaty such as the current UNCLOS draft that fails to protect American interests is no basis for investment. We can easily do without the "comprehensive" and "universal," but we cannot do without "acceptable."

A Window that Should Remain Closed

Despite predictions of doom after the U.S. refused to sign the treaty, the world moved America's way. As mineral prices declined, so did too the prospects of massive mineral harvests from the seabed. Third World states that had begun planning on how to spend the windfall they expected to collect through the UN began to face reality. And as developing countries started experimenting with market economics, they backed away from the collectivist NIEO, of which the LOST had been an integral part. By the early 1990s some Third World diplomats were privately admitting to U.S. officials that the Reagan administration had been right to kill the treaty.

But in Washington bad ideas never die. They simply lie dormant, waiting for a sympathetic bureaucrat or politician to revive them. Moreover, international treaties attract State Department negotiators like lights attract moths. Thus, the Clinton administration decided to "fix" the LOST.

Negotiations followed in 1993 and 1994. After winning a few changes in the treaty's most burdensome provisions, the State Department enthusiastically endorsed the agreement. On July 27, 1994 before the UN General Assembly U.S. Ambassador Madeleine Albright praised the LOST for providing "for the application of free market principles to the development of the deep seabed" and establishing "a lean institution that is both flexible, and efficient. Two days later Washington formally affixed its signature to the convention, which now sits before the Senate for ratification.

Although the revised LOST is not as bad as its predecessor, it would still create a Rube Goldberg system -- with International Seabed Authority, Enterprise, Council, Assembly, and more -- that is guaranteed to become yet another multilateral boondoggle. Its performance so far has been mixed at best: For instance, the ISA has been on the losing end of fights with the government of Jamaica when the latter turned off the ISA's air conditioning. With no seabed mining in the offing, protecting "the emblem, the official seal and the name" of the ISA, as well as abbreviations of that name through the use of its initial letters," has been a matter of some concern to authority officials.

A fully-functioning ISA is likely not only to waste money, but also to discourage ocean minerals production. Moreover, the treaty would resurrect the redistributionist lobbying campaign once conducted by developing states unwilling to deal with the real causes of their economic failures. Indeed, the LOST would essentially create another UN with the purpose of transferring wealth from industrialized states to the Third World voting majority.

Of course, treaty proponents all say that the treaty was "fixed." Actually, that's not the case. For instance, the treaty still includes an Authority, Enterprise, Assembly, Council, revenue sharing, international royalties, Western subsidies for the Enterprise, a Council veto for land-based minerals producers, and the like. The original statist framework remains. Even the State Department has acknowledged that the new "Agreement retains the institutional outlines of Part XI."
The Clinton administration did work hard to turn a disastrous accord into a merely bad one. But for all of its emphasis on the individual trees, it left the worst forests standing. In some places it substituted ambiguity for clearly negative provisions. The result is an improvement -- and a dramatic testament to the distance that market ideas have traveled since the LOST was opened for signature in 1982. But the ISA remains an unnecessary boondoggle, intended only to hinder seabed development. The Enterprise continues to serve as an economic white elephant. The financial redistribution clauses remain a special interest sop to poor states. And the entire system is likely to end up bloated and politicized, like the UN.

For instance, the treaty retains both the ISA, of undetermined size, and the Enterprise, an international version of the ubiquitous state enterprises that have failed so miserably all over the world. The Authority remains almost comically complicated, with an Assembly and Council, and such subsidiary bodies as the Finance Committee and Legal and Technical Commission, all with their own arcane rules for agendas, memberships, procedures, and votes. The LOST revisions restrict some of the ISA's discretion, but still submerge seabed mining in the bizarre political dynamics of international organizations. Private firms must continue to survey and provide, gratis, a site for the Enterprise for each one they wish to mine. Anti-monopoly and -density provisions would still apply disproportionately to American mining firms.

ISA fees have been lowered, but companies would continue to owe a $250,000 application fee and some level of royalties and profit-sharing. (The "system of payments," intones the compromise text, shall be "fair both to the contractor and to the Authority," whatever that means. Fees "shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals," even though seabed production is more expensive, riskier, and occurs in territory beyond any nation's jurisdiction.)

The revised LOST establishes a new "economic assistance fund" to aid land-based minerals producers. Surplus funds would still be distributed "taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status," such as the PLO. Theoretically America could block inappropriate payments -- at least so long as it was a member of the Finance Committee -- but over time the U.S. would come under enormous pressure to be "flexible" and "reasonable."

In fact, redistribution has been an important objective for the ISA during its short life so far. For example, a proposal was made for an African institute of the oceans, as if that was the highest priority for countries suffering from civil war, economic collapse, and social chaos. Voluntary trust funds have been established to aid developing countries, though few people or nations have rushed forward to contribute -- forcing the ISA to fill the fund coffers.

Even some of the specific "fixes" look inadequate. Consider the voting system, admittedly a major improvement over that in the original accord. According to the revised treaty, the U.S. would be guaranteed a seat on the Council, though still not a veto. The Council would consist of four chambers, any one of which could block action if a majority of its members voted no. On matters of serious interest the U.S. probably could win the necessary extra two votes in its chamber to form a majority, but not necessarily. The career foreign service officers likely to represent most nations, including America, at the ISA would not want to be forever known as obstructionists. Moreover, this purely negative veto power does not guarantee that the ISA would act when required, to approve rules for mining applications, for instance.

An additional problem occurs because the land-based mineral producers, whose interest is antagonistic to the very idea of seabed mining, and "developing States Parties, representing special interests," such as "geographically disadvantaged" nations, each have their own chamber, and thus a de facto veto over the ISA's operations. Moreover, the qualification standards for miners are to be established by "consensus," essentially unanimity, which gives land-based producers as much influence as the U.S. The possession of a veto provides them with an opportunity to extract potentially expensive concessions -- new limits on production, for instance -- to let the ISA function. Unfortunately, once the Authority asserts jurisdiction over seabed mining, potential producers would be hurt by a deadlock.
Indeed, production controls, one of the most important controversies in the original text, could recur under the new agreement. The revision does excise most of Article 151 and related provisions, which set a convoluted ceiling on seabed production to protect land-based miners. However, it leaves intact Article 150, which, among other things, states that the ISA is to ensure "the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the area." That wording would seem to authorize the Authority to impose production limits. The U.S. might have to rely on its ability to round up allied votes to block such a proposal in the Council in perpetuity.

Funding remains a problem as well. The U.S., naturally, would be expected to provide the largest share of the ISA's budget, 25 percent to start. How much that would be we don't know; the budget is to be developed through "consensus" by the Finance Committee, on which the U.S. is temporarily guaranteed a seat ("until the Authority has sufficient funds other than assessed contributions to meet its administrative expenses"), and approved by the Assembly and Council. Years ago the U.N. estimated that the ISA could cost between $41 and $53 million annually, on top of initial building costs of $104 and $225 million. The Clinton administration contended that the new agreement provided for "reducing the size and costs of the regime's institutions." How? By adopting a paragraph in the revised text pledging that "all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective."

Similarly, states the new accord, the royalty "system should not be complicated and should not impose major administrative costs on the Authority or on a contractor." These sentiments might be genuine. In fact, so far the Authority has been spending only about $10 million annually. But then, the world's wealthiest nation is not yet a member, and you can't pluck the goose until you have it in hand. Moreover, the revised agreement changed none of the underlying institutional incentives that bias virtually every international organization, most obviously the UN itself, towards extravagance.

In fact, concern over bloated budgets was a major factor in Moscow's initial decision not to endorse the treaty. Russian Ambassador H.E. Ostrovsky explained to the General Assembly that though the revisions were "a step forward," he doubted the new agreement could achieve its goals. Of particular concern was the fact that "general guidelines such as necessity to promote cost-effectiveness can not be seriously regarded as a reliable disincentive." Even before the treaty had even gone into force, Ambassador Ostrovsky pointed to "a trend to establish high paying positions which are not yet required."

**Technology Transfer**

Finally, there is technology transfer, one of the most odious redistributionist clauses from the original convention. The mandatory requirement has been discarded, replaced by a duty by sponsoring states to facilitate the acquisition of mining technology "if the Enterprise or developing States are unable to obtain" equipment commercially. Yet the Enterprise and developing States would find themselves unable to purchase machinery only if they were unwilling to pay the market price or preserve trade secrets. The new clause might be interpreted to mean that industrialized states, and private miners, whose "cooperation" is to be "ensured" by their respective governments, are therefore responsible for subsidizing the Enterprise's acquisition of technology. Presumably the U.S. and its allies could block such a proposal in the Council, but, again, it is hard to predict the future legislative dynamics and potential log-rolling in an obscure UN body in upcoming years.

Moreover, the amended agreement leaves intact a separate, open-ended mandate for coerced collaboration. The Authority, states Article 144, "shall take measures":

(b) to promote and encourage the transfer to developing States technology and scientific knowledge so that all States Parties benefit therefrom.
2. To this end the Authority and States Parties shall co-operate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom. In particular they shall initiate and promote:

(a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, inter alia, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;

(b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area.

At best this suggests that Western firms would be expected to help equip and train their competitors. At worst it could end up authorizing some sort of mandatory system -- one close to that originally intended by LOST's framers. Ambiguous and obscure grants of power in the service of a highly politicized organization could turn out to be quite dangerous.

At issue is not just technology useful for seabed mining. Dual use technologies with military applications might also fall under ISA requirements. Peter Leitner, a DOD adviser, points to "underwater mapping and bathymetry systems, reflection and refraction seismology, magnetic detection technology, optical imaging, remotely operated vehicles, submersible vehicles, deep salvage technology, active and passive military acoustic systems, classified bathymetric and geophysical data, and undersea robots and manipulators." Acquisition of these and other technologies could substantially enhance the undersea military activities of potential rivals, most notably China, which already has purchased some mining-capable technologies from U.S. concerns.

The treaty is a solution in search of a problem. A good international treaty would be useful, but it is not necessary. And once Washington ratified the treaty, any future renunciation of the LOST, resulting from misuse or misinterpretation of the agreement, might not be considered enough to reestablish Americans' traditional high seas freedoms.

Conclusion

All in all, the LOST remains captive to its collectivist and redistributionist origins. It is a bad agreement, one that cannot be fixed without abandoning its philosophical presupposition that the seabed is the common heritage of the world's politicians and their agents, the Authority and Enterprise. The issue is not just abstract philosophical principle, but very real American interests, including national security. For these reasons, the Senate should reject the treaty.

Footnotes

1. Doug Bandow is a Senior Fellow at the Cato Institute. While serving as a Special Assistant to President Ronald Reagan, he was a Deputy Representative to the Third United Nations Conference on the Law of the Sea. The Cato Institute receives no government funds.
Fighting Terrorism at Sea: Options and Limitations under International Law

Rüdiger Wolfrum *

I. Introduction

II. Traditional Mechanisms on the Elimination of Acts of Violence at Sea
   1. General Remarks
   2. Piracy
   3. The Suppression of Other Forms of Violence at Sea

III. Mechanisms to Face New Challenges of Terrorism and to Suppress the Transport of Weapons of Mass Destruction
   1. The 2005 Protocol to the Rome Convention
   2. Assessment
   3. Measures against Ships carrying Weapons of Mass Destruction or Relevant Hard or Soft Ware (PSI)

IV. Approaches Under General International Law to Suppress Terrorist Activities at Sea and the Transport of Weapons of Mass Destruction
   1. Introductory Remarks
   2. Self-Defense
   3. Measures against Ships Under the Control of Terrorists Taken by or on Behalf of the Flag State
   4. Precautionary Measures - Control of Cargo

V. Conclusions

* This contribution is based upon the Twenty-Eighth Doherty lecture delivered by the author in Washington D.C., 13 April 2006, organized by the Center for Oceans Law and Policy, University of Virginia School of Law, Charlottesville, Virginia, USA.
I. Introduction

Assessing existing international law rules concerning the suppression of piracy or terrorism at sea, related support activities or activities having been recently assimilated to such activities, requires a clear distinction between different scenarios:

- Acts of violence against a ship, its passengers or its crew similar to piracy but not meeting the narrow confines of the established definition of piracy;
- Acts using a ship as a weapon against navigational safety;
- Using the sea as a means of providing logistic support for terrorist activities;
- Using the sea as a platform to launch a strike against a state or to use a ship as a weapon against a state;
- Transport of weapons of mass destruction without a terrorist background.

International treaty law as well as customary international law has developed mechanisms to suppress acts of violence at sea, such as piracy or other acts directed against ships, airplanes or platforms. However, new developments seem to indicate that these mechanisms do not embrace modern threats. In particular these mechanisms did not explicitly provide for measures taken in response to ships being used as weapons. This situation has changed with the adoption of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts (SUA) Against the Safety of Maritime Navigation (Rome Convention). Designing such measures had to strike a balance between the freedom of navigation and the security interests of individual states as well as the ones of the community of the states as a whole. Further, it has been

1 The most general definition of the notion of terrorism is to be found in the Convention for the Suppression of the Financing of Terrorism, 1999 (ILM 39 (2000), 270: article 2, paragraph 1 b of that Convention reads: „Any ... act intended to cause death or serious bodily injury to a civilian, or any other person not taking part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”
felt that the increasing proliferation of weapons of mass destruction and the uncontrolled trade in the relevant hard and soft ware may cause an additional threat to international peace and security, in particular since such hard and soft ware may fall into the hands of terrorists. Mechanisms to restrict such trade are now interwoven into the mechanisms to suppress terrorism.

II. Traditional Mechanisms on the Elimination of Acts of Violence at Sea

1. General Remarks
Attempts to protect shipping from interference by acts of violence have a long history in international and national law and have resulted, amongst others, in the development of rules providing that piracy is to be considered an international crime. The international rules in question endow all states with the right to take enforcement measures for the suppression of piracy. This, in fact is to be seen as an infringement of the flag state principle which – to put it into a nutshell – means that ships on the high seas are under the jurisdiction of the flag state only.4

The international rules on piracy should not merely be considered relics of the past. Piracy still constitutes a threat to the safety of navigation and acts of piracy are on the increase.5 The existing rules for the suppression of piracy are inadequate. They do not even provide for an efficient regime against piracy narrowly defined. Nevertheless, attempts have been made to broaden the application of the rules concerning piracy so as to cover other forms of violence at sea or to suppress the transport by sea of armaments for terrorists. These attempts have failed.6

The failure to substantially broaden the existing regime against piracy is the reason why specific international agreements deal with the suppression of other forms of violence at sea; the most important of them being the Rome Convention.7 After 11 September 2001 several new

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4 The flag state principle constitutes the well established mechanism through which public international law is being implemented and enforced in maritime areas outside the jurisdiction of states.
5 See on this topic under: <http://www.imo.org/Facilitation/mainframe.asp?topic_id=362>. According to this source acts of piracy are increasing (last visited 22 October 2007).
6 To try to make use of the regime against piracy to suppress other activities is not a new one. For example, the attempt has been made to consider submarine warfare as piracy (see, for example), the agreement of Nyon which attempt to criminalize submarine warfare as piracy.
7 These are, in particular, the Rome Convention (note 3) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, ILM 27 (1988), 685. Further international agreements of relevance are: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; the
international instruments have been adopted to meet the new challenges.\textsuperscript{5} Even an international treaty dealing with terrorist attacks against shipping of nuclear and radioactive material exists.\textsuperscript{9} The most important of them is the above mentioned 2005 Protocol to the SUA Convention. These instruments follow a different approach from the one governing the rules on piracy.

2. Piracy
One of the major deficiencies of the international rules concerning the suppression of piracy already codified in the Geneva Convention on the High Seas of 1958\textsuperscript{10} and repeated in the Convention on the Law of the Sea of 1982 (LOS Convention) is their narrow definition of piracy.\textsuperscript{11}

According to article 101 LOS Convention only those acts which have been committed illegally “for private ends” by the crew or the passengers of a private ship or a private aircraft on the high seas against another ship or aircraft or against persons or property on board such ship or aircraft are considered acts of piracy.

The restriction that only acts of violence committed for private ends constitute piracy limits the scope of application of those rules considerably.\textsuperscript{12} This excludes acts of violence being treated as piracy if these acts are committed in order to destabilize a government or to cause unrest and terror with the view to blackmailing a government or for religious or ethnic grounds – typical attitudes of modern terrorism – being treated as piracy. The same is true for liberation movements, insurgents etc. who have seized a ship for political reasons.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{6} See for these instruments under: <http://www.un.org/terrorism/instruments.html>. With the view to fill existing security gaps Russia has initiated a Convention for the Suppression of Nuclear Terrorism.
\item \textsuperscript{10} UNTS Vol. 450 No. 6465.
\item \textsuperscript{11} Doc. A/CONF.62/122 and Corr.
\end{itemize}
\end{footnotesize}
The meaning of the word “illegal” in the definition of piracy in article 101 of LOS Convention is unclear; the legislative history is not enlightening. It is for the courts of the prosecuting states to decide whether the act of violence under consideration was illegal under international law or the national law of the prosecuting states.

Another limitation stems from the fact that only acts on the high seas and in the exclusive economic zones\(^\text{13}\) may be qualified as pirate acts but not those committed in the coastal waters of a state. The rationale of this limitation is that it is for the coastal state concerned to fight piracy. But what is the situation if the coastal state concerned is, for whatever reason, not able to control its coastal sea as is the case for failed states?

Actions against pirates may be taken in accordance with article 105 of LOS Convention. According to article 107 of LOS Convention a pirate ship may be seized only by a warship or a military aircraft or another ship in government service. The courts of the respective states will decide upon the adequate penalties and will also take a decision on the confiscation of the pirate ship and its cargo. What is important is that piracy belongs to the few crimes, including also the crime of genocide, to which the principle of universality applies. This means that the right to take enforcement measures against pirates is vested in all states and not only in states which have suffered the particular act of violence.

Taking the wording of the LOS Convention literally it seems that the possibilities for fighting piracy effectively are limited. Currently this is the prevailing view.\(^\text{14}\) There are good reasons for taking a different position, though. The LOS Convention offers quite some options in the fight against terrorist acts at sea.

It has to be acknowledged that the central provision, namely article 107 of LOS Convention, is worded as an option for states to take up rather than as an obligation incumbent upon them. However, states are under an obligation to cooperate in the repression of piracy according to article 100 of LOS Convention. Reading article 100 and 107 of LOS Convention together, it can be argued that states may not lightly decline to intervene against acts of piracy. This is

\(^{13}\) Article 101 of the LOS Convention refers to the high seas only. Nevertheless, article 101 of the Convention equally applies in exclusive economic zones since article 58, paragraph 2, of the Convention contains a corresponding cross-reference.
particularly important in respect of coastal states. Piracy relies for its logistical basis and for the sale of goods on cooperation with coastal states or at least the relevant local authorities. Such cooperation between a coastal state and pirates is in violation of article 100 LOS Convention. Similarly, a ship entitled to intervene in cases of piracy may not, without good justification, turn a blind eye to such acts.

As indicated earlier, under the rules for the suppression of piracy, a warship may not intervene against acts of violence by one ship against another private ship or against the persons or property on board such a ship carried out in the coastal waters of another state. However, other justifications for appropriate actions countering this act of violence do exist. A warship witnessing an attack against a merchant ship in the coastal waters of another state carried out by a private ship may intervene under its obligation to render assistance to persons in distress. Although article 98 of LOS Convention is intended to cover distress as the consequence of a natural disaster or of a collision at sea, it reflects the existence of a general obligation to safeguard human life at sea and in this respect it is applicable here. This possibility is a limited one, though. It does not embrace, in general, the mandate to suppress piracy in a particular area.

According to general international law, rescue actions may be taken by a warship to assist a ship under attack in the coastal waters of another state under the principle of humanitarian intervention. Although this approach is currently disputed,\(^1\) it has to be acknowledged that such interference in the sovereignty of the state concerned is less prevalent than in cases where the intervention takes place in the territory of the given state. Moreover, the fact also has to be taken into account that it is the obligation of the coastal state concerned to protect ships against attacks from pirates. If the warship of another state intervenes on behalf of a ship carrying the same flag it can at least presume that the coastal state would agree to such action. Nevertheless, the power to intervene in such cases, and in particular the jurisdiction to prosecute the offenders, rests primarily with the coastal state concerned. The right to intervene is, accordingly, a limited one.

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The same applies in respect of the pursuit of a pirate ship if the act of piracy has been committed on the high seas and the pirate has sought shelter in foreign coastal waters. In general, the coastal state concerned has to give its consent to such pursuit. Such consent may be presumed, given the obligation of the coastal state concerned to cooperate in the suppression of piracy.

However, these possibilities allow foreign states to intervene on the spot only, whereas the suppression of piracy in general remains under the authority of the coastal state concerned. No other state may act on its behalf without its explicit consent.\textsuperscript{16} It is evident that the effectiveness of measures for the suppression of piracy relies on efficient cooperation with those states on whose coast pirates are operating. States may, however, resort to the possibilities under general international law to induce states to fully and effectively implement their obligations in this respect. Turning a blind eye to the activities of pirates is in itself an act of piracy, activities such as preparing to sell a ship and its cargo or such a sale itself is falling short of the requested cooperation in the suppression of piracy. States permitting such transactions do not live up to their international obligations, and counter measures may be taken against them. Theoretically, the Security Council may declare that these situations endanger world peace and may authorize states to take appropriate action against the state in question. Certainly, this is not the case originally envisaged by Article 39 of the Charter of the United Nations. However, the Security Council demonstrated in the Lockerbie Case, that it is willing to intervene for the protection of international communication.\textsuperscript{17}

Similarly, coastal states which do not engage sufficiently in the suppression of piracy or whose authorities are even accomplices in such crimes can be held internationally liable for damage ships have suffered. We may ask why in the past no case was brought against states in whose territorial waters pirates are operating for their failure to cooperate in the suppression of piracy, and why no ship owner has, so far, approached its national government for diplomatic protection \textit{vis-à-vis} these states.

Existing international law rules on the suppression of piracy cover a small segment of violence on the high seas only. Although the prosecution of piracy is founded on the principle of universality, states have, so far, not been induced to take forceful action against pirates. In

particular, the obligations of coastal states to suppress pirate activities are of a general nature only and hitherto have not been enforced by those states whose ships have suffered pirate attacks.

3. The Suppression of Other Forms of Violence at Sea

Specific international agreements attempt to fill the gap in the suppression of violence at sea left by the narrow definition of piracy in LOS Convention and its predecessor, the Geneva Convention on the High Seas (1958). The already mentioned Rome Convention for the Suppression of Unlawful Acts (SUA) Against the Safety of Maritime Navigation of 1988\(^1\) together with the associated Protocol of the same date for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf\(^2\) prohibits a broad range of acts of violence directed against ships or shipping.\(^3\) The Rome Convention was, in fact, the result of a diplomatic initiative taken by the Governments of Austria, Egypt and Italy in response to the Achille Lauro incident, which had made it clear that the rules of international law existing then were not appropriate for dealing with maritime terrorism.\(^4\)

The Rome Convention protects navigation as such as well as individual ships, the latter being the principal objective. Prohibited acts include the seizure or taking control of a ship by force or the threat thereof; the performance of acts of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; the destruction or damaging of a ship or its cargo which is likely to endanger the safe navigation of that ship; the placement of devices on a ship which causes the destruction or damage to the ship which is endangering the safety of navigation; the destruction or damaging of maritime navigational facilities likely to endanger safe navigation or the killing or injuring of persons in the context of any of the aforementioned offenses. Thus, the Convention covers not only acts of terrorism directed

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\(^1\) See note 3.


\(^3\) Although most East Asian countries acceded to the UN Convention on the Law of the Sea not all of them adhered to the Rome Convention. Southeast Asian States have adopted the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Southeast Sea http://www.aseansec.org.14838.htm.

against ships but all imaginable acts of violence at sea. Only to a limited extent the Convention deals with the use of ships as weapons.

According to article 3, para. 1(c), of the Rome Convention, it is an offense to unlawfully and intentionally destroy a ship or cause damage to a ship or its cargo in a way which is likely to endanger the safe navigation of that ship. Using a ship as a weapon against harbor facilities – similar to the airplanes used on 11 September 2001 against the Twin Towers in New York – which results in the destruction of that ship, accordingly, may be considered an offense under this provision of the Rome Convention. However, the offense would not cover the gravity of such crime adequately, since it neither reflects the damage done by the use of the ship nor the threat such use would pose to navigation in general or to other ships or persons. On that basis, it seems more appropriate to consider invoking article 3, para. 1(e), of the Rome Convention, according to which it is an offense to destroy or seriously damage maritime navigational facilities or to seriously interfere with their operation if such act is likely to endanger the safe navigation of a ship.

III. Mechanisms to Face New Challenges of Terrorisms and to Suppress the Transport of Weapons of Mass Destruction

1. The 2005 Protocol to the Rome Convention
The 2005 Protocol to the Rome Convention\(^\text{22}\) was developed in direct response to the 11 September 2001 attempts to define the offenses to be covered by the Rome Convention more broadly. The 2005 Protocol to the Rome Convention adds a new article, article 3bis, which states that a person commits an offense within the meaning of the Rome Convention if that person unlawfully and intentionally commits one of the acts listed, if it is the purpose of this act to intimidate a population, or to compel a Government or an international organization to do or to abstain from any act. It was necessary to describe the motivation in such detail since it was not possible to agree otherwise on the notion of terrorism.

The acts referred to are the following:

\(^{22}\) See note 3; on its legislative history see Tiribelli (note 21) at 146 et seq.
- using against or on a ship or discharging from a ship any explosive, radioactive material or biological, chemical or nuclear weapon in a manner that causes or is likely to cause death or serious injury or damage;
- discharging, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
- using a ship in a manner that causes death or serious injury or damage;
- transporting on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act;
- transporting on board a ship any biological, chemical or nuclear weapon, knowing it to be such a weapon;
- transporting any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement;
- transporting on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a biological, chemical or nuclear weapon, with the intention that it will be used for such purpose.

The transportation of nuclear material is, subject to specific conditions, not considered an offense if it is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons.  

Under the new instrument, a person commits an offense within the meaning of the Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offense under the Rome Convention or an offense set forth in any treaty listed in the Annex. The Annex lists nine such treaties.

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23 Article 3 bis, para. 2 of the 2005 Protocol.
24 Article 3 ter of the 2005 Protocol.
The new instrument also makes it an offense to unlawfully and intentionally injure or kill any person in connection with the commission of any of the offenses in the Convention; to attempt to commit an offense; to participate as an accomplice; to organize or direct others to commit an offense; or to contribute to the commission of an offense.  

The new crimes covered mean that it goes beyond fighting terrorism; it may also be used to enforce the Non-Proliferation Treaty. It is this aspect in particular which has been most controversially discussed.

The new instrument requires parties to take the necessary measures to enable a legal entity (a company or organization, for example) to be made liable and to face sanctions when a person responsible for the management or control of that legal entity has, in that capacity, committed an offense under the Convention.

2. Assessment
Although the Rome Convention is broad in respect of its territorial scope of application, and has been broadened as far as the offenses covered are concerned by the 2005 Protocol, the sanctions mechanism it provides for is limited.

The obligations of States Parties regarding the suppression of offenses under the Rome Convention may be summarized by referring to the old principle *aut dedere aut judicare* already mentioned by *Hugo Grotius*, whereby a state has an obligation to surrender an alleged offender to another state having criminal jurisdiction or, alternatively, may prosecute the offender itself.

Criminal prosecution is reserved for those states exercising criminal jurisdiction in accordance with the Rome Convention in respect of the offender or the offense. According to the respective provisions of the Rome Convention, the offender must have the nationality of the prosecuting state or the offense must have occurred in the coastal waters of the state claiming the right to prosecute or on board a ship flying the flag of that state. The Rome Convention provides for the possibility of states’ being able to establish their criminal jurisdiction for other cases too. The most important aspect of it is that states may establish criminal jurisdiction in cases where one of their nationals has been injured or killed. Finally, states are under an obli-

\[25\] Article 3 quarter of the 2005 Protocol.
gation to prosecute offenses under the Rome Convention in cases where they do not surrender the alleged offender.

This general clause is meant to ensure that such offenders do not find a safe haven. The rules concerning the right to prosecute an offender under the Rome Convention ensure that states other than the ones referred to do not exercise criminal jurisdiction under the Rome Convention.

The 2005 Protocol provides for marginal improvements in that respect only. Article 11 of the Rome Convention covers extradition procedures. A new article, article 11bis, states that, for the purposes of extradition, none of the offenses should be considered a political offense. New article 11ter states that the obligation to extradite or afford mutual legal assistance need not apply if the request for extradition is believed to have been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person’s position for any of these reasons. Article 12 of the Convention requires States Parties to afford one another assistance in connection with criminal proceedings brought in respect of the offenses. A new article, article 12bis, covers the conditions under which a person who is being detained or is serving a sentence in the territory of one State Party may be transferred to another State Party for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offenses.

The inadequacy of this particular aspect of the 2005 Protocol becomes particularly evident if compared with the respective rules on piracy. Prosecution on account of piracy is based upon a broader concept of criminal jurisdiction, namely the principle of universality. This marks the significant difference between those two regimes. Whereas piracy is considered a truly international crime, an offense under the Rome Convention is not. The Rome Convention acknowledges only that several states may have an interest in prosecuting offenses under this agreement. It is also worth reiterating that the deterrent effect the Rome Convention is meant to have is wasted on suicidal offenders. They do not fear prosecution as envisaged by the Rome Convention or other international agreements for the suppression of terrorist attacks which follow the same approach. Those who hijacked the airplanes on 11 September 2001 violated several of such international agreements; this – as well as the possibility of criminal prosecution – was of no concern to them.
There is one further highly relevant difference between the legal regime against piracy and the 2005 Protocol. The rules of international law concerning the suppression of piracy provide for the possibility of taking direct action to suppress an act of piracy whereas the Rome Convention concentrates on the prosecution of offenders only. This already severely limits the possibilities of taking response action let alone actions of a precautionary nature. The latter gap constituted the most significant deficiency in the Rome Convention. This was not a gap which had been left open unintentionally. On the contrary, article 9 of the Rome Convention clearly states that rules of international law pertaining to the competence of states to exercise investigation or enforcement jurisdiction on board ships not flying their flag are not affected. Accordingly, the Rome Convention can be used neither to take effective response actions against ships under the control of terrorists nor to take preventive actions.

It was not possible to close this gap by referring to the rules concerning the suppression of piracy as has already been indicated. These rules address piracy in the traditional meaning of the notion but they do not form an adequate basis for suppressing terrorist acts at sea or the use of the sea as an avenue for the transport of weapons or logistical support for terrorists. Even in cases where the ships concerned have been taken by an act of violence it would be difficult to maintain that these activities were undertaken by private ends. In all other cases where terrorists have contracted ships passage directly or indirectly there is no possibility of assimilating this with piracy and of taking action on that basis.

This lacuna is now remedied in part by the 2005 Protocol to the Rome Convention. Article 8 of the Rome Convention covers the responsibilities and roles of the master of the ship, flag state and receiving state in delivering to the authorities of any State Party any person believed to have committed an offense under the Convention, including the furnishing of evidence pertaining to the alleged offense. A new article, article 8bis, in the 2005 Protocol covers cooperation and procedures to be followed if a State Party desires to board a ship flying the flag of another State Party, outside the territorial water of any state, when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be, involved in the commission of an offense under the Convention.
The authorization and cooperation of the flag state is required before such boarding can take place. Such authorization may be made in general or *ad hoc*. A State Party may notify the IMO Secretary-General that it will grant the authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response within four hours. A State Party can also notify that it authorizes a requesting Party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine whether an offense has been, or is about to be, committed. Finally, a State Party may grant the authorization to board a ship under its flag when requested.

Article 8bis of the 2005 Protocol includes several safeguards when a State Party takes measures against a ship, including boarding. The safeguards include: not endangering the safety of life at sea; ensuring that all persons on board are treated in a manner which preserves human dignity and in keeping with human rights law; taking due account of safety and security of the ship and its cargo; ensuring that measures taken are environmentally sound; and taking reasonable efforts to avoid a ship being unduly detained or delayed. The use of force is to be avoided except when necessary to ensure the safety of officials and persons on board, or where the officials are obstructed in the execution of authorized actions.

These rules on boarding are regarded as a major and innovative step in suppressing terrorism at sea. There may be some doubts as to whether this view is actually tenable. Compared, for example, with the rules on boarding and inspecting fishing vessels under the Straddling Fish Stocks Agreement these new rules are rather disappointing. This Agreement provides for the boarding and inspection of fishing vessels on the high seas if there are sufficient grounds to believe that it has seriously violated the rules concerning fishing. No *ad hoc* admission by the flag state is required. Obviously the protection of living resources is more important than the protection of the security of states against terrorist attacks.

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26 Article 8bis, para. 4 b of the 2005 Protocol.
Finally, the Protocol lacks an appropriate dispute settlement clause in spite of the fact that flag states and inspecting states may disagree as to whether the investigation was justified in substance and in form.

3. Measures against Ships carrying Weapons of Mass Destruction or Relevant Hard or Soft Ware (PSI)

a) Introductory Remarks

It is the objective of the Proliferation Security Initiative (PSI), originally announced by the US President Bush in 2003 to interdict the “transfer or transport of weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors of proliferation concern.” The PSI has evolved through a series of meetings and agreements. The underlying rationale of the initiative is to reduce the proliferation of weapons of mass destruction and, in particular, to ensure that such weapons or technology would not fall into the hands of terrorists. The eleven core participants developed a set of principles on September 4, 2003. The Statement of Interdiction Principles – claiming that the Initiative is not violating international law – calls upon all PSI Participants, as well as other countries, not to engage in the trade of weapons of mass destruction and related technology with countries of proliferation concern and to permit their own vessels and aircraft to be searched if suspected of violating or endangering the principle of non-proliferation of weapons of mass destruction as provided for in the PSI. The Statement further establishes a procedure for the exchange of information on suspicious vessels. The initiative is open for accession by other states. Apart from that participating states are called upon to conclude ship-boarding agreements with other states. This is, particularly meant to provide for a legal basis to board ships under so-called flags of convenience. The core commitments of interest here are:

- not transport or assist in the transport of weapons of mass destruction;


29 The Statement of Interdiction Principles is to be found on the Web Site of the State Department http://www.state.gov./t/np/rls/fs/23764.htm (last visited ......).

30 Critical in this respect Garvey, note 24 at 132 et seq. Such agreements have been concluded so far by the United States with Panama, Liberia, the Marshall Islands and Cyprus.
board their own vessels in their respective internal waters and territorial sea areas as well as on the high seas, if there is reasonable ground for suspicion that they are engaged in proliferation activities;

- consider to provide consent to boarding of their vessels by the authorities of other participating States;

- take measures against foreign vessels in the sea areas covered by their territorial sovereignty and in their respective contiguous zone.

The legal basis of the PSI – frequently characterized as an international partnership of states – has not been clarified fully. It is being claimed that the PSI conforms to the law of the sea and the various jurisdictional standards articulated in the LOS Convention. One may further argue that it – in general – reflects that attitude of the UN Security Council to stop the proliferation of weapons of mass destruction. As far as its format is concerned it constitutes a collection of bilateral agreements constituting a collective partnership without amounting to an international organization.

Most problematic is subparagraph 4(d) of the Statement, which calls on PSI participants:

“To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected or carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.”

Intercepting ships, which are under the suspicion to carry weapons of mass destruction, without the consent of the flag state raises the question of the compatibility of such action with the law of the sea at least as a matter of principle. Under the Convention on the Law of the Sea the competences to intercept a vessel depends where such action is undertaken in the territorial waters of a state, in the exclusive economic zone or on the high seas.

b) Interception in territorial waters

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31 See Garvey (note 24) at 129.
32 See Garvey (note 24) at 129; Heintschel von Heinegg (note 24) at 191 with further references.
33 S/Res. 1540.
As long as the interception of a vessel under flag different from the intercepting state takes place in the internal waters by the coastal state concerned such act cannot be contested from the point of the law of the sea. No other state may take action against such a ship, including the flag state, unless the coastal state concerned has consented thereto.

The situation is more complicated in the territorial sea. The territorial sea forms part of the territory of the coastal state concerned but ships under the flag of other States enjoy the right of innocent passage. According to article 25 LOS Convention coastal states may take action against a passage which is not innocent. However, innocent passage is, according to articles 18 and 19 LOS Convention, limited and may even be limited further if certain conditions are met by the national law of the coastal state concerned. These provisions are to be considered as customary international law.

According to article 19, para. 1, of LOS Convention passage is not innocent if it is “prejudicial to the peace, good order or security of the coastal state” or if the ship is engaged in one of the activities listed in article 19, para.2, of LOS Convention. Transporting weapons of mass destruction is not mentioned in para. 2 which most consider to constitute an exhaustive list of activities which renders passage not innocent. For that reason recourse is necessary to article 19, para. 1 of LOS Convention. However, this does not solve the problem if the vessel is merely in transit since according to this paragraph only such passage is not innocent which is prejudicial to the peace, good order or security of that particular coastal state. Taken literally article 19 of the LOS Convention excludes that the coastal States limits the exercise of passage with the view to protect the interest of the community of states. It may act in its own interests only.

Although article 21 of the LOS Convention gives the coastal state the authority to adopt laws and regulations in accordance with international law this competence is limited. None of the issues which may be regulated on that basis would cover the mere transit of weapons of mass destruction. It should be noted in this context that the transport of nuclear substances is, according to article 23 of the LOS Convention, not in contradiction with the principle of innocent passage. Finally, article 27 of the LOS Convention cannot, at least not in itself, serve as

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34 Article 17 of LOS Convention.
35 Garvey (note 24), at 131 with further references.
36 It is astonishing that this article is rarely referred to nor is stated that this is an article insisted upon by the United State.
a basis for controlling ships in transit. Here again it is required that either the coastal state’s action are been undertaken to defend its own interests (paragraph 1, lit. (a) and (b)), if such act is being undertaken upon request of the master of the ship or the flag state or for suppression of illicit traffic in narcotic drugs or psychotropic substances (paragraph 1, lit. (c) and (d)). However, it has been argued that coastal States may declare the transport of weapons of mass destruction and the relevant soft wave as a crime under their national criminal law and take enforcement action on the basis of article 27 LOS Convention. They would have to argue that the crime has been committed on board the ship passing through the territorial sea and that this crime is of a kind to disturb the peace of the country or the consequences of the crime extend to the coastal State. This interpretation constitutes a problematic circumvention of the inherent limits of article 27 LOS Convention. On the same basis the whole transport of nuclear waste of the transport of dangerous goods could be prohibited.

It has been argued that a passage can be considered to be not innocent if the conditions of S/Res. 1540 (2004) of 28 April 2004 are met. It has further been argued that states may, on the basis of S/Res. 1540, enact national legislation declaring the transport of weapons of mass through their territorial seas a criminal offence which would allow the coastal state concerned to take actions as prescribed in article 27, para. 1 of the LOS Convention. Certainly S/RES 1540 provides that the proliferation of weapons of mass destruction constitutes a threat to international peace. Even if one accepts that the Security Council may exercise such quasi legislative power this does not render the transit of such material automatically non-innocent. The definition of innocent is quite narrow. It is required that such passage is prejudicial to the peace, good order or security of the coastal state. Apart from that the legislative history of the resolution reveals that it was not meant to cover indictments of vessels. The legal situation in respect of international straits is similar to the one discussed so far.

c) Interception on the high seas

37 Heintschel von Heinegg (note 24) at 193; Logan (note 24) at 263.
38 Article 27 para. 1 (b) LOS Convention.
39 Article 27 para. 1 (c) LOS Convention.
40 Heintschel von Heinegg (note 24), at 194.
41 See article 19 LOS Convention.
42 See below.
43 See Logan (note 24) at 264.
It is being discussed controversially\(^44\) whether ships carrying weapons of mass destruction without being targeted against a particular state may be interdicted on the high seas by warships of another state without the consent of the flag state concerned.

The exclusive jurisdictional relationship between a flag state and its vessel on the high seas is well rooted in customary international law. In the *Lotus case* the Permanent Court of International Justice held that “vessels on the high seas are subject to no authority except that of the State whose flag they fly”.\(^45\) Article 92 LOS Convention codifies this principle. Several exceptions are provided for, a waiver by the flag state or the vessel is without a flag, or the vessel is engaged in piracy, slavery or unauthorized broadcasting. Accordingly there is a strict limit against boarding and inspecting a vessel under a flag different from the one of the investigating vessel.\(^46\)

It has been argued, however, that article 88 LOS Convention provides a basis for arresting a vessel being under the suspicion to carry weapons of mass destruction.\(^47\) According to article 88 LOS Convention the high sea shall be used for peaceful purposes.\(^48\) This requires that the transport of weapons of mass destruction has been declared *erga omnes* as a threat to peace. Whether this is the case requires considering meaning and scope of UN Security Council Resolution 1540 (2004) or to consider the possibility of counter-measures under the rules of state responsibility. It is also necessary to establish whether the interception of foreign ships amounts to a violation of the prohibition of the use of force.

Security Council Resolution 1540 (2004) affirms as already stated that ‘proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security’ and requires *inter alia*, all states to ‘adopt and enforce appropriate effective laws which prohibit any non-state actor to … transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.’\(^49\) This means in the context


\(^{45}\) PCIJ ser. A 1927 No. 9 at 25.

\(^{46}\) See article 110 LOS Convention.

\(^{47}\) Logan (note 24) at 268.

\(^{48}\) See also article 301 LOS Convention.

\(^{49}\) Preambel and para. 2.
dealt with here that a State which either knowingly allows the transport of weapons of mass destruction or that does not intervene in case it is informed of a breach or which does not take appropriate legislative measures and provides for their effective implementation commits an international wrongful act.\textsuperscript{50} The central question which remains is whether every state may take relevant countermeasures. According to the rules on state responsibility\textsuperscript{51} countermeasures are, as a matter of principle, available to an ‘injured’ state.\textsuperscript{52} A state may also be considered ‘injured’ where the obligation breached was owed to a group of states and the state taking countermeasures was specifically affected.\textsuperscript{53} An alternative would be that the obligation was owed to a group of states and the breach has radically changed the position of all members of that group. This focusing on injured states does not mean that no action may be taken by individual states to protect so-called collective interests\textsuperscript{54} without qualifying as injured states. However, in such circumstances states may only approach the state in breach of its obligations and, amongst others, request cessation of the breach but it may not take countermeasures. This point was discussed quite controversially in the International Law Commission. The Commission stated the state practice did not endorse that individual states may take countermeasures in defense of collective interests as long as the latter did not qualify as injured states.\textsuperscript{55}

It has been argued, though, that all activities of non-state actors resulting in a proliferation of weapons of mass destruction constituted a threat to international peace and security and that due to that the category of injured state cannot be limited to potentially targeted states. For that reason every state was to be considered as an injured state and thus could take countermeasures against the ships or aircraft in question.\textsuperscript{56} Such approach is difficult to sustain. It would deprive the essential differentiation of the rules on state responsibility of most of its meaning. It also neglects that the enforcement of internationally legislated obligations either \textit{vis-à-vis} individual states rests with the respective organ of the state community, that is in this case the Security Council, or by states or a particular state having been mandated by the community organ accordingly. States are only called upon to enforce the Security Council in-

\textsuperscript{50} Heintschel von Heinegg (note 24), at p.200.
\textsuperscript{51} Reprinted in: James Crawford, The International Law Commission’s Articles on State Responsibility, 2002, at 61 et seq.
\textsuperscript{52} See article 42.
\textsuperscript{53} See article 48.
\textsuperscript{54} See article 48, para. 2.
\textsuperscript{55} See the commentary of Crawford (note 47) at 276 et seq.
\textsuperscript{56} Heintschel von Heinegg (note 24), at p. 200-201.
ternally. It is not possible to consider the rules on state responsibility in isolation from the primary obligation they are assisting to enforce. In this respect it has to be noted too that all references to interdiction were removed from the resolution upon the initiative of China. This is a clear indication that the Security Council was not meant to be used as a basis to take action against foreign ships. This cannot later be remedied by having recourse to the rules on state responsibility. It is only for the Security Council to mandate such actions to be undertaken.

Apart from that it has been discussed whether that interdicting a foreign vessel amounts to a breach of Article 2, para. 4, UN Charter or whether it constitutes a police action only.

IV. Approaches under General International Law to Suppress Terrorist Activities at Sea and the Transport of Weapons of Mass Destruction

1. Introductory Remarks
It has for a long time been neglected, that terrorism at sea or the transport of weapons of mass destruction may be fought on the basis of general international law. In that respect general international law supplements the rules so far described.

2. Self-Defense

The Council of the North Atlantic Treaty Organization like-
wise stated on 12 September 2001 that the terrorist attack of 11 September 2001 had triggered the right of self-defense in accordance with article 5 of the North Atlantic Treaty. The International Court of Justice seemed to be reluctant to follow such approach although its jurisprudence in this respect is not fully conclusive. Its statement in the Advisory Opinion Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Opinion as well as in the case concerning Oil Platforms (Islamic Republic of Iran v. United States of America) may have a procedural background only since neither Israel nor the USA had substantially invoked the right to self-defense. However, in the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) this question was left open.

The reaction of the UN Security Council and of the Council of the North Atlantic Treaty Organization is based upon a modified understanding of the right to self-defense, according to which actions of self-defense are triggered by attacks which by their very nature and gravity are equivalent to military attacks whereas it is irrelevant whether such attacks were launched by, or can be directly attributed to, a sovereign state.

It is to be noted that the wording of Article 51 of the UN Charter does not limit self-defense to attacks undertaken by a state only. In that respect the drafters of the UN Charter were probably wiser then later commentators. It should be further noted that according to Art. 2, para. 4, of the UN Charter use of force is prohibited in international relations which implies that such obligation applies to interstate relations only. However, it is of relevance also that after the adoption of the UN Charter there was a predominant practice and respective opinio iuris that self-defense could be exercised against attack by states or at least controlled by them. The attacks of 11 September 2001 have changed this situation as demonstrated by the resolutions of the UN Security Council. What seems to be of essence now is the view the target state has

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62 ICJ Reports 2004, 136
63 ICJ Reports 2003, 161.
64 Judgement of 15 December 2005 at p. 53. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.
65 See J.A. Frowein, ....
adopted and could adopt under the circumstances when the attack took place. This interpretation of the right to self-defense reflects the fact that states have ceased to have the monopoly on waging war. Warlike activities having identical negative effects upon international peace and security may equally well be carried out by terrorists, especially if such terrorists are working within an international network. The mechanisms designed to restore international peace and security, whether they are of a multilateral, regional or unilateral nature, have to reflect this change in international relations.

However, this raises an additional problem, namely about the potential target of measures of self-defense. May such actions only be directed against the terrorist group or also against the state harboring such group? This is not the place to deal with this issue in detail. It may be sufficient to say that there are several avenues of justifying counter attacks against states harboring terrorists. Such states may by giving assistance to terrorists or by not suppressing their activities have violated their international obligations. The activities of terrorists may further be attributable to states under the rules of state responsibility.

It is well established that all actions of self-defense have to meet the test of proportionality. This is also true for actions of self-defense against ships under the control of terrorists and used as weapons. However, the array of possible effective measures against such ships is limited; their interception and destruction may be the only effective course of action.

3. Measures against Ships under the Control of Terrorists Taken by or on Behalf of the Flag State

On the high seas, ships are, in principle, under the sole jurisdiction of their flag state and it is up to the flag state to enforce international law with respect to ships flying its flag. The flag state principle is by no means anachronistic; it is one of the central elements guaranteeing freedom of navigation. Through this mechanism it is ensured that international law and the national law of a particular state applies to ships on the high seas. Otherwise ships on the high seas would operate in a legal vacuum. Similarly, the flag state principle concentrates enforcement powers which may be taken against a ship in one authority – that of the flag state. Otherwise a ship would be the target of various, possibly conflicting actions. But there is also a quid pro quo. Only if flag states exercise their jurisdiction effectively and thus ensure that ships do not violate the applicable international and national law will other states refrain from taking action against such ships.
If a ship has been brought under the control of terrorists with the aim of using it as a weapon, the flag state is under an international obligation to intervene, given the worldwide and unconditional condemnation of terrorism by the Security Council acting under Chapter VII of the UN Charter. The question is, though, whether the state in question will be in a position to do so or to do so before the threat posed by such a ship materializes. If this is impossible, the flag state concerned not only has the option but in fact is under an obligation to request assistance from other states.

A different line of argumentation may also be considered. Ships in the hands of terrorists constitute a mortal danger to the citizens of the targeted state and a duty to intervene can be based on the general principle of safeguarding human life. This is not only a principle governing the law of sea but can equally be based upon on the obligation to protect human life under the international regime for the protection of human rights.

This is of relevance also in those cases where the flag state is not able to react but ships of other states are. Interference in the sovereignty of the state whose flag the ship in question is flying can, at least, be justified by the fact that the flag state concerned is under an international obligation to intervene with the view of suppressing terrorism.

The flag state may consent to such intervention. As a result, the intervention would clearly conform to international law. In cases where military intervention against a ship under a foreign flag is the only means of protection against terrorists, the flag state is obliged to give its consent to such intervention. It may even be possible to consider going one step further and arguing that, in cases of a clearly identified terrorist threat to a ship, the consent to intervene, with the aim of ensuring that the terrorist threat does not materialize, may be presumed.

Finally, one further approach may be considered. Only ships flying the flag of a state are, on the high seas, under the exclusive jurisdiction of the flag state. Is that equally true for ships controlled by terrorists and targeted as weapons? It is worth considering whether, since the flag state has lost control of them; such ships should not be treated as ships without nationality. This would mean that any state would be entitled to arrest and seize such ships. However, it must be borne in mind that article 104 of the LOS Convention provides for the retention of nationality of pirate ships and it would be necessary to establish why and under which cir-
cumstances ships taken over by terrorists or equipped by terrorists to serve as weapons lose their nationality.

The main problem connected with any attempt to reduce the danger which ships in the hands of terrorists may pose to states, their citizens or navigation in general is that of obtaining reliable information early enough to intervene. This information has to pertain to the fact that a particular ship is posing such a threat and against which target. The possibility of states’ considering – as is the practice with air traffic approaching the United States of America – requesting ships to communicate details about crew, passengers, cargo and destination to their ports of call well in advance cannot be ruled out. Although this may constitute an extra burden for shipping, it may be proportionate considering the threat such ships pose. Further, it is possible to imagine that some states may claim maritime zones for interception and intervention, as already claimed by the United States of America for the suppression of trade in narcotic drugs. This is not the place to deal with this practice. Undertaken unilaterally, some may argue that such an approach may result in the erosion of the freedom of navigation. It is a well-established fact that the freedom of navigation is not an absolute one. Account has to be taken of other established interests of the members of the community of states. The fight against terrorism may be one; however, means of suppressing it have at least to pass the test of proportionality, if they result in a limitation of established freedoms.

4. Precautionary Measures – Control of Cargo
S/RES/1368 (2001) and 1373 (2001) also indicate that terrorist attacks of such or similar scale may be considered to pose a threat to international peace and security and that the Security Council may take appropriate action on the basis of Article 39 of the UN Charter. This is of particular relevance for the suppression of terrorism by preventing the freedom of navigation from being misused in order to support terrorism.

Already the Preamble of the International Convention for the Suppression of the Financing of Terrorism of 1999\(^67\) states that terrorism is a violation of the purposes and the principles of the UN Charter to maintain international peace and security. The UN General Assembly has in several resolutions condemned international terrorism and called upon states to take steps and counteract the financing of terrorism and terrorist organizations. In S/RES/1368 (2001) the international community is called upon to “... redouble their efforts to prevent and suppress ter-

\(^{67}\) See under <http://untreaty.un.org/English/Terrorism/Conv12.pdf>.
rorist acts including by increasing cooperation ...”.68 S/RES/1373 (2001) is more specific. The Security Council decided – acting under Chapter VII of the UN Charter – that all states shall “... take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning of other states by exchange of information ...”.69 The Security Council in the same resolution stated “... afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist attacks ...”.70 Finally, the Security Council in S/RES/1377 (2001) of 12 November 2001 underlined “... the obligation [of] states to deny financial and all other forms of support and safe haven to terrorists and those supporting terrorism.”71 These resolutions, in particular Security Council resolution 1373, form the necessary international law basis for the marine interception operations undertaken by various naval units, including a German naval unit, in the Indian Ocean and off the coast of Somalia. On this basis it is possible to approach and stop ships under foreign flags where there are indications that they may be supporting terrorism, and investigate their documents, cargo and crew. Owing to their obligation under the Security Council resolution, adopted under Chapter VII of the UN Charter, to suppress terrorism also by eliminating their financial and logistical support, the flag states may not object to an investigation of ships under their flags by warships of other states, as long as the measures taken are proportionate. In fact, the warships are acting on behalf of these flag states since it is for them to ensure that ships under their flags are at no times used in support of terrorist activities. No explicit consent of the flag state is necessary, as the denial of such consent would be contrary to the obligation under S/RES/1373.

This reasoning is substantiated if a comparison with the legal situation prevailing under the international law of maritime warfare is made. The naval forces of the belligerent parties may search ships of states not involved in the armed conflict to make sure that they are not supporting the activities of the other party. This is all the more applicable if it is considered that the Security Council has condemned terrorism and has made it mandatory to cooperate in its suppression.

Whether such activities in given maritime zones are acceptable and in particular whether such naval activities are effective is a different matter.

70 Ibid., operative para. 2 lit. f.
Precautionary measures have been taken on the part of port authorities in an attempt to provide stricter control of ships’ cargo in general. It may be too late to investigate the cargo at the ports of destination. Therefore a policy has been developed to check cargo at the port of departure. The container security initiative set up by the United States attempts to extend the zone of security outward by shifting security and screening activities to the border of the exporting country. On 19 September 2002, Singapore became the first country to sign an agreement with the United States of America allowing U.S. customs inspectors to ensure that cargo shipping containers bound for the United States are not being used for terrorist attacks. This system seems to mirror one which was already set up between the United States of America and Canada for the ports of Halifax, Montreal and Vancouver. Several other port authorities have agreed to join the U.S. container safety program and more have joined since the decision not to join has repercussions when United States ports are reached. In the first phase the top twenty ports that send the largest volume of container traffic to the United States have been included. In a second phase ports of political or strategic significance have been included. Currently more than 50 ports throughout the world participate in this initiative – most of them being European or Asian.

The main problem with this initiative is that it only protects the United States and that it discriminates all transport not coming from the ports cooperating in the Container Safety Initiative. Apart from that it has to be stated that – although terrorism is a universal phenomenon – the United States is just cooperating with not much more than 30 states in this respect. This approach however, makes any attempt to find a truly universal solution – including, for example, IMO – futile.

Another precautionary approach is reflected by the amendments to the International Convention for the Safety of Life at Sea (SOLAS Convention). Under a new Chapter “Special

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72 As to the details see Marjorie Florestal, Terror on the High Seas, Brooklyn Law Review 72 (2007), 385-447.
74 Florestal (note 71), 395; she (at 399 et seq.) also argues that this initiative is in violation with the most-favoured nation principle under Article I, para. 1 GATT.
Measures to Enhance Maritime Security” Member States are required to establish an International Ship and Port Facility Security Code.

IV. Conclusions

A perusal of the existing international instruments to be used for the suppression of international terrorism at sea indicates that they are in a state of transition. This is due to different reasons. The most prominent of them are that the community of states has to deal with a new type of organized crime and a new type of offender. International terrorism works within an international network which makes it easy to switch the basis from which operations are launched. Modern forms of communication allow weapons and other necessary supplies to be transported to the targeted state. The criminals, in particular those carrying out such attacks, are not threatened by the fear of subsequently finding no shelter and being prosecuted. The latter, however, has hitherto been the principal mechanism for suppressing terrorist activities.

The Convention on the Law of the Sea and subsequent special international agreements has responded to this new challenge. They should be seen and assessed as a whole.

This legal development clearly indicates that international law as such and the procedures for amending it are flexible enough to react to new challenges. What is remarkable is the shift of emphasis to be witnessed in these new regimes namely the focus on precautionary measures.

However, it is impossible to end at a clearly positive note. Although piracy as well as terrorist activities at sea are clearly of an international nature only some of the legal responses are developed, so far. In particular the proliferation security initiative as well as the container security initiative does not reflect a multilateral approach but rather a unilateral one where individual states cooperate on the basis of bilateral agreements. This not only weakens its effectiveness – at least so far as its scope is concerned – but also jeopardizes the multilateral efforts undertaken against some forms of violence at sea.
Security at Sea: Legal Restraints or Lack of Political Will? Comments on the Keynote Address by Admiral Hoch

Wolff Heintschel von Heinegg*

Introduction

It should be commonplace that security at sea is, to say the least, challenged by numerous threats. If not countered appropriately, these threats will inevitably limit our economic sustainability as well as our capabilities to continue using the world’s oceans for security operations—whether they are authorized by the UN Security Council, conducted within a regional framework, or in pursuance of national security considerations. Especially in Europe, some political leaders neither recognize the importance of the seas, nor are they willing to take the decisions necessary for an effective and efficient preservation of maritime security. All too often they are seconded by legal experts who claim that maritime security operations, while certainly necessary, are contrary to international law. Instead of thoroughly scrutinizing the applicable law, they rely on doctrines originating from the past that find no basis in current international law. Thus, the law is being abused as a cheap excuse for passivity while, in reality, it is a lack of political will and courage that prevents the necessary steps from being taken.

Those who suffer most from the situation just described are the members of the armed forces. These individuals are entrusted with tasks almost impossible to fulfill because they are not equipped with either the means necessary or the political backup on which they are so heavily dependent. Their deployment often is restricted to a mere presence although robust and convincing action is needed to restore or maintain security in the area concerned. The degree of frustration...
resulting from such imposed inactivity is steadily growing, and it becomes increasingly difficult to convince members of the armed forces of the importance of their deployment out of area. It may be added that the source of that frustration is not necessarily a national decision. Due to their ambiguity, both UN Security Council Resolution 1701\(^1\) and the Rules of Engagement\(^2\) drafted by the UN Department for Peacekeeping Operations, have failed to clarify the mandate of the naval forces deployed off the Lebanese coast.

This commentary will concentrate on three threats to maritime security also referred to by Admiral Hoch: piracy and armed robbery at sea, proliferation of weapons of mass destruction, and terrorism. Its aim is to show that international law applicable to maritime security operations provides for operable rules that do not pose an obstacle, but rather, if interpreted and applied correctly, enable our naval forces to take necessary measures.

I. Counter-Piracy Operations

Piracy and armed robbery at sea continue to pose a considerable threat to maritime security. While the tsunami disaster led to a decrease in the number of incidents, recent figures give clear evidence of a return to the higher levels that existed prior to the tsunami.\(^3\) In other areas, such as in the waters off the East-African coast, criminals profit from the unstable political conditions in the coastal States. For example, due to the lack of an effective government, the situation off the Somali coast has remained unchanged, and pirates and armed

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\(^2\) The Rules of Engagement, like national Rules of Engagement, are classified.

\(^3\) For the most recent statistics, see the weekly piracy reports published by the International Chamber of Commerce at http://www.icc-ccs.org/prc/piracyreport.php
robbers continue to use the Somali territorial sea as a place of refuge. However, the lack of an effective government in Somalia has not resulted in the disappearance of that State, nor has it deprived Somalia from the protection of its territorial integrity under international law. The concept of “failed” or “failing” States is political in character and is of dubious value. So far, the continuing existence of Somalia as a subject of international law has not been doubted by either international institutions or by a considerable number of States. Thus, the basic rule still applies, according to which counter-piracy operations within the territorial sea without the—implicit or explicit—consent of the Somali government are considered a violation of that State’s territorial sovereignty.

This, however, does not mean that foreign warships deployed at the Horn of Africa are under an absolute obligation to refrain from any activities directed against pirates or armed robbers at sea as long as they remain within the territorial sea of Somalia. Even if the Somali authorities were willing to comply with their obligation to provide for the security and safety of foreign navigation in the territorial sea, third-party states’ ships would be entitled to render assistance to those who are under attack by pirates or armed robbers at sea. This, of course, would presuppose that the Somali authorities are informed about the incident but are not in a position to intervene in time. Any inactivity on the part of those observing acts of violence at sea would be contrary to the well-established custom of seafarers to immediately render assistance to those who are

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4 Ibid.
6 It may be recalled that the International Court of Justice, in the Corfu Channel Case, recognized “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” and “the Albanian Governments complete failure to carry out its duties after the explosions”. ICJ, Corfu Channel Case (Merits), Judgment of April 9, 1949, ICJ Rep. 1949, at 22, 35.
at distress at sea. According to the position taken here, this is an obligation under customary international law and is not limited to the high seas.\(^7\)

The right of assistance, including assistance entry by aircraft\(^8\) is, of course, limited and does not include law enforcement measures. In other words, the measures taken must be strictly limited to what is necessary to save those under attack. This may include the use of weapons if no other means are available to prevent the criminals from continuing the acts of violence.

Until today, the Somali government and the Somali authorities have not provided convincing evidence that they indeed are willing and able to combat criminal acts in their territorial sea. Rather, there are reasonable grounds for suspicion that pirates and other criminals are tolerated in the area. Hence, any assistance against acts of violence in the Somali territorial sea rendered by foreign warships would not constitute a violation of the territorial integrity of Somalia. In this regard, the situation in East-Africa clearly differs from the situation in the Strait of Malacca and in the adjacent sea areas. There, the states bordering the Strait, while rejecting a US offer to cooperate in the fight against pirates and armed robbers at sea, clearly are prepared to take the steps necessary and to comply with their obligation under international law to provide for security and safety in the sea area.\(^9\)

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\(^7\) While Article 96 of the 1982 UN Law of the Sea Convention on the duty of rendering assistance appears in Part VII only, this does not mean that that obligation does not apply in other sea areas as well.

\(^8\) The right of assistance entry, which must be distinguished from search and rescue operations, presupposes that the location of those in distress is known. See The Commander’s Handbook on the Law of Naval Operations, NWP 1-14M, para. 2.5.2.6 (July 2007 edition).

\(^9\) On the Regional Maritime Security Initiative (RMSI) see http://www.globalsecurity.org/military/ops/rmsi.htm
II. Counter-Proliferation Operations

Counter-proliferation operations at sea directed against foreign vessels (and aircraft) will, in most cases, be limited to monitoring of international sea and air traffic. If, however, there are reasonable grounds for suspicion that a vessel is engaged in the illicit trade of weapons of mass destruction, including their components and delivery systems, it will become necessary to board the ship and, if the grounds for suspicion persist, to divert it to a sea area or port for the purpose of conducting a search. At first glance, such interdiction or interception measures constitute a violation of the flag State’s sovereignty because none of the conditions laid down in Article 110 of the 1982 UN Law of the Sea Convention are met. In view of the restrictive character of this provision, there is, moreover, no room for an analogy that would result in the equation of proliferators with pirates or slave traders.10

1. Consent

Of course, consent would be a perfect legal basis for any interference with foreign shipping. The United States, by concluding eight boarding agreements with some of the world’s most important flag States,11 has taken the steps necessary to enable its Coast Guard to inspect vessels flying the respective flags if certain preconditions are fulfilled. Other states have not followed that

10 Apart from the restrictive character of that provision, it is more than doubtful whether there is room for such an analogy in public international law. Since the basis of that law is consent, consent must always be proven. It may not be replaced by legal techniques.
11 Bilateral boarding agreements have been concluded with Liberia (February 11, 2004), Panama (May 12, 2004), the Marshall Islands (August 13, 2004), Croatia (June 1, 2005), Cyprus (July 25, 2005), Belize (August 4, 2005), Malta (March 15, 2007) and Mongolia (October 23, 2007).
example, but will have a similar legal basis after the entry into force of the 2005 Amendment to the SUA Convention. Until then, they will have to obtain the flag State’s consent in each individual case.

In this context, it needs to be emphasized that there is a division of opinion on the question of whether the master’s consent would serve as a sufficient legal basis for the boarding of a foreign vessel. While, e.g., France and the United Kingdom are not prepared to rely on the master’s consent, the United States and Germany consider it a sound legal basis. It should be considered, however, that the master of a foreign vessel may at any point in time recall his consent. In that case, the boarding team would have to immediately leave the ship.

2. Countermeasures

In view of the foregoing discussion, a question remains as to the legality of maritime interception operations in cases where there is no consent from either the flag State or the ship’s master. The present author has analyzed this question intensively elsewhere. It is therefore sufficient to summarize the findings as follows:

12 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 UNTS 221; reprinted in 27 ILM 668 (1988). The 2005 Amendment will not only criminalize the transport of WMD and their components, but will also serve as a legal basis for intercepting vessels if there are reasonable grounds for suspicion that they are engaged in such activities.

First, within its territorial sea, the coastal State is entitled to enforce its laws prohibiting the trafficking of weapons of mass destruction, including their components and delivery systems, vis-à-vis foreign vessels. The provisions of the 1982 UN Law of the Sea Convention are flexible enough to be interpreted in a way that allows for interference with foreign vessels encountered in the territorial sea if there are reasonable grounds for suspicion that they are engaged in illicit trafficking of such items.\textsuperscript{14}

Second, in high seas areas, the legal situation is more difficult because Article 110 of the UN Law of the Sea Convention merely provides some exceptions from the general prohibition of interference with foreign vessels in those sea areas. However, UN Security Council Resolution 1540 (2004), while not explicitly authorizing interference with foreign vessels, can be relied upon if a vessel is reasonably suspected of being engaged in proliferation activities by non-state actors.

According to UN Security Council Resolution 1540,\textsuperscript{15} “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security.” Consequently, the Security Council, acting under Chapter VII, has identified a series of obligations with regard to the prevention of WMD proliferation by non-state actors.\textsuperscript{16} Admittedly, in Resolution 1540 the UN Security Council has not authorized the boarding or capture of vessels and aircraft suspected of transporting WMD and

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\textsuperscript{16} In a footnote to the resolution, the term “non-State actor” is defined as an “individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.”
\end{flushright}
their delivery systems.\textsuperscript{17} Reportedly, the People’s Republic of China’s support for the resolution was obtained only after the United States dropped a provision authorizing the interdiction of foreign vessels suspected of carrying WMD on the high seas.\textsuperscript{18} Other states expressly emphasized that the resolution did not authorize such interdictions.\textsuperscript{19} If the Security Council had provided such an authorization—either in general terms or with regard to vessels and aircraft of a given nationality—the resolution would have provided a perfect legal basis.\textsuperscript{20}

However, the continuous plea for express authorization by the Security Council whenever security issues are at stake is unrealistic. It is based upon an erroneous perception of the UN system of collective security. Of course, a functioning institutionalization of the use of force, including measures short of self-defense, may be an ideal worth working for. However, at present the system is far from perfect. It is wishful thinking to believe that, e.g., the People’s Republic of China will ever vote in favor of a Security Council resolution aimed at proliferation activities by North Korea and authorizing the interdiction of North Korean vessels and aircraft suspected of being engaged in such transports.

In view of the fact that the present system of international law is far from excluding unilateral or multilateral action outside the UN system of collective security, non-compliance with the obligations laid down in Resolution 1540 constitutes a violation of international law and entitles the injured States to take

\textsuperscript{18} S.D. Murphy, UN Security Council Resolution on Nonproliferation of WMD, 98 AJIL 606-608, at 607 (2004).
appropriate countermeasures, including countermeasures short of self-defence.\textsuperscript{21} Contrary to the position taken by some international lawyers, that a resolution cannot be characterized as having established a “self-contained regime,” nothing in Resolution 1540 justifies the conclusion that it could not “be enforced without the legislative body, i.e., the Council, itself taking the requisite enforcement action against the recalcitrant state […]”.\textsuperscript{22} If that were true, all the efforts undertaken by the states to agree upon bilateral or multilateral instruments justifying the interdiction of WMD proliferation by non-state actors would be in vain and, ultimately, contrary to their obligations under the Charter and resolution 1540.\textsuperscript{23}

Accordingly, every state that either allows or otherwise—actively or passively—assists the transport of WMD and their delivery systems by non-state actors will violate its international obligations under Resolution 1540. A justification based on an assertion that the state in question does not dispose of the necessary means to comply with its duties is immaterial because Resolution 1540 provides, in paragraph 7, that states requiring assistance in implementing the resolution should accept an offer to that effect by those states in a position to do so.\textsuperscript{24} A state that knowingly allows the transport of WMD or their delivery

\begin{itemize}
\item \textsuperscript{21} The term “countermeasures short of self-defense” relates to situations of a prohibited use of force not amounting to an “armed attack” as defined in Article 51 of the UN Charter. For an appraisal see, inter alia, the Dissenting Opinion of Judge Simma in the Case concerning Oil Platforms, \textit{International Court of Justice}, Judgment (Merits) of November 6, 2003, at para. 12. \textit{Further Heintschel von Heinegg, Current Legal Issues} (\textit{supra} note 13).
\item \textsuperscript{22} \textit{Lavalle (supra note 17#)} at 424. A similar view is taken by Zimmermann and Elberling (\textit{supra} note 19) at 76.
\item \textsuperscript{23} \textit{Heintschel von Heinegg, The Proliferation Security Initiative} (\textit{supra} note 13).
\item \textsuperscript{24} Para. 7 reads: “Recognizes that some States may require assistance in implementing the provisions of this resolution within their territories and invites States in a position to do so to offer assistance as appropriate in response to
\end{itemize}
systems, or that fails to prevent such transports on board vessels flying its flag, or on board aircraft bearing its markings, or by its nationals, commits an internationally wrongful act under international law. According to the well-established principles of the law of state responsibility, as codified in the 2002 rules prepared by the International Law Commission, the state injured by a violation of international law is entitled to take the necessary countermeasures in order to either induce the wrongdoer to comply with its obligations or to re-establish the legal status quo ante in lieu of the delinquent state. Since all forms of WMD proliferation activities by non-state actors are to be considered a threat to peace and international security and since the vast majority of states, including the People’s Republic of China, agrees that such activities pose a considerable danger, the category of “injured State” is not limited to potential target states. Consequently, countermeasures and reprisals involving visit, search and capture specific requests to the States lacking the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the above provisions.”


Article 49 of the ILC rules reads as follows:

“1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.”

Note, however, that the restriction in para. 1 is not part of customary international law because states have continuously claimed a right to resort to counter-measures in order to re-establish the legal status quo ante in cases in which the obliged state has been either unwilling or unable to comply with its international obligations.
may be taken against vessels and aircraft for the mere reason that they are flying
the delinquent state’s flag or that they are bearing that state’s markings (genuine
link). However, in view of the importance of the freedom of navigation and
aviation, such measures must be necessary and strictly proportionate. That will
only be the case if there are reasonable grounds for suspicion that the vessels or
aircraft concerned are indeed engaged in illicit activities of WMD transportation,
i.e., that they are acting without the legal authority of any state.28

III. Counter-Terrorism Operations

The current Operation Enduring Freedom, whose geographic area of
operations is not limited to the territory of Afghanistan, but also includes
maritime interception operations at the Horn of Africa,29 is but one piece of
evidence demonstrating the importance states attribute to counter-terrorism
operations. According to the position taken here, the Global War on Terror
(GWOT)—a political rather than a legal term—has only once met the criteria
necessary to create an international armed conflict: the Allied attack on
Afghanistan. Apart from that exceptional situation, the GWOT may neither be
characterized as an international nor a non-international armed conflict. The
publications on that issue are legion. It is, therefore, sufficient to recall that so far
the United States has been the only state claiming to be in a situation of armed
conflict. As long as other states remain reluctant to share the US view, any claim
of the applicability of the law of armed conflict, or international humanitarian
law has no basis in either state practice or international treaty law.

28 For a similar argument in the context of counter-terrorism see Heintschel von Heinegg,
Current Issues (supra note 13).
29 See Heintschel von Heinegg, Operation Enduring Freedom (supra note 13).
Be that as it may, with regard to maritime counter-terrorism operations in the high seas, there is no need for application of the law of armed conflict. On the one hand, there are numerous multilateral treaties dealing with all forms of terrorism. On the other hand, the law of countermeasures and the right of self-defense do provide for a sufficient legal basis.

1. Countermeasures

Like counter-proliferation operations, counter-terrorism operations at sea are justified by reference to countermeasures as well. It may be recalled that the UN Security Council, in Resolution 1373, acting under Chapter VII, has determined a variety of legal obligations of states with regard to transnational terrorism. Again, if a state either assists transnational terrorism or has knowledge that its nationals or merchant vessels are providing such assistance, but still remains inactive, that state is in clear violation of its obligations under the UN Charter.

Of course, if the assistance rendered amounts to direct participation in an armed terrorist attack, or if the attack is in some other way attributable to the sponsoring state, the target state will be entitled to take self-defense measures. Whether the armed response qualifies as an “on-the-spot reaction” or a “defensive armed reprisal” is merely a matter of the modalities of the exercise of the right of self-defense. In any event, the target state has the right to respond by the use of armed force.

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30 Those treaties may be found at: http://untreaty.un.org/English/Terrorism.asp
31 UN Doc. S/RES/1373 (2001), para. 1 lit. d) and para. 2 lit. a) and e).
33 For these concepts see Y. Dinstein, War, Aggression and Self-Defence, at 219 et seq. (4th ed., Cambridge 2005).
Apart from self-defense, the state targeted by acts of transnational terrorism is entitled to take defensive countermeasures, “short of Article 51,”\textsuperscript{34} against the state that is actively or passively assisting or otherwise furthering transnational terrorism. Accordingly, countermeasures or reprisals involving visit and search could be taken against vessels for the mere reason that they are flying that state’s flag (genuine link). Again, in view of the importance of the freedom of navigation, such measures must be necessary and strictly proportionate. Thus, they may be taken only if there are reasonable grounds for suspicion that the vessels affected are indeed engaged in or assisting activities of transnational terrorism, e.g., if the state in question fails to prevent the merchant vessels flying its flag from transporting terrorists or objects that are designed to further transnational terrorism.

2. Self-Defense

According to the views of the states actively contributing to \textit{Operation Enduring Freedom}, counter-terrorism operations at sea find their legal basis in the inherent right of self-defense. However, if maritime interception and interdiction operations are solely based upon the right of self-defense, there needs to be a sufficiently clear link to the threat posed by transnational terrorism. This will, for example, be the case if there are reasonable grounds for suspicion that a given vessel is involved in the carrying of terrorists and/or of weapons destined for an area known to serve as a hiding-place or training ground for terrorist groups. In any event, the generally accepted legal limitations of the right

\textsuperscript{34} For the legality of acts ‘short of self-defense, see the Separate Opinion of Judge Simma, \textit{International Court of Justice}, Case concerning Oil Platforms (\textit{Islamic Republic of Iran v. United States of America}), Judgment (Merits) of November 6, 2003, para. 12.
of self-defense—immediacy, necessity, proportionality—have to be observed. Indiscriminate maritime interception and interdiction operations exercised in vast sea areas would be disproportionate and, hence, not justified by the right of self-defense.

It may be added in this context that if a vessel can be connected to a persisting threat of transnational terrorism, no further conditions have to be met. Any form of consent—whether from the flag State, or by the ship’s master—is irrelevant. The right of self-defense has never been made dependent upon the will of third-party states or on individuals. The UN Security Council alone would be in a position, by taking effective measures, to terminate the exercise of that inherent right.

The practice of states taking part in Operation Enduring Freedom clearly shows that they regard the right of self-defense as the legal basis for their maritime interception operations. However, when it comes to visit and search of vessels, they have preferred to rely on some additional legal bases. For example, the boarding of vessels has been made dependent upon the master’s consent (so-called compliant boarding). This practice is but one illustration of the feeling of legal uncertainty surrounding counter-terrorism operations at sea. The reason is simple: While the right of self-defense has been recognized to also apply to armed attacks by non-state actors, and while at least the states participating in Operation Enduring Freedom consider themselves in a continuing situation of self-defense against transnational terrorism, no state has undertaken the effort to identify operable criteria that would enable the armed forces entrusted with these operations to clearly establish their powers in the conduct of counter-terrorism

35 See only Dinstein (supra note 33), at 235 et seq.
36 See Article 51 UN Charter: “[…] until the Security Council has taken measures necessary to maintain international peace and security.” For an evaluation, see Dinstein (supra note 33), at 211 et seq.
operations at sea. Accordingly, they are not in a position to establish when and under what conditions they would be entitled to board a ship despite a lack of consent. The same holds true with regard to the capture of items found on board intercepted vessels or the capture of persons suspected of being engaged in terrorist activities. In most situations they will merely prevent suspects from proceeding with their voyage and—without physically capturing them—wait for US forces to ultimately perform the act of capture. This is far from satisfactory and entails numerous unsolved legal questions, e.g., the obligation to comply with universal or regional human rights standards. Obviously, up to the present, states have seen no necessity for a specification of their rights and obligations in counter-terrorism operations based on the right of self-defense. According to the position taken here, it is, however, not sufficient to agree, in a most general manner, on the applicability of the right of self-defense without providing the armed forces with a sound clarification of their powers when it comes to the exercise of the right of self-defense with the aim to effectively and efficiently combat transnational terrorism. This is far from being an exercise to be left to international lawyers. If states remain unwilling to accept the US position on the applicability of the law of armed conflict to counter-terrorism operations, they are under an affirmative obligation to agree on operable standards and criteria that will prevent the members of their armed forces from being confronted with alleged violations of the applicable international (and domestic) law.

Concluding Remarks

During the past six years we have witnessed a remarkable development of international law applicable to counter-terrorism and counter-proliferation operations. While, in 2001, no one would have subscribed to the view that the
right of self-defense applies to armed attacks committed by non-state actors, there is today general agreement that this is indeed the case. Moreover, the threat posed by non-state actors in the field of proliferation of weapons of mass destruction has induced states to enforce their efforts with a view to effectively counter such illicit activities. Hence, there is widespread agreement on the principal legality of maritime security operations. Any allegation as to their illegality under contemporary international law is unfounded.

Still, much remains to be done. On the one hand, there is a dramatic need for operable rules and standards upon which the armed forces depend if their operations are to be effective and successful. On the other hand, any progressive development or specification of the applicable law must be undertaken in a most cautious manner. Too much is at stake. Maritime security operations do not take place in a vacuum. They occur in an international space that is of utmost importance for our economies and our security. Any unreasonable interference with international shipping and aviation—wherever it occurs—would jeopardize the achievements of the past century and certainly would contribute to an erosion of the law of the sea and, thus, to an increasing nationalization of the high seas and international airspace.
TOWARD MORE EFFECTIVE COUNTER PIRACY POLICY

by

John Norton Moore

Prepared for the Maritime Piracy/Counter Piracy Workshop

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June 12, 2009

German Bundeswehr soldiers apprehend pirates in the Gulf of Aden off Somalia March 3, 2009
Toward More Effective Counter Piracy Policy
By John Norton Moore

Contents

I. Introduction ............................................................................................................................................... 3

II. An Overview of Applicable International Law........................................................................................... 7

   A. The Law of the Sea ............................................................................................................................... 8

   B. The SUA Convention .......................................................................................................................... 10

   C. Security Council Resolutions .............................................................................................................. 11

   D. Jurisdiction.......................................................................................................................................... 11

III. An Overview of Applicable United States National Law & Policy .......................................................... 13

   A. Legal Provisions in U.S. National Law ............................................................................................... 13

   B. United States Counter Piracy Policy ................................................................................................... 14

IV. An Overview of Principal Counter Piracy Options ................................................................................ 15

   A. Enhanced Policing & Enforcement within National Jurisdiction ....................................................... 15

   B. Enhancing Policing & Enforcement within Under-Governed Areas .................................................. 15

   C. Prevention and Interdiction Efforts at Sea (and on Land) ................................................................. 16

   D. Criminal Prosecution and Civil Liability.............................................................................................. 17

   E. Focused Efforts to Reduce Incentives for Piracy ................................................................................ 17

V. Recommendations for More Effective Counter Piracy Policy................................................................ 18

VI. Conclusion .............................................................................................................................................. 21

ELECTRONIC ATTACHMENTS ....................................................................................................................... 23

SELECTED BIBLIOGRAPHY............................................................................................................................ 24
TOWARD MORE EFFECTIVE COUNTER PIRACY POLICY

By

John Norton Moore

“We remain resolved to halt the rise of piracy . . . . To achieve that goal, we must continue to work with our partners to prevent future attacks, be prepared to interdict acts of piracy and ensure that those who commit acts of piracy are held accountable for their crimes.”

Statement by President Barack Obama on the occasion of the rescue of Captain Phillips, April 12, 2009

I. Introduction

Piracy, like terrorism, is ancient. But also like terrorism it tends to come in waves or clusters; clusters which are temporal, geographic and linked by mode. Some of the earliest recorded piracy is that of the Sea People who terrorized the Aegean and Mediterranean in the 13th century BCE. Even earlier, in 75 BCE in a classic example of ransom piracy, Julius Caesar was taken by Cilician pirates, held in the Dodecanese Islands and subsequently ransomed before he built a fleet, returned to capture the pirates, and had them crucified. Piracy continued throughout the classical and post-classical periods with recurring waves such as that of the Irish pirates in the 4th century who sold St. Patrick into slavery, 9th century Muslim pirates terrorizing the Mediterranean, and

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Chinese pirates during the mid-Qing dynasty terrorizing the Chinese junk trade. The Caribbean piracy from approximately 1560 until the mid 1720s, not so nice in its own day, is now the stuff of romanticized legion and Disney movies. Thomas Jefferson’s resolve in ending the reign of kidnapping, robbery and terror from the Barbary pirates is a classic of American history. The Barbary pirates operated from the coast of North Africa between the 16th and 19th centuries and may have captured and sold as slaves more than one million Europeans until Jefferson’s determination ended the scandalous pillage and tribute. Few, however, are aware of the Bias Bay piracies of the 1920s and 30s in the China Sea. More recently, the 1980s witnessed an explosion of piracy as armed robbery and accompanying murder in the Strait of Malacca, the Indonesian Archipelago and off Thailand against the Vietnamese “Boat People.” But except for the Barbary pirates, none of these recurrent waves of piracy have captured international attention as has the Somalia ransom piracy dating from about 2003. For the unexpected, indeed startling, success of the pirates in blackmauling millions in ransom payments from ship owners has ensured one of the most rapid explosions in piracy in history. This piracy began with captures of fishing vessels and subsequently escalated to container and dry cargo ships (including a ship carrying military tanks) and even a supertanker. Today it is truly out-of-control and the rate of Somalia piracy in 2009 far exceeds that for 2008.

Modern piracy is not a single phenomenon. The bulk of incidents in many different clusters around the world tend to be armed robberies against ships in harbor, at anchor or during relatively in-shore transit. There is also some piracy driven by civil unrest and insurgency, as seen today in the Niger delta. But the core of the recent Somalia piracy is seizure of ships and their crew for payment of ransom, as with the kidnapping of Julius Caesar in antiquity. According to the IMO, which has since July 1995 issued monthly reports on piracy, the number of reported piracies in 2008, at 306 globally, was up 8.5% over the figure for 2007. The bulk of these attacks were simply armed robberies typically while the victim ships were at anchor or berthed in harbor. As such, the bulk of attacks take place within the internal or territorial waters of nation states. But another way in which the recent Somali piracy is atypical is that it has morphed into the seizure of ships simply transiting off the coast of Somalia, at least once as far as 655 nautical miles from the coast of

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2 See generally “Piracy” in Wikipedia. I am indebted to Professor Jack Grunawalt, the Stockton Professor of International Law at the Naval War College, for the Julius Caesar and St. Patrick examples.

3 Sadly, the United States, Russia, and Spain paid bribes (or “tributes”) to Morocco, Algiers, Tunis, and Tripoli (collectively the “Barbary Pirates”) until Jefferson’s decisive action in response.


Somalia (the MV Pompei seized on April 18, 2009) – and at least with one attack 757 nautical miles at sea (the MV Shanghai Venture attacked on April 6, 2009). Moreover, and alarmingly, as of April 23, 2009, the 19 successful hijackings and 81 reported pirate attacks to that date in 2009 put 2009 on track for a 650% increase over 2008 if the same attack rate were maintained.6

Piracy is decreasing in certain areas, typically because of more effective efforts by coastal nations against piracy. Thus, there was a decrease in the Malacca/Singapore Strait from 12 attacks in 2007 to only 2 attacks in 2008, driven by a continuing effective regional cooperative effort by Singapore, Indonesia and Malaysia in the Strait. In contrast, there was a substantial increase from 60 reported instances of piracy in 2007 to 134 in 2008 off East Africa, driven largely by the Somalia ransom phenomenon.7 And, as the above statistics show, 2009 could be the worst year yet for Somali ransom piracy.

The costs of this high-level of piracy against shipping commerce of the world are considerable, though in purely economic terms small in comparison to world trade. These costs include additional insurance expenditures to transit the riskiest areas, the additional fuel and operating expenses to avoid these areas, the outlay of ransom payments, the costs of governmental responses – including movement of warships into the threatened areas, and, above all, the sometimes minimized human costs for mariners of this illegal activity. Thus, the IMO reports that for 2008 six crew members were killed, forty-two were injured/assaulted and approximately seven hundred and seventy-four crew members were taken hostage/kidnapped, with about thirty eight crew members still unaccounted for.8 As to ships, during 2008 fifty-one ships were reportedly hijacked with one vessel still unaccounted for.9 Another more difficult cost to measure is the toll on the rule of law and global stability of permitting ongoing brigandage as simply a normal cost of business. There may also be an opportunity cost in failing to act effectively against piracy and thereby missing an opportunity to enhance global cooperation and security. Because the economic expenses of piracy are small relative to the overall value of trade and shipping there is a tendency to shrug it off as simply “manageable.” I believe this is a core mistake in dealing with piracy which considerably underestimates the human, rule of law, and opportunity costs in failing to act.


8 It is critically important that we focus on protection of mariners in relation to piracy. All too often their rights are neglected. For a parallel problem in neglecting the rights of mariners simply to be paid and not abandoned in some port far from home see “Out of sight, out of mind: Seafarers, Fishers & Human Rights” (A Report by the International Transport Workers’ Federation (2006).

9 See IMO Annual Report, supra note 3, at para 6, page 2.
To understand piracy, ancient or modern, and to seek to identify and bring about a more effective counter piracy policy, one should begin by examining the incentives of those who decide to engage in piracy, particularly the leaders of the pirate organizations. Indeed, the newest paradigm for understanding and affecting foreign policy generally is that of “incentive theory.”

Typically the incentive for pirates, unlike that necessarily for terrorists, is profit, and, in context, greater profit than is available from other activities in which the pirates can engage, and in a setting in which the enhanced risk from counter measures is less than the enhanced profit incentive. That is, not surprisingly, the piracy equation, whether of the more typical armed robbery variety, or the Somali ransom variety, is simply a risk/reward calculation on the part of the pirates. Of course, the real-world is messy in the actualization of this calculation and includes psychological factors, inadequate information and erroneous assumptions about profit or risk. In turn, these psychological factors, in settings of economic and governmental collapse as in present-day Somalia can trigger the equivalent of a “gold rush” toward piracy as barriers to entry are low, alternative opportunities are few, and ransom payments exceed the wildest dreams of those who first ventured into the ship seizure and ransom business.

10 See, e.g., JOHN NORTON MOORE, SOLVING THE WAR PUZZLE (2004).

11 For an excellent understanding of the full context generating the recent ransom piracy off the Somali Coast see “Piracy off the Somali Coast,” Final Report/Assessment and recommendations of the International Expert Group on Piracy off the Somali Coast (Nairobi 10-21 November 2008).
Because of the complexity of this real-world “incentive” calculation there is no single “magic bullet” to end piracy. But collectively there are actions which can be taken which will make a major difference in altering the risk/reward ratio for piracy, and which can dramatically reduce the risk of piracy. Some of these actions, not surprisingly, relate to restoring government function and providing an enhanced economic milieu, which will reduce the incentives for piracy in under-governed areas where piracy thrives. These measures tend to be difficult, costly and time-consuming, as with proposals to fundamentally change the context of governmental and economic collapse in Somalia, even if the international community had the know-how and will to make the change, which is questionable.12 Other counter piracy actions relate to enhancing the risk for the pirate activity, whether through more effective interdiction or more effective criminal prosecution. In turn, these activities can be national, regional or truly international through treaty or United Nations action. Moreover, because of the diversity of shipping and different forms of piracy, there is no “one-size fits all” in counter piracy actions. For example, defensive ship-riders may in certain contexts be a useful response against ship seizures for ransom, but they may also be inappropriate for chemical carriers with highly flammable cargos. Finally, a promising avenue, particularly for the newer Somali ransom piracy relates to reducing the flow of ransom payments. From this mix, this short concept paper will discuss several potential approaches, additive to current efforts, toward a more effective counter piracy policy.

II. An Overview of Applicable International Law

International law has long condemned piracy and supported extraordinary measures of state action to counter piracy. The principal relevant areas of international law are the law of the sea; an important recent anti-terror convention which also applies to acts which may be piratical -- that is, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention); recent United Nations Security Council counter piracy Resolutions; and the international law of jurisdiction. These relevant areas of international law will be briefly examined in turn.

12 See the excellent recent report from the U.S. Naval War College Workshop on Somali Piracy, Commander James Kraska, “Report on the U.S. Naval War College Workshop on Somali Piracy: Fresh Thinking for an Old Threat” (April 28, 2009) (assisted by support from Booz Allen Hamilton), which both recognizes the importance of the failed Somali political and economic milieu for the rise of the recent Somali piracy cluster but which concludes that “it is doubtful the international community has the capability or will to transform Somalia quickly into a stable and viable state.” Id. At “Key Insights,” page 1. See also James Kraska and Brian Wilson, Combating Pirates of the Gulf of Aden: the Djibouti Code and the Somali Coast Guard, Ocean & Coastal Management (in press, 2009).
A. The Law of the Sea

The 1982 United Nations Convention on the Law of the Sea (UNCLOS), now in force for 157 countries and the European Union and regarded by the United States as evidence of customary international law pending what is hoped to be prompt Senate Advice and Consent, is the authoritative basis for contemporary international law of the sea. This Convention, with respect to its piracy articles, largely readopts the piracy articles from the 1958 Geneva Convention on the High Seas which has been in force for the United States for decades. Among the most important piracy articles in UNCLOS, which includes Articles 100 through 107 and Article 110, is Article 100 which creates a “Duty to co-operate in the repression of piracy” and provides “All states shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” Article 101 gives a “Definition of piracy” as:

Piracy consists of any of the following acts:
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraphs (a) or (b).

Also important, Article 105 provides:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 110 on “Right of visit” then provides that “a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity . . . [may board if] there is reasonable ground for suspecting that . . . the ship is engaged in piracy . . . .”

The effect of these articles is to define piracy under the modern law of the sea as an act which takes place beyond internal waters, territorial sea, or archipelagic waters of a coastal state and is “any act of depredation, committed for private ends by the crew or the
passengers of a private ship or a private aircraft, and directed “against another ship or aircraft, or against persons or property on board such ship or aircraft.” In this connection it should also be noted that, textually at least, any act even on land or not outside the jurisdiction of any coastal state “of inciting or of intentionally facilitating an act . . . [of piracy as defined in Article 101 of UNCLOS]” is itself an act of piracy. So the UNCLOS definition of piracy would include the entire piracy crime unit, including any organizers or facilitators on land. Articles 105 and 110 then provide nations with powerful authority to board suspected pirate vessels, seize a pirate ship or aircraft and arrests persons and property on board the pirate vessel and “determine the action to be taken” with respect to “penalties to be imposed” and “the actions to be taken with regard to the ships, aircraft or property.”

It should be noted that acts of armed robbery against ships or their cargo or crew which take place in port, in internal waters, in the territorial sea or in archipelagic waters are not piracy under international law, though they may still be violations of the SUA Convention. This is simply because such acts are regarded under international law as within the sole jurisdiction of the port or coastal state in question. Moreover, traditional “piracy” involves acts for “private ends” as opposed to “political objectives” as in terrorism. In this connection, an effort by Malta during the UNCLOS negotiations to broaden the definition of piracy to remove the “private ends” limitation and also to extend piracy to acts anywhere beyond internal waters was defeated by coastal nations which have jealously guarded their jurisdiction in this regard.13

A related question is the right of a state which is pursuing pirates to chase them into the territorial sea or archipelagic waters of a third state. The position of the United States on this question is that it will first make every effort to notify and obtain the consent of the coastal state but where that is not possible it may “continue pursuit” into these areas absent protest by the coastal nation. Thus, the latest Commander’s Handbook on the Law of Naval Operations states:

If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from international waters or airspace into the territorial sea, archipelagic waters, or superjacent airspace of another country, every effort should be made to obtain the consent of the nation having sovereignty over the territorial sea, archipelagic waters, or superjacent airspace to continue pursuit . . . . The inviolability of the territorial integrity of sovereign nations makes the decision of a warship or military aircraft to continue pursuit into these areas without consent a

13 See III UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Satya N. Nandan & Shabtai Rosenne eds., Center for Oceans Law & Policy 1995), 182-223 & 237-246, at 198-99. And see the discussion of the SUA Convention and its applicability to piracy at section 100.7 of this Virginia Commentary at page 185, and of the Convention at 186-96.
serious matter. However, the international nature of the crime of piracy may allow
continuation of pursuit if contact cannot be established in a timely manner with the
coastal nation to obtain its consent. In such a case, pursuit must be broken off
immediately upon request of the coastal nation, and, in any event, the right to seize
the pirate vessel or aircraft and to try the pirates devolves on the nation to which the
territorial seas, archipelagic waters, or airspace belongs.14

It is evident that modern law of the sea powerfully facilitates actions by every navy
and coast guard in the world to take action against pirates acting beyond internal waters,
territorial sea or archipelagic waters. In turn, these areas under the jurisdiction of coastal
nations are areas where the coastal state, not surprisingly within its area of sovereignty, has
the responsibility to deal with piracy, as it does to deal with its own internal crime. The
erroneous rumor, apparently put out by uninformed opponents of the 1982 Law of the Sea
Convention, that the Convention creates “rules of engagement” which hamper efforts at
control of piracy is 180 degrees off track.15 Similarly, the United States, to protect its own
sovereign rights, has no difficulty supporting the reality that piracy under international law
is limited to areas beyond national jurisdiction.

**B. The SUA Convention**

The Convention For the Suppression of Unlawful Acts Against the Safety of Maritime
Navigation (1988) was a response to the terrorist takeover of the *Achille Lauro* in 1985. As
such, it is one of twelve United Nations anti-terror conventions. But the definition of the
offence covered by the Convention in Articles 3 and 4 applies broadly to acts which would
be piracy and does so without either the “private ends” limitation of the UNCLOS definition
or the more restrictive “beyond national jurisdiction” limitation of UNCLOS. Thus, on this
latter point, Article 4(1) makes clear that “This Convention applies if the ship is navigating
or is scheduled to navigate into, through or from waters beyond the outer limit of the
territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.”
It is also understood that “the Convention will apply in straits used for international
navigation, without prejudice to the legal status of the waters forming such straits in
accordance with relevant conventions and other rules of international law.”16 A core effect

14 The Commander’s Handbook on the Law of Naval Operations §3.5.3.2 (NWP 1-14M, COMDTPUB P5800.7, A
July 2007).

15 See, e.g., *Obama’s Next Hostage Crisis*, Review and Outlook Editorial, WALL STREET JOURNAL, April 9, 2009, at
difficulties for navies trying to prevent piracy.” Not only is this assertion 180 degrees wrong about the Law of the Sea
Treaty, but that treaty also does not even create “Rules of Engagement,” which are generated under national law and
regulations, not under UNCLOS.

16 Virginia Commentary, supra note 12, at 188.
of this Convention, as with other United Nations anti-terror conventions, is to create an obligation to prosecute or extradite offenders of the Convention. As with the LOS provisions, this Convention also includes within the definition of the offence broader categories of persons than those directly involved in the piracy at sea. Thus, it also applies to “attempts,” and to “abetting,” and to “any person who is otherwise an accomplice of a person who commits such an offence.”

C. Security Council Resolutions

In response to the burgeoning Somali ransom piracy, as of 2008 the United Nations Security Council became amenable to the entreaties of the IMO and adopted a series of Resolutions creating binding legal obligations on member states with respect to certain aspects of piracy. These Resolutions are Resolution 1816, adopted on June 2, 2008, Resolution 1838, adopted on October 7, 2008, Resolution 1846, adopted on December 2, 2008, and Resolution 1851, adopted on December 16, 2008. Each of these Resolutions declares that it is “Acting under Chapter VII of the Charter of the United Nations,” thus making clear that it is creating binding legal obligations on all member states of the United Nations. Most importantly, these Resolutions have put the authority of the United Nations Security Council squarely against piracy and authorized certain actions within the territorial sea of Somalia as well as, more recently, even on the land territory of Somalia. Throughout these Resolutions and discussions about them it is clear that the Somali case re counter piracy actions of third states in the territorial sea and on the land territory of Somalia is viewed as a one-off setting in which the world knows that the areas where the piracy originates are only episodically governed by real state authority and that the at least nominal state authority of Somalia, the Transitional Federal Government of Somalia (the TFG) has authorized and requested these extraordinary actions against piracy emanating from its national territory.

D. Jurisdiction

International law has long recognized that piracy creates “universal jurisdiction.” That is, any nation in the world may try pirates before its own national courts. Indeed, piracy is sometimes viewed as a jus cogens offense under international law generating an obligation for all nations to cooperate in eradication of the offense. A classic statement of this “universal jurisdiction” appears in Hackworth’s Digest which says:

It has long been recognized and well settled that persons and vessels engaged in piratical operations on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them. This stern rule
of international law refers to piracy in its international-law sense and not to a variety of lesser maritime offenses so designated by municipal law.”

Similarly, the Restatement (Third) of the Foreign Relations Law of the United States provides in § 404 that: “A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy . . . .” It goes on to note that international law “does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.”

Under this principle of “universal jurisdiction” it is clear that any state may seize and try a pirate under its own national laws, and that such seizure and trial is not restricted to settings where the territory or nationals of the state in question are affected. Considerations which may militate against trials in a particular state, however, might be lack of implementing national laws, willingness to defer to a third state deemed for one reason or another to be a better forum for trial, and possibly in some cases simply practical concerns about evidence, the trial process, and even possible liability to grant asylum to the pirate (though this later objection seems overblown in most circumstances).

Crew of the hijacked Ukrainian vessel MV Faina standing on deck under the watch of armed Somali pirates on November 9, 2008


18 I RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 and Comment (b), at 254 & 255 (1987). See also §§ 522 & Comment (c) to that section which provides: “Any state may seize a ship or aircraft on the high seas on reasonable suspicion of piracy, arrest the suspected pirates, seize the property on board, try the suspected pirates, and impose penalties on them if convicted,” in II, RESTATEMENT at 84.
III. An Overview of Applicable United States National Law & Policy

“The United States strongly supports efforts to repress piracy and other criminal acts of violence against maritime navigation. The physical and economic security of the United States – a major global trading nation with interests across the maritime spectrum – relies heavily on the secure navigation of the world’s oceans for unhindered legitimate commerce by its citizens and its partners. Piracy and other acts of violence against maritime navigation endanger sea lines of communication, interfere with freedom of navigation and the free flow of commerce, and undermine regional stability.”


A. Legal Provisions in U.S. National Law

United States national law provides clear constitutional authority for congressional action with respect to piracy, as well as currently enacted long-standing legislative provisions under which pirates may be tried before United States federal courts.

Thus, Article I, section 8 of the United States Constitution provides that: “The Congress shall have Power . . . . To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of nations.”

Title 18 § 1651 of the U.S. code, entitled “Piracy under law of nations” provides: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.” An earlier version of this provision of the criminal code provided for the death penalty. This legislative definition of the crime of piracy authorizing trial and punishment under United States national law was upheld by the Supreme Court in 1820 in United States v. Smith, 18 U.S. 153 (Wheat 1820), against a challenge that the reference to international law in the definition of the crime made the crime too vague to be constitutional.

Similarly, 18 U.S.C. § 1659 entitled “Attack to plunder vessel” could also be used for prosecution of certain piracies in United States national courts. This crime is defined as:

Whoever, upon the high seas or other waters within the admiralty and maritime jurisdiction of the United States, by surprise or open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined under this title or imprisoned not more than ten years, or both.
One difference here is that the offense would apply also to such acts within the internal waters or territorial sea of the United States.

In addition to the above, 18 U.S.C. §§ 1652, 1653 and 1654, also create certain criminal responsibilities for piracy if the pirate is a citizen of the United States, or the piracy, or arming of any private vessel of war or privateer, is directed against a citizen or vessels of the United States.

Thus, 18 U.S.C. § 1652 addresses citizen pirates:

Whoever, being a citizen of the United States, commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state, or on pretense of authority from any person, is a pirate, and shall be imprisoned for life.

18 U.S.C. § 1653 addresses aliens as pirates in certain treaty settings:

Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is a pirate, and shall be imprisoned for life.

While 18 U.S.C. § 1654 concerns arming or serving on privateers:

Whoever, being a citizen of the United States, without the limits thereof, fits out and arms, or attempts to fit out and arm or is concerned in furnishing, fitting out, or arming any private vessel of war or privateer, with intent that such vessel shall be employed to cruise or commit hostilities upon the citizens of the United States or their property; or Whoever takes the command of or enters on board of any such vessel with such intent; or Whoever purchases any interest in any such vessel with a view to share in the profits thereof shall be fined under this title or imprisoned not more than ten years, or both.

**B. United States Counter Piracy Policy**

In light of the substantial discussion and writing setting out recent United States counter piracy policy this concept paper will not repeat that discussion here. Attached is a recent official formulation in the form of a MEMORANDUM FOR THE VICE PRESIDENT of June 14, 2007, prepared during the Administration of George W. Bush, which summaries some of the core points of U.S. policy. The 2007 Maritime Security (Piracy) Policy is appended as Annex B to the National Strategy for Maritime Security. Also attached is a superb overview article by CDR James Kraska, JAGC, USN, of the faculty of the Naval War College entitled “Developing Piracy Policy for the National Strategy for
Maritime Security,” which is forthcoming in the Autumn 2009 issue of the Naval War College Review. Finally, the National Security Council developed a Partnership Action Plan for Countering Piracy in the Horn of Africa in December, 2008. The Partnership Action Plan provides greater fidelity to the 2007 policy, and applies it to the threat of Somali piracy.

IV. An Overview of Principal Counter Piracy Options

Counter piracy actions and policies can be grouped under the following headings: enhanced policing and enforcement activities within national jurisdiction, enhanced policing and enforcement within under-governed areas, prevention and interdiction efforts at sea and on land, criminal prosecution and civil liability, and focused efforts to reduce incentives for piracy. Since many of these issues have now been dealt with extensively in the literature, only a few comments will be made here about each grouping.

A. Enhanced Policing & Enforcement within National Jurisdiction

For the vast majority of modern piracy, which is simply armed robbery in port, at anchor, or in near-shore transit, the real answer is enhanced police activity, or in shared near-shore transit areas such as the Strait of Malacca/Singapore, enhanced regional anti-piracy policing and enforcement. When this has been done, as in recent years in the Strait of Malacca/Singapore among neighboring nations the result has been a dramatic decline in piracy. Indeed, for the bulk of piracy, which is simply armed robbery in port, at anchor, or in near-shore transit, such enhanced anti-piracy police activity by the coastal state or states in whose waters the attacks take place is the real answer to piracy.

B. Enhancing Policing & Enforcement within Under-Governed Areas

The recent Somalia piracy presents a classic example as to how some of the most egregious examples of piracy in human history depend on territorial sanctuary for the pirates. Such sanctuary provides a platform to launch attacks, a place to take the pirated ship, cargo or crew, and a potential defensive area against response. In the modern age such territorial sanctuary for pirates would seem largely to be either settings of a failed state, as in Somalia, or that of a local warlord or local government leader providing overt or covert support to pirates.

Clearly the elimination of such sanctuaries, as in economic and political reform in Somalia today, would be of great benefit for counter-piracy policy. Unfortunately, such undertakings are poorly understood, difficult and costly. Comprehensive counter piracy policy, however, will certainly look carefully at what might be done here as the recent U.N. Security Council Resolutions have, at least rhetorically, with respect to Somalia.
A variant of this effort seeks to enhance some local or regional counter piracy coast guard or police presence to deal with the issue at its point of origin. One concern here in areas of a failed state or under-governance is whether the new assets to assist such an enhanced coast guard or police presence might simply find their way into the resources of the pirates. Well done efforts here, however, might pay substantial dividends.

**C. Prevention and Interdiction Efforts at Sea (and on Land)**

There are many paths to enhanced prevention and interdiction efforts at sea. These include enhanced non-lethal practices for ship operators, such as measures to make access to the ship more difficult, changes in route, enhanced evasion tactics, and use of high-pressure hoses to repel boarders; Q ships to entrap pirates; greater warship presence; warship protected transit corridors through at-risk areas; armed or unarmed ship riders; convoys; and more. Core problems here are the reluctance of commercial ship owners to get involved in armed defensive measures, the huge number of ships and size of ocean areas which may be involved, the costs of warship and counter piracy operations, including convoys, for example, and the special vulnerability of certain ships such as bulk chemical carriers. Moreover, the at sea component of piracy, as we see off Somalia, may be unemployed youths easily recruited over and over by managers hidden on land as to which even highly successful interdiction may not be adequate to deter if payoffs are sufficiently high. Further, certain governments, such as those of the European Union, may have restrictive concepts as to appropriate use of force which get in the way of effective real-world anti-piracy actions. Finally, unless a warship arrives before a pirate take-over of the ship, it is stuck in a difficult hostage situation rather than an effective setting of deterrence, prevention and interdiction.

A recent UNITAR Report on “Analysis of Somali Pirate Activity in 2009” points out the potential importance of these at sea prevention and interdiction efforts when it notes: “The overall pirate hijacking success rate for 2009 (vessel hijackings / total attacks) is currently at 23%. This is significantly lower than the average in 2008 of 40% and is likely due to the increased naval patrols and heightened security practices of the merchant vessels in the Gulf of Aden.”

There may also from time to time be target-rich pirate operations centers on land which may present appropriate targets for special operations. Core problems here are the difficulty in obtaining good intelligence, the ease with which organizers and ring-leaders can hide themselves among the general population, the difficulty in separating pirates and their ships from others in the vicinity, and

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19 Three of the most obvious but important measures to be taken by the ship operators themselves are speeding up transit through high risk areas, taking evasive actions when attacked, and removing any pilotage ladders affixed to the hull.
simply the usual costs and disincentives of military operations, as are particularly known by professional military themselves. The history of such actions in Somalia, admittedly larger actions for a different objective, is nevertheless instructive in suggesting caution.

Yet another component of counter piracy efforts on land may simply be in restricting importation of or access to certain weapons, such as RPG’s which are favored by pirates, or ships, or equipment such as powerful outboard motors. Difficulties here include the frequently ubiquitous nature of such weapons in areas which are weakly governed and which are thus precisely the areas available for pirates operations, and the dual use capability of certain boats or outboard motors.

D. Criminal Prosecution and Civil Liability

As has been seen, every nation has jurisdiction under international law to arrest and try pirates. There is also no bar, and sometimes benefit as per the recent agreements with Kenya to prosecute pirates, to reach agreement to hand pirates over to a third nation for trial. Sadly, however, nations have too frequently been finding reasons why they cannot try pirates. It is shockingly wrong to apprehend pirates and then release them on the beach. One major concern here, with respect to effective counter piracy policy, as is also true with respect to criminal sanctions against terrorism, is that typically only the low-level “mules” will actually be captured and put on trial. Unlike the days of the Caribbean pirates the real organized piracy crime ring-leaders are remaining on land while they send young impecunious recruits to sea.

There is increasing interest in the use of civil litigation as a tool in the fight against terror. This newer tool might at least be explored for settings in which pirates are being assisted by local officials.

E. Focused Efforts to Reduce Incentives for Piracy

It is theoretically, at least, possible to fashion policies to lessen the incentives for profit which support piracy. With respect to the armed robbery in port or near-shore transit variety of piracy, removal of such incentives might largely focus on uncovering modes for selling stolen goods, etc., and would seem largely a matter of enhanced coastal-state police action. With respect to ransom piracy, however, there is a very major at least theoretical opportunity, to reduce the payment of ransom which fuels such piracy. This is the “incentive effect.”

Lessening the flow of funds to pirates also has a “capabilities effect.” For certainly as the pirate organizations become richer, their ability to obtain more sophisticated intelligence,

communications, weapons, and boats is enhanced. In turn, whatever can be done to reduce the flow of funds to the pirate operations will hinder their capabilities as well as their incentives to undertake piracy.

V. Recommendations for More Effective Counter Piracy Policy

Many responses to the Somali ransom piracy are already underway. The articles and materials gathered in the Attachments and Bibliography to this concept paper discuss these efforts. As such, this section, which I believe is the core of any contribution I may have to make on the piracy matter, suggests certain enhanced measures which seem to me to have considerable promise.

First, a core strategy in lessening the Somali ransom piracy is to reduce the flow of ransom payments from ship-owners to the pirates. In this connection, one possible approach would be a further Security Council Resolution which would require member states to take measures, including criminal or civil sanctions as nationally appropriate, to ban payment of ransom to pirates. As Secretary of State Clinton recently indicated in the piracy context, the United States Government has a policy of never paying ransom to pirates or terrorists. Similarly, the Kenyans recently called for such a ban. It is also clear that a ban even substantially effective would dramatically reduce the incentives and capabilities of the ransom pirate organizations. I would suggest that to minimize the human cost of such a ban that it be announced a month in advance of its effective date and apply solely to pirate captures after the effective date. Of course there will be substantial opposition to such a ban from those who believe that they have an obligation to ransom their employees or property, or that such a ban will generate even more extreme behavior by the pirates. But as a former United States Ambassador in at-risk terrorism settings I was glad that the United States Government was absolutely clear that it would not pay ransom for release of Americans. I believed then, as I do now with respect to ransom payments for piracy, that a policy of paying ransom has far greater harm in putting employees at risk than the harsher seeming policy of refusing to pay such tribute. I doubt that such a binding Security Council Resolution would immediately halt all ransom payments, but it has the potential to dramatically reduce the flow of ransom payments to pirate groups, particularly if the Resolution is accompanied by a Security Council working group charged with an effort at monitoring such ransom flows to the pirate organizations. At minimum, we should encourage mandatory confidential reporting of ransom payments to governments whose nationals are making payments, and perhaps to the IMO as well. This would, at least, provide some handle on the nature of the flow of incentives to the pirates.

Second, security against piracy is primarily a problem for governments; not the private sector. Police protection and minimum order are core functions of government everywhere. Moreover, for a variety of reasons, individual ship-owners are not in a good position to take action, other than certain limited non-lethal measures, to lessen the risk of piratical attacks (though they do
have an obligation to their crew, passengers and stockholders to at least take those best practices, as recommended by IMO, which seem to add protection.) While actions of individual navies, or the more organized efforts of NATO, the European Union, or the United States acting with regional partners, are promising and important, the size of the ocean areas involved suggests an even more enhanced prevention and interdiction effort to at least considerably raise the cost of ransom piracy. In this connection, one additional possibility is for a United Nations Security Council Resolution urging member states – and particularly the permanent members of the Security Council – to contribute a reasonable number of small Navy SEAL type counter piracy teams which can be helicoptered or otherwise embarked on commercial vessels as they enter an at-risk area and disembarked when the ships clear the area. If all of the permanent members of the Security Council put up just 10 teams that would be fifty teams available for transit on ships through the at-risk areas. Perhaps these numbers would do the job, perhaps a study will show that the number of ships transiting the area would require a larger number of teams, but the point is that an effective armed defensive ship rider system surged into at-risk areas would greatly enhance prevention and deterrence efforts. Moreover, such a focused defensive ship-rider system operates to prevent takeover of a ship, not simply to watch over it as a warship might after a takeover.

Third, while, as with the challenges from terrorism and drugs, criminal sanctions are not by themselves likely to resolve at least the ransom piracy problem given the incentives to create effective criminal organizations operating for profit, at least the international community should stop the nonsense about releasing pirates on the beach or unwillingness to try pirates. There may indeed be some costs for undertaking trial but those costs should be regarded simply as part of the cost of the international obligation for all nations to work to end piracy. As such, the United States should itself adopt a policy of announcing that it will ensure trial either in its own courts or that of cooperative other nations of all pirates captured and that it is strongly encouraging every nation in the world to pass whatever laws may be necessary, or make whatever policy changes may be necessary, to ensure effective trial of all pirates captured.

Fourth, there have also been innovative proposals to declare the 200 nautical mile Exclusive Economic Zones of largely ungoverned states such as Somalia, which are actively breeding ransom piracy, as special areas in which the mere possession of “pirate equipment” is a basis for seizure and forfeiture of the vessel carrying such equipment. Such pirate equipment, of course, would need to be identified reasonably in relation to fishing and other interests of the coastal community and with specificity. But such equipment might include rocket-propelled grenades, outboard motors over a

21 The phrase “Navy SEAL type teams” is used here to refer to small, highly mobile and well-trained military teams which can be quickly and easily moved on and off ships as they transit high risk areas. In terms of United States armed forces, Navy SEAL teams may well be overqualified for such assignments and teams of well-trained sailors or marines might suffice except in unusual circumstances, such as in the case of the specialized sharpshooters required in the April 2009 taking of the Maersk Alabama in the Gulf of Aden.
certain size, or boarding ladders, none of which would be related to traditional fishing or other economic uses. Moreover, any such system would need a mechanism for dispute resolution concerning challenges to seizures. Again, any such proposal would require Security Council action.

Fifth, as with the parallel to Security Council and national actions taken against the financing of terrorism in the aftermath of the 9/11 attacks we should carefully examine efforts to proceed against the assets of criminal piracy gangs. The Treasury Department in the United States, as well as comparable departments in Europe, have become adept at seizing the assets of terrorist organizations. Applying the same effort, and perhaps techniques, to piracy could prove productive in lessening both incentives for piracy and funds adding to capabilities.

Sixth, while generally counter piracy military operations on land are likely to yield only marginal benefit in the fight against organized criminal piracy, there may be exceptional circumstances where intelligence and availability of capabilities for such operations and the nature of the operation itself and its projected costs will properly suggest a military response. Certainly it would be useful to demonstrate to the pirates that there may be additional costs in direct military operations against what they have perceived to be a land sanctuary. The recent actions of United States Navy Seals in the at sea rescue of Captain Phillips from pirates will likely also have a salutary demonstration effect. And the trial of the surviving pirate in United States District Court in the Southern District of New York is an important statement that the United States, at least, is prepared to undertake its duty to criminally prosecute pirates.

Seventh, since perceptions as to profit opportunities are crucial in the successful recruiting by criminal piracy gangs of “piracy mules” who are prepared to undertake the risky operations in small boats against large ships as entailed by the Somali ransom pirate trade, it might be worth a major effort at providing information to the locales in question as to pirates dying at sea, pirates being tried in foreign countries, and the overall slim chances of a pirate payout for the individual “pirate mules.” As well, of course, it might be worthwhile to work at sophisticated efforts seeking to mobilize the local populations in vocally opposing pirate operations. That is, as with terrorism, ideas and subjectivities matter, and efforts to influence hearts and minds in the local communities should not be neglected. Similarly, as with certain counter-insurgency successes in Iraq, every effort should be made to turn local tribal leaders or warlords against the pirates.

Eighth, if there is any existing flow of non-humanitarian aid internationally to the areas involved, one possible option to consider, in order to turn the local population against the pirates, might be to announce that any ransom amounts paid to pirates from the area affected will be deducted from these international aid efforts and refunded to the affected mariners. This option, of course, should not be considered with humanitarian aid and should not be initiated with a new aid program -- which might then be mistakenly viewed as simply a pay-off by the community for piracy. Frankly, I am skeptical of this option but I include it here to add emphasis to the importance
of altering incentives; an emphasis which I firmly believe to be the bottom line in controlling all forms of piracy.

Finally, the United States, NATO, the European Union and the Community of Democracies should all encourage more effective Security Council focus on enhanced national and regional counter piracy actions in the more ordinary armed robbery in port or at anchor variety of piracy. The recent actions of Malaysia, Singapore and Indonesia in the Strait of Malacca/Singapore is a superb example of what can be done if the countries involved get serious about stopping piracy.

VI. Conclusion

“Piracy and armed robbery against ships threaten the lives of seafarers and the safety of international shipping, which transports 90 percent of the world’s goods. . . . Safe, healthy and productive seas and oceans are integral to human well-being, economic security and sustainable development.”

Statement by the United Nations Secretary-General on the occasion of World Oceans Day, June 8, 2009

The international community has been remiss in not taking more effective action against piracy. The problem has been of concern for mariners and ship owners for years. Yet until the recent escalating Somali ransom piracy this problem has been obscured in a general background noise of low-level crime and terrorism. The rise of a major pirate industry in the recent Somali ransom piracy has slowly generated greater willingness for nation states to seriously address the
problem. More affirmatively, a response is now underway and hopefully will soon at least reduce the Somali piracy. It is particularly encouraging that this problem has now been taken up by the United Nations Security Council. But it is very discouraging that rates of Somali piracy are hugely up in 2009 over 2008. It is likely that the Somali piracy psychological “gold rush” effect has a considerable lag in responding to enhanced prevention and interdiction efforts. Hopefully this will be the case and soon we will be able to see a substantial decline in what is now an out-of-control and intolerable piracy.

There is no single magic bullet toward more effective counter piracy policy. A starting point, however, is to differentiate between the more usual armed robbery against ships in port, at anchor or in near-shore transit, from the Somali ransom variety. With respect to the former, a combination of enhanced non-lethal security measures from ship owners with much enhanced policing by the relevant coastal state or states, individually and/or regionally, would seem a core response.

With respect to the burgeoning Somali ransom piracy a combination of efforts to reduce the friendliness of the Somali sanctuary to piracy, enhanced at sea prevention and interdiction, and particularly efforts to reduce the flow of ransom payments to the pirates, their leaders and their logistics suppliers would seem to offer the most effective combination for an enhanced counter piracy policy.

Most importantly, we must not treat modern day piracy as simply a minor nuisance to be endured. Whatever its economic cost, the human cost of captured, killed and injured crew, the disrespect for law bred through acceptance, and the opportunity cost in failing to use this global scourge—with its resulting strong international condemnations—to strengthen international cooperation for security and the rule of law are of great importance. It is simply wrong in the 21st century to be accepting an industry of ransom piracy. All that is needed is effective leadership committed to ending this scourge to the global commons.
ELECTRONIC ATTACHMENTS

1) Piracy off the Somali Coast: Workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia, Nairobi 10-21 November 2008


10) Analysis of Somali Pirate Activity in 2009  (UNITAR/UNOSAT)

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PAGES 179-272 INTENTIONALLY DELETED
Environmental degradation used to be limited, both in time and geographic scope. Now, the effect of our activities on the environment are becoming irreversible and threaten the planet’s ecosystem on a global scale. The adverse effects of human development on the environment threaten the whole of planet Earth.

The public, well before the politicians, have recognized the need to overcome the sterile debate which opposes economic development and environmental protection. The time has come to harmonize social, economic, and political development to allow all human beings to benefit from long-term sustainable development, without compromising the needs for future generations.

For many years now scientists have discarded their traditional reserve by predicting that serious climatic disruptions on a global scale are likely in the foreseeable future. Despite the proliferation of international conferences on global warming, the depletion of the ozone layer, deforestation, acid rain, and the loss of species of flora and fauna, concrete measures still need to be taken. The urgency and the scope of these and other problems are limiting the development of a global strategy to prevent them.

Before it is too late the Antarctic must, as a matter of priority, benefit from a coherent management of the planet. Keeping the Antarctic continent intact is an absolute necessity for our future.

THE FRAGILITY OF THE ANTARCTIC ECOSYSTEM

The Antarctic continent is covered by a sheet of ice which extends over 14 million square kilometres. The sheet represents 90% of all terrestrial ice and 70% of the fresh water on the planet. The Antarctic extends well beyond its vast land mass, into an ocean of 36 million square kilometres: the southern ocean which surrounds it and extends northwards is a hydrogeological barrier which separates it from the three other great oceans. Without this southern ocean, which provides a unique source of food, no life would be possible on the land. Inextricably linked, the ocean and the land are part of the same ecosystem.

The harsh climatic conditions, and the region’s isolation from other oceans, make the Antarctic ecosystem particularly fragile and unique: the continent harbours a number of special areas where plants of a lower rank have been able to

*Translated from the French by Philippe Sands.

The Antarctic Environment and International Law (J. Verhoeven, P. Sands, M. Bruce, eds.: 1-85333-630-0; © Graham & Trotman; pub. Graham & Trotman, 1992; printed in Great Britain), pp. 5–10.
establish themselves; only a handful of marine mammals and a small number of birds have been able to adapt. The food-chain is founded upon the krill, which all other animals depend for their survival.

The Antarctic is an immense ice desert; life is concentrated in several coastal oases where it comes up against man, also attracted to these privileged areas which are often more accessible, better protected, and sometimes even ice-free in the summer.

The development of all human activity in the Antarctic (scientific bases and logistical support, tourism, sea and air traffic) increases local pollution, causes the degradation of habitats and disruptions for the animal populations.

The ecosystem is remarkably well adapted to the rigours of the Antarctic climate (temperature, wind, light, etc). But the ability of these living organisms to adapt to additional constraints is limited, as is the possibility of colonizing new nesting areas for birds which are being chased. Factors such as pollution and the modification of habitats resulting from human activities can have dramatic and long-term effects. The consequences of the oil spill caused by the sinking of the Argentinean supply ship Bahia Paraiso in January 1989 will be felt for many years to come.

THE ANTARCTIC AND THE EQUILIBRIUM OF THE GLOBAL CLIMATE

Additionally, the Antarctic plays a critical role in maintaining the equilibrium of the planet’s climate. The Antarctic system—land, ocean, atmosphere—is the natural refrigerant of the earth’s temperature system.

The Antarctic ice sheet returns up to 80% of the sun’s incidental rays, contributing to the maintenance of low temperatures in the region. This capacity to “refrigerate” at the heart of a dynamic system regulates the average temperature of the Earth.

It is the contrast between the low temperatures in the polar regions and the heat of the equatorial regions which induces atmospheric and marine currents on the planet. Together with the rotation of the earth, it contributes to the patterns of these currents.

The purity of the Antarctic system, as well as its geographic location, creates a unique laboratory for the study of global processes. The air bubbles which are trapped in the ice at the moment of its creation constitutes a precious source of information to determine the concentrations of greenhouse gases and the temperature of the atmosphere hundreds of thousands of years ago. The most recent analyses show that the temperature variations which have occurred since the beginning of the industrial age are half due to the ice cycle and half to the increase of greenhouse gas concentrations in the atmosphere.

If our understanding of the workings of the terrestrial system is continually developing as a result of new information, we are, and will continue to be, unable to predict the changes which the system could withstand. We must act with caution, avoiding the irreparable and irreversible. Now the worst could happen if the Convention on the Regulation of Antarctic Mineral Resources enters into force (the treaty signed in Wellington on 2 June 1988 by the representatives of 33 states parties to the 1959 Antarctic Treaty).
THE MINERAL RESOURCES OF THE ANTARCTIC
AND THE FUTURE OF THE WORLD

After the second great increase in oil prices, and as a result of concerns over the future supply of primary commodities, the state parties to the Antarctic Treaty decided to negotiate a Convention on Antarctic Mineral Resources. The extreme climatic conditions of the Antarctic and the absolute necessity of maintaining the status quo on claims to territorial sovereignty led the negotiators to adopt a prohibitive legal text which largely takes into account measures to protect the environment.

However, we remain opposed to the Wellington Convention, principally for the following reasons:

(a) The world does not need the hypothetical resources which might be found in the Antarctic, particularly since known reserves of oil and minerals are overabundant, and the experts are recommending the reduced use of fossil fuels to prevent global warming.

(b) If the mineral resources of the Antarctic were to be exploited, developing countries, whose economies are largely dependent on exports of primary resources, would be heavily affected. In the present international economic and political climate, it is very difficult for many countries to accept that the 25 states which are Consultative Parties to the Antarctic Treaty, should decide to exploit commercially the wealth of the Antarctic.

(c) The harshest climatic conditions anywhere on the planet would inevitably cause damage to any industrial installations in the Antarctic. Accidents resulting from such damage would have incalculable, and probably irreversible, consequences on the Antarctic’s fragile ecosystem. It is difficult to imagine the value of the regulations, treaties, and good intentions when industrial operators find themselves confronted by winds of 300 kilometres per hour and icebergs several dozen kilometres long.

(d) The high level of technology achieved by our civilization helps us to solve many problems, but it has not helped us to avoid human errors, which can have significant ecological consequences. The Chernobyl accident or the oil spill from the Exxon Valdez are only the tip of the iceberg of our errors. The technologies proposed and developed for off-shore oil exploitation in the Arctic are not adapted to the extreme conditions of the Antarctic.

(e) As mentioned earlier, the Antarctic plays an essential role in maintaining the climatic equilibrium of the planet. The Antarctic provides the refrigeration for the planetary system. The polar sheet which covers the Continent is also an essential element in the climatic archives of our planet.

If the exploitation of mineral resources in the Antarctic is currently an economic absurdity and an ecological nonsense, why was time and effort spent developing a Convention to regulate the exploitation of non-exploitable mineral resources? One can only conclude that the whole process was a monumental waste of time, effort, and money! The only approach is to revisit and reconsider the fundamental principles which led to the negotiation and adoption of this Convention.
THE ANTARCTIC TREATY: THE EXPERIENCES AND DEFICIENCIES

The preamble to the Washington Antarctic Treaty provides that “it is in the best interests of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord”.

The Treaty establishes a hierarchy based on the participation of each nation in scientific research. Today, thirty-nine countries have signed the Treaty. Amongst these, twenty-five recognized as Consultative Parties as a result of their contribution to scientific research, and the majority of them have at least a base in the Antarctic. Fourteen other countries have ratified the Treaty but do not carry out “substantial” scientific activities in the Antarctic or have any bases. These countries are non-consultative parties. Rule by consensus dominates. Important decisions are taken by unanimity, at the biannual meetings of the Conference of the Parties.

The Antarctic Treaty has allowed the development of scientific research while freezing the territorial claims of a certain number of countries. Freezing does not mean abandonment. Countries claiming territorial rights believe, for the most part, that they have a major role to play in the operation of the Treaty. They constitute, together with the other original signatories of the Treaty, a “club”.

Since 1961 the signatories of the Treaty have adopted a collection of measures, recommendations and agreements concerning the protection of the environment and the conservation of marine living resources. These measures have not prevented the massacre of whales (regulated by the International Whaling Commission), and of certain seals. The over-exploitation of krill is leading to important dislocations and disequilibriums in the local ecosystem. Signatory countries must in principle follow measures taken by consensus, but in practice these are often not strictly applied. No sanctions are taken against parties in breach when they are identified.

All the Recommendations taken within the framework of the Antarctic Treaty have the object of regulating human activity without ever prohibiting any or really limiting them. It is this approach which has led to the negotiation, and then to the adoption, of a Convention unsuitable for the regulation of activities relating to mineral resources in the Antarctic. It is the same approach which prevents the adoption of voluntary measures to regulate tourism. The functioning of the Antarctic Treaty is marked by a great inertia due principally to the absence of permanent institutions and to the biannual nature of consultative conferences.

A NEW CHALLENGE FOR THE ANTARCTIC TREATY

The extreme climatic conditions which occur in the Antarctic limits human activities, allowing a decent preservation of the environment. It is the brutality of these climatic conditions which now places in danger the conservation of this environment, as a result of the intensification of certain human activities—tourism, certain expeditions, and the eventual exploitation for mineral resources—all occurring as a result of technological progress adapted to the polar region.
The Antarctic Treaty must be adapted to the new global priorities which are emerging. Economic development must take into account the protection and the preservation of the environment. Certain natural areas must be protected for their vital importance in the maintenance of the climatic equilibrium of our planet. Those areas include the Antarctic.

A real global policy of conservation and protection of the Antarctic will not freeze the evolution of man's activities. Rather, it will preserve options for future generations. The following fundamental principles should guide this global policy:

- the need to protect the exceptional value of the Antarctic region, including water, air, land, flora and fauna;
- only those activities without negative consequences on the local and global environment should be permissible;
- the Antarctic must remain a land of science, where scientific research is co-ordinated; of peace, where all military activities are prohibited; of security, where the production of energy will be limited and all toxic wastes prohibited;
- the Antarctic must be a place where sincere and disinterested international co-operation is strongly encouraged;
- the Antarctic must become a region where activity likely to lead to commercial excesses are limited and severely controlled;
- the Antarctic must have a privileged place for the observation of global climatic changes which threaten the planet, and the importance of its role in the thermal regulation of the planet should be recognized.

The application of these fundamental principles would allow only the following activities to be authorized:

- a limited and strictly regulated exploitation of the Antarctic's natural resources (krill, fish);
- the hunting of a very limited number of seals, solely for scientific reasons, and a prohibition on the hunting of cetaceans;
- geological research activities which contribute to an improvement in our understanding of the geological structure of the Continent;
- tourist activities comprising "day-trips" from cruise ships of a limited size and special construction, such ships having a right to enter only specially defined areas and zones;

Additionally, there is a need to:

- harmonize existing measures in a single instrument of general application;
- take new measures strictly regulating all human activities;
- encourage international co-operation by the development of co-operative scientific programmes over the long term; the establishment of international scientific bases which allow research work by teams from all countries, the optimal use of investments, the closure of bases which are under-utilized, and the rationalization of research programmes; the elaboration and the adoption of a coherent programme of activities for the Antarctic.
CONCLUSIONS

The commander and crew of the Calypso witnessed unforgettable moments during the 1972 expedition to the Antarctic. The extraordinary beauty of its ice mountains are a constant reminder to explorers and to scientists of the extreme climatic conditions which prevail on this Continent at the end of the world. Our own observations revealed the great fragility of the Antarctic ecosystem, a fact confirmed by the large number of scientific researches taking place from all over the world. The important role of the Antarctic in the maintenance of the planet’s climatic equilibrium is now universally recognized.

From where then comes this desire to sacrifice the last virgin space on our planet in the name of economic growth? The maintenance of life on earth will depend on the speed of our ability to understand that economic development can no longer take place to the detriment of our environment. The Antarctic must remain a privileged domain of the scientific research which has, until now, proceeded with the greatest respect for the environment. Damage to the environment which has been observed around the bases provides us with warnings. It is evidence of the consequences for the Antarctic if the exploitation of its mineral resources were authorized.

Millions of people around the planet have already heard the warning signals sent by Commander Cousteau and by other environmental groups. Many politicians and states have already committed themselves to a genuine and durable protection of the Antarctic.

The legal regime ensuring effective protection of the Antarctic environment will be developed after long negotiations between the parties to the Antarctic Treaty. Should the Antarctic be declared a natural reserve, a land of science? Should a global convention on the conservation and protection of the Antarctic be negotiated? Could existing measures be modified and reinforced? Should the Antarctic Treaty be amended? The different possibilities will be examined in 1991 in the context of a special Conference dedicated to the protection of the Antarctic environment.

The success of that conference will turn on the adoption of a Convention satisfactory to all states. The governments of some states have not yet heard the sound of public opinion which is calling for a complete prohibition of the exploitation of mineral resources of the Antarctic. We have less than one year to make sure that those States hear, and to convince them of the merits of that position.
3

General Introduction

Joe Verhoeven*

The Antarctic has for a long time had a relatively discrete existence, sheltered from the tribulations and passions which regularly challenge international relations. This is not because the Antarctic treaty regime is a particularly simple one. To the contrary, the obscurities, lacunae, and uncertainties to be found in the Washington Treaty of 1 December 1959, which defines the fundamental characteristics of the Antarctic regime, are abundant, perhaps even more so than elsewhere. In spite of this, the Treaty has maintained the “white” continent as a zone of “peace” in the face of the contradictory desires of the States party to it. For almost thirty years important scientific research has been carried out in an environment of relative calm, while intense wars, at least cold, have been fought elsewhere.

The growth in the number of international conventions and agreements relating to the Antarctic provide evidence of the success of inter-State co-operation—in 1959 that term was considered preferable to “collaboration” to emphasize the participation of States in a common endeavour1—the fields of which, and partners in, have progressively enlarged.

The signature on 2 June 1988 in Wellington of a Convention on the exploitation of Antarctic mineral resources is part of this process. It is an exemplary manifestation of a desire to act in a prudent and concentrated manner in regard to a particularly sensitive matter. The complexity and length characterizing the negotiation of the Convention are certainly due, in part, to the need to establish strict limits on certain activities whose consequences could be disastrous for humanity. This explains the original nature of the formulae agreed: they provide for preliminary inquiries concerning the extent to which any contemplated activities are likely to affect the environment, a definition of protected zones, a particularly close scrutiny of applications for exploration or exploitation permits, the need for State registration and support . . . or the establishment of specific institutional arrangements. The Convention is a remarkable development, even if not entirely satisfactory or convincing. In certain other fora it came to be seen as a model to be used in other, future contexts relating to the exploitation of resources.

Initially, in certain circles the Convention was enthusiastically received. That response did not last long. Considered only yesterday to be a remarkable instrument for the protection of the environment, today it is seen as a vehicle for the destruction of that same environment. Why the sudden transformation? There is no objective reason, since no new discovery, scientific or other, occurred to encourage a radical

*Translated from the French by Philippe Sands.


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challenge. The fact is, however, that public opinion does not support the adoption of the Wellington Treaty any more. The activities of certain NGOs, which had always opposed any exploitation of Antarctic resources, were instrumental in condemning an agreement described by Commander Jacques Cousteau as “villainous”. The opposition by the NGOs was not surprising. The sudden “volte-face” of certain governments which had previously supported the negotiations was much more surprising. France and Australia took the lead in this respect, announcing on 18 August, 1989 their intention not to sign the Convention.

The blow had significant effects. Ratification by France and Australia is indeed necessary for the Convention to enter into force. Will the blow be fatal? Only the future will tell, even if many now believe that the provisions adopted at Wellington were still-born. In the mean time, the desire to exploit resources seems to have definitively given way to a desire to protect the environment. The latter has become the main preoccupation, higher even than any profit which might result from exploitation. Admittedly, the drafters of the Convention had always protested their desire to protect the Antarctic environment, and this is borne out by some of the provisions adopted at Wellington. That being said, the emphasis has been radically altered. The objective is no longer to regulate the exploitation of resources in such a way as to protect the environment; it is to prohibit radically such exploitation, transforming the Antarctic into a land of “science and culture”, permanently exempted from activities which are profit-motivated.

The project—which could be described as “revolutionary”—is certainly attractive. It explains the title of this colloquium: “The Antarctic and the Environment: Future Prospects?”. The subject undoubtedly raises issues of environmental law. It raises the issue of what we want to do, and can do, to preserve the fragile Antarctic environment, damage to which could prove catastrophic for the entire planet. That said, it is clear that the protection of the Antarctic environment also raises other questions about the legal status of the “white continent”, clear answers to which will have to be identified if the Antarctic environment is to be effectively defended.

By way of introduction, it is therefore worth posing three questions relating to the rules which will determine the future of the Antarctic and the authorities called upon to enforce them and ensure their respect. Before dealing with these issues, however, it is also necessary to consider the legal status of the Antarctic, which is far from clear.

**WHAT STATUS?**

There is clearly no need to recall the mysteries surrounding the precise legal status of the Antarctic in international law. The “family of nations” has yet to reach agreement on a number of critical legal issues. Seven states maintain territorial claims, some of which overlap. Initially these claims were met with a certain indifference by the international community. Five States claim to be entitled to participate in any regulatory matters relating to the Antarctic, and two of these have reserved their right in respect of territorial claims in certain circumstances.

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2 Argentina, Australia, Chile, France, Norway, New Zealand, and the United Kingdom.
3 South Africa, Belgium, Japan, the USSR, and the United States.
4 USSR and United States.
These twelve States signed the Antarctic Treaty on 1 December 1959. What right did they have to do so? None, if they were purporting to act in the name of "humankind", in whose interest they wished to limit the continent to peaceful uses. Which is not to say, on the other hand, that they are prevented from using, on a reciprocal basis, certain personal rights and interests, limited as they may be . . . However, even between Parties to the Washington Treaty, many ambiguities still exist. Article IV merely "freezes" claims to territorial sovereignty without prejudice to their legal status, also providing that nothing achieved under the operation of the Treaty can sustain or challenge rights which are claimed.

Since 1959 participation in the Treaty has expanded. Twenty-eight more States have signed, bringing to forty the number of parties. The scheme has gained in credibility. Even if participation is still not universal, it is no longer exclusively the domain of a somewhat mixed group of powers whose territorial designs led them to the immense frozen continent so far from their borders. Even if other more or less unselfish motives exist . . . the ambiguities will continue to exist as long as Article IV will make it unnecessary to investigate what exactly is—or should be—the legal status of Antarctica. The advantage is that in the short term certain thorny questions are put to one side; the disadvantage is that in the longer term this is no basis on which to establish a regime which is satisfactory to all States, whether or not they are party to the Washington Treaty.

The situation is extremely complex. The simplest solution might be to take the view that there exists a joint ownership of an original kind between the signatories to the Washington Convention. The existence of such joint ownership ("indivision") is undeniable, even if the parties are not in perfectly identical situations. The difficulty, however, is to ensure its validity against third parties. This would be automatic if the individual part of each state had to do with territorial sovereignty. The position is nevertheless a difficult one to defend: not all States claim territorial rights over the Antarctic, and certain parts of Antarctic are still not subject to any territorial claims. Moreover, third parties have, as a general matter, never accepted any of the existing territorial claims. Admittedly, they cannot challenge agreements made by others, except in so far as they may be in breach of a rule of jus cogens. The rule concerning the relative effect of treaties, which protects them from imposing any obligation without their consent, also prevents them from putting into question matters which other States have agreed to by treaty between themselves. States which are not party to the Washington Treaty are nevertheless entitled not to consider the status resulting from Antarctica from the Washington Treaty as a reality that would be imposed by general international law. They therefore remain entitled to claim that all members of the international community participate in the elaboration of a regime which would be valid against all states.

The problem is not new, and one could be tempted to consider that the controversies surrounding the Wellington Convention have no links with it. This, however, would be very doubtful since the exploitation of mineral resources is hardly neutral on this issue. So long as States were concerned only about scientific endeavours, the issue of sovereignty maintained a low profile, whether that sovereignty was undivided or divided, between twelve or forty States. Attitudes are

5 Second preambular paragraph.
6 See B. Simma, "Le Traité antarctique: crée-t-il un régime objectif ou non?", in F. Francioni and T. Scovazzi, International Law for Antarctica, pp. 137 et seq.
transformed, however, when it comes to the exploitation of mineral resources. The degree of control necessary in the case that exploitation is authorized cannot but reinforce a territorial approach raising the issue of the appropriation of sovereignty. In this context it is quite remarkable that the Wellington Convention should be expressly applicable to the continental shelf. But it is not only the appropriation of sovereignty implied by the division of mineral riches which is questionable; more fundamentally, it is the claim by a small number of States to be entitled to divide among themselves riches which are not at first sight exclusively reserved to them which will trigger the strongest protests. How can one explain that on the eve of the 21st century some States—which happen to be among the wealthier members of the international community—are seeking to deprive all others from benefits from which nothing, not even duly established sovereign rights, can legitimately exclude them?

Exploitation of the mineral riches of the Antarctic necessarily leads to a fundamental choice: the sovereignty of States or common heritage of mankind. The common heritage approach is considered inappropriate by some. It is not, even if in this context it is not related to an area which is either res communis or res nullius, in the traditional sense. The idea of “common heritage” frightens some, unaccustomed as they are to it in the context of a system built around the anarchic power of sovereign, equal States. The idea of “common heritage”, however, illustrates very clearly the responsibilities of the international community in the face of the only land mass which still remains undivided into exclusive sovereign areas. It is to be hoped that those who currently defend the notion in the context of the Antarctic in order to gain possible access to its riches, will defend it as vigorously when other obligations and issues are at stake, particularly in relation to the protection of the environment.

WHAT RULES?

The Washington Treaty has been significantly developed since 1959, to the extent that it is now possible to talk of an Antarctic “system”. A number of treaties have been adopted, including principally the 1972 London Convention on the protection of seals, the 1980 Canberra Convention on the Conservation of Antarctic Marine Flora and Fauna . . . and the 1988 Wellington Convention. The “Consultative Parties” have also adopted numerous “Recommendations” the normative effect of which is often not open to challenge. Among the better known is Recommendation IX-1, adopted in 1977, which established a moratorium on the exploration and exploitation of mineral resources in the Antarctic pending the adoption of a specific Convention on the matter. These are all positive developments, evidence of the success of focused and specific administrative efforts. That being said, for at least two reasons the structure remains unsatisfactory.

The first reason is mainly technical, creating a certain incoherence and imprecision in the system, or elements of it. It results among others from the fact that the geographical scope of the numerous treaties which form the Antarctic “system” do not completely overlap, and the State parties to each are not necessarily the same. This is the price to pay for legislation by treaty in a context characterized

7 Article V.
by ambiguities. It is also a fact that the status of the various "Recommendations" which supplement the treaty structure is somewhat uncertain. Even if it is clear that they are rooted in the Washington Treaty, certain important questions remain unanswered in respect of their nature and authority, even if no one, except a few isolated legal commentators, seriously doubts their prohibitive character. Only a revision of the institutional structure of the Treaty would remove many of the uncertainties, which, in the mean time, limit the clarity and effectiveness of the Antarctic "system".

There is also a second reason for doubting the normative effect of the "system" as a whole: the rules it sets out are generally particularly vague. Nothing is very certain, apart from the fact that "Antarctica shall be used for peaceful purposes only", an obligation which is somewhat limited considering that the use of force is in any case prohibited as a matter of international law.

What does such an obligation imply? It is difficult to give it a precise meaning, apart from those military and nuclear activities which are the subject of more detailed provisions elsewhere in the Washington Treaty. That being said, a similar criticism can be levelled beyond the Antarctic "system". Many other sectors are also subject to a handful of vague rules, without anybody complaining. Such can also often be the case in national law. Why not therefore be satisfied with the present rules of the Antarctic regime, relying faithfully on the future to settle adequately the difficulties that will surely arise, for instance by adopting appropriate rules? The inadequacies of the institutional arrangements will not, however, assist in the rapid resolution of these difficulties, particularly in the context of a decision-making process which requires consensus. Differences concerning the exploitation of the Antarctic's economic resources puts the spotlight on these issues... even if the Wellington Convention also shows that it may not be impossible to reach a satisfactory compromise agreement. Or at least showed it, since the Wellington Convention has now been radically challenged, even if some have expressed the hope that such challenge will only last temporarily.

However, supportive one might be of vague and imprecise rules, the criticisms levelled at the Wellington Convention illustrate the need for precision in respect of one aspect at least of Article 1 of the Washington Treaty: should the exploitation of Antarctic mineral resources be permitted or prohibited, however "peaceful" it may be? The drafters of the Wellington Convention wanted to permit such activities; public opinion did not agree and, eventually supported by certain governments, sought prohibition of such activities. The power of public opinion is evidenced by the Franco-Australian Declaration of 18 August 1989, now apparently supported by a number of other governments.

Whether one likes it or not, a new rule is needed. Even if it seems somewhat vain to try in a few words to support one approach over the other, it is difficult however not to be drawn towards a clear prohibition of all economic exploration and exploitation of Antarctic mineral resources. The reason is simple. Whatever precautionary measures might be taken, the risks which such exploration might have for the Antarctic environment and for the planet as a whole are so great that it must undoubtedly be better to prohibit completely exploration and exploitation,

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8 Article IX.
9 See F. Orrego Vicuña, Antarctic Mineral Exploitation (1988), pp. 64 et seq.
however ludicrous the idea of a “World Park” may be to some. This conclusion also draws strength from the hypothetical and limited nature of the potential benefits which economic exploitation might bring. Not only is the existence of certain mineral resources (oil and gas in particular) still mythical, and their exploitation could be prohibitively expensive, but moreover, whatever benefit these resources may bring, they would never in themselves be sufficient to satisfy growing world demand for traditional, fossil-fuel energy sources. At best, exploitation of Antarctic mineral resources could delay by a few months or years the development of new, and one hopes, cleaner energy sources. Whatever significant private gain which might flow from exploitation, such a minuscule benefit to the international community cannot justify activities whose consequences could be catastrophic for all.

These risks explain why some national authorities have banned all exploitation in the Antarctic, without waiting for a decision of the Consultative Parties. Belgium has been a pioneer. The Law of 23 October 1989, which was adopted unopposed, prohibits Belgian citizens from undertaking “all activities for the purpose of prospecting, exploration, or exploitation of the mineral riches” of the Antarctic, subject to criminal penalties. Since then several other Parties to the Washington Treaty have followed suit.

Prohibition is a fundamentally positive development, even if it is not certain that such unilateral acts are necessarily welcome. As a general matter it is not appropriate for a national legislature to compromise the result of a lengthy and complex negotiation by taking independent initiatives, particularly where the provisions being adopted are hastily dealt with although their penal character would have justified that more attention be given. Parliamentary authority should rather exercise control over the conduct of international relations, including ratification of treaties, at the appropriate time, and this would be fully satisfactory. In this context it could be said that the measure has a purely symbolic effect, the only purpose of which is to draw public attention to a controversial issue. Parliamentary legislation for symbolic purposes alone is undesirable. Symbolic legislation does not give weight to the authority of the law or imbue parliamentarians with dignity. There are other ways of alerting public opinion. That said, the most serious error is the attempt to regulate unilaterally and on a national basis a matter which is essentially international in character. The Antarctic, like other global environmental issues more generally, needs international regulation to be effective.

The international community needs therefore to organize itself in such a way as to be able to take effective measures, particularly to prohibit the exploitation of certain economic resources or to subject such activities to certain conditions in the general interest of the international community as a whole. It will never be appropriate for national authorities to permit themselves the illusion of being able to regulate adequately a matter which lies beyond the exclusive jurisdiction of any particular State. National authorities should faithfully put into effect that which has been agreed to or decided at the international level; they should not seek to substitute themselves for a competent international authority, especially under the pretext of failure of such an authority.

13 See e.g. the US Antarctic Protection Act of 1990 and the Australian law of 27 March 1991.
14 For Belgian law, see J. Verhoeven, “Le législateur belge et l’Antarctique”, JT (1990), 337–339.
WHAT STRUCTURE?

The institutional structure of the Antarctic system is properly speaking non-existent. The 1959 Washington Treaty is limited to requiring periodic meetings of the Contracting Parties, or at least of those identified as Consultative Parties, which carry out substantial scientific research activity in the Antarctic. The administrative powers of the Consultative Parties are ill-defined. Their representative may "recommend" measures to ensure that the Treaty's objectives are respected. This has not prevented them from adopting various enactments whose provisions are usually considered as having the character of an international "agreement", even if their precise legal status is unclear. Such Recommendations have been very numerous. This has allowed the representatives of the Consultative Parties to exercise a quasi-legislative function, the merits of which have been emphasized on more than one occasion. The Recommendations represent tangible achievements, even if the closed nature of the meetings does not reinforce the credibility of this quasi-legislative body.

This situation remained unchanged for a considerable time. The treaties concluded after the Washington Treaty did establish a number of new, specific institutions. The 1980 Canberra Convention established a Commission for the Conservation of Antarctic Flora and Fauna with legal personality, and the 1988 Wellington Convention establishes a more complex institutional structure comprising a Commission, a Consultative Committee, a "Special Meeting of the Parties", Regulatory Committees, and a Secretariat.

Apart from these recent developments, some of which may never see the light of day, the deficiencies in the institutional structure is surprising. How can effective administration of the Antarctic seriously be claimed without other tools, especially when the number of Contracting Parties has increased significantly? That being said, the system as a whole has functioned reasonably well, however surprising that may seem. The Meetings of the Consultative Parties allowed interested States to negotiate arrangements, while sheltering the Antarctic from various significant international tensions and preserving the peaceful character of uses mainly associated with scientific research.

The period of consensus may now have passed. Today the Antarctic needs more effective administrative tools. Why? Because the controversies surrounding the exploitation of mineral resources shows clearly that consensus between the Contracting Parties on the serious issues facing the future of the Antarctic has more or less disappeared, and that the gravity of these challenges calls for a more effective and credible system of administration. In this regard it must be recognized that however remarkable the results of the Antarctic system have been so far, today it presents a double weakness, relating to the administrative techniques available and the representativity of those who make use of it.

The existing instruments of administration in the Antarctic are rudimentary. They are entirely based on regular meetings of people during the course of which agreement is reached, on the basis of good faith and mutual accord, to adopt measures

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15 Article IX.
17 Article VII.
18 Chapter II, Articles 18–36.
needed to cope with a changing situation. Up to a certain point the effectiveness of the approach is undeniable, since it has, for example, allowed the Consultative Parties to protect the Antarctic environment even in the face of the silence of the Washington Treaty. It is hard to see for how much longer these structures can be maintained. The increase in the number of Contracting Parties makes consensus much more difficult, while the gravity of many of the challenges often requires more effective and restrictive measures than “Recommendations”, the nature and authority of which are uncertain. Not surprisingly the Wellington Convention seeks to establish a more complex structure to deal with exploitation which would create great risks. It is unlikely, however, that the Wellington Convention will ever enter into force.

This opportunity to create more effective administrative arrangements should not be missed. Beyond the Antarctic there are other economic resources which require international regulation . . . and also other administrative problems, especially relating to the protection of the environment, which require international measures. An Antarctic “World Park” would also require effective, economical, and reliable administration . . . requiring new techniques, especially if one wants to avoid to be dependent on states’ sovereignty which are increasingly subject to attack. The challenge is simple: to establish administrative organs which are representative and competent, and endow them with appropriate powers to achieve their objectives. There are many models which could be followed, especially with regard to supranational arrangements. What is needed is clear political will . . . and it is far from certain that such will can be maintained in a context where states remain very devoted to sovereignty, and perhaps even more in cases where such sovereignties are uncertain.

For administration to be credible it must also be representative of the society on whose behalf it purports to act. The Antarctic system is currently closed and unrepresentative. Its partners, carefully selected, amount to a club, membership of which is limited to those who can show a special interest in the Antarctic. Until now the system has functioned well, allowing the development in the Antarctic of important research programmes while provisionally suspending disputes over sovereignty. However, the basis upon which the “club” manages the Antarctic is becoming increasingly fragile as problems worsen and as issues in hand involve interests exceeding those of the members of the club. That fragility is exposed as the potential exploitation of mineral and economic resources throws up totally new issues. The claims by the signatories to the Washington Treaty to answer alone these questions would be admissible if the Antarctic regime really amounted to a joint-ownership. In such a case, the Contracting Parties, if not the Consultative Parties alone, would certainly be representative of a club fully entitled to administer a deserted continent. Whatever the exact nature of the members of the club’s claims, the situation is, however, different. It is not therefore acceptable that a handful of States should be able to act alone in relation to matters which are not of their exclusive concern, however attentive they may be to the interests of the international community.

That being said, the club is not completely closed. Its membership has increased, and now stands at forty States. The newest members have been carefully chosen before being “invited to accede to the Treaty with the consent of all the Contracting Parties”. Membership is now three times its original size, but
still not truly representative of the 170 or so States which comprise the international community, even if the “Consultative Parties” appear more concerned than ever not to injure those who are not members of the club. In this context, it is notable that the Preamble to the Wellington Convention provides that the Contracting Parties believe “that the effective regulation of Antarctic mineral resource activities is in the interests of the international community as a whole”, while recognizing the need to “respect Antarctica’s significance for, and influence on, the global environment” and “take into account the interests of the international community as a whole” in the exercise of their responsibilities. Who would not welcome this clear affirmation of the existence of an international community and a desire to safeguard its interests, since there are still too many who are unwilling to recognize even the idea of an international community? That said, the paternalistic nature of this approach seems rooted in another age. Thankfully the times are past when a handful of States could take in hand the interests of all others, as occurred, for example in the Paris Treaty of 20 February 1920 which granted Norway sovereignty over Spitzberg, “in the general interests of the international community”. If the international community has an interest in the Antarctic, as identified by the terms of the Wellington Convention, it is for that community as a whole to determine who will protect its interests, and how they should be protected, especially where no widely recognized sovereign claims have been established. It is not the right of a particular circle, club or coalition, however well intentioned, to assume the obligations and prerogatives of a collective “administration”, leaving aside those who are naturally entitled to participate.

The most glaring exclusion from the club is in respect of developing countries, although it is difficult to generalize, since certain members of the Group of 77 have been invited to participate, and as the interests of each may differ greatly. The fact is that participation by Group of 77 countries is very limited, and their weight in the proceedings is negligible. This cannot only be explained by their limited contribution to scientific research... India and Malaysia have tried to open up the club. Without great success, even if the United Nations has now become involved in the matter.

Affirming the right of the whole of the international community to participate in the administration of the Antarctic is closely linked to the idea of common heritage of mankind. Such a relationship is clear. Participation rights and the “common heritage” proposition have not yet been fully accepted, which is not surprising since they lack a basis as being de lege lata. However, no particularly convincing reasons have been put forward to deny the existence of these propositions, at least as de lege feranda. To the contrary. It is hard to see how to avoid such a conclusion once the idea of the Antarctic being subject to undivided sovereignty is not accepted, even if it could be considered dangerous to transfer sensitive responsibilities to some United Nations body, particularly without other precautionary measures. Administration by a United Nations body is not helped by precedents. In this context one can see why the “club” refuses to hand over administrative authority of the Antarctic area to the United Nations, at least in the near future and before other institutional reforms have taken place. But we don’t see how its
administration could in the longer term remain credible if it continues to be left in the hands of an intrinsically selective group, and if it refuses to allow all members of the "international community" some role in the administration of its interests.

If the relatively closed character of the "club" is to this extent open to criticism, contrary to the protestations of some of its members, it is on the other hand not surprising that no place has been officially reserved in the Antarctic system for NGOs. Until now States have not been in the habit of permitting NGOs to participate in public international administration. It is a fact, however, that NGOs have been—and continue to be—particularly active in these matters, carrying out studies, inquiries, protests . . . on the environment generally and the Antarctic in particular.\(^{24}\) NGOs were behind the policy changes adopted by certain governments in respect of the Wellington Convention. Thus, today's discussions on the future of the Antarctic are also an opportunity to consider carefully the role of NGOs in a reconsidered system. It is not desirable to go so far as to grant them direct responsibilities in the administration of the Antarctic, which they are very likely to refuse anyway. In order to ensure transparency in the decision-making process, it would still be right that the organizations which have demonstrated an interest should be more formally involved, in an appropriate form and appear.

The Wellington Convention or the Protocol, frustrating it, which will establish the prohibition of the exploitation of the mineral resources of the Antarctic are not the appropriate place to settle questions which more fundamentally put into question the "system" established by the Washington, London, and Canberra treaties. What is urgently needed now is agreement on at least a basic protection of the environment of a region with a particularly fragile ecosystem. This symposium, organized by the Department of International Law at the Catholic University of Louvain and the Centre for International Environmental Law at King's College London, will address these environmental concerns. One must nevertheless be aware that there cannot be a satisfactory long-term solution to these environmental issues without a more profound reform of the Antarctic system, which explains the reasons for the lengthier considerations given to them in our introduction.

Arctic Politics

Conflict and Cooperation in the Circumpolar North
CHAPTER 12

The Arctic: Distinctive Region or Policy Periphery?

No one now denies the growing international significance of events taking place in the Arctic. Technological advances in nuclear-powered submarines, submarine-launched ballistic missiles (SLBMs), and air-breathing cruise missiles, coupled with a concurrent erosion of confidence in the deterrent value of land-based intercontinental ballistic missiles (ICBMs), have transformed the Arctic into a leading theater of operations for strategic weapons systems. Though production and transportation costs are high under Arctic conditions, the region looms large in any assessment of the global energy picture. The bulk of both the crude oil and the natural gas produced in Russia—most of the world-class energy resources of the former Soviet Union are now under Russian jurisdiction—flows from giant fields (for example, the Samotlor oil field and the Urengoi and Yamburg gas fields) located in northwestern Siberia. As of the end of 1991, about 25 percent of the crude oil produced in the United States came from the North Slope of Alaska.

Nor is the rising international significance of the Arctic limited to matters of security and resource development. Northern Na-

This chapter originated as a discussion paper prepared for the first session of the Working Group on Arctic International Relations held at Hveragerdi, Iceland, 20–22 July 1988. The Working Group is an unofficial forum that allows practitioners and scholars from the eight Arctic countries to identify emerging issues and to exchange thoughts, off the record, regarding the pros and cons of alternative responses to these issues.
tives have assumed positions of leadership among indigenous peoples worldwide, a fact that makes them a force to be reckoned with in connection with the rapid evolution of the fourth world movement. Both because the Arctic is regarded as a major generator of the Northern Hemisphere's weather and because the temperature increases associated with global warming are likely to be particularly pronounced in the high latitudes, the Arctic is likely to play a key role in the global environmental changes expected to occur over the next several decades.

Yet the implications of these Arctic developments for the content of public policies in the Arctic Rim states, as well as for the processes through which Arctic policies are made in these states, are far from clear. Is the Arctic emerging as a distinctive international region—comparable to other accepted regions, like the Middle East, East Asia, or Antarctica—for purposes of policy analysis and public decision making? Concretely, are the Arctic Rim states likely, during the foreseeable future, to add substantial Arctic expertise to their policy planning staffs; create bureaus of Arctic or northern affairs in their foreign ministries, establish effective interagency coordinating mechanisms to handle complex Arctic issues, or devise new Arctic policies to replace the policies of benign neglect they have habitually relied on in dealing with Arctic matters in modern times? Or is the Arctic destined to be relegated to the status of a remote periphery of no more than passing concern to the Arctic Rim states—not to mention others—in policy terms? To be blunt about it, are public policymakers likely to continue to dispose of Arctic issues by assimilating them into broader conceptual categories or letting them run their course without any deliberate public intervention?

In this chapter, I argue that there are no unambiguous, much less analytically correct, answers to these questions. Observers can and do employ the same facts to justify treating the Arctic as a distinctive region or as a policy periphery, depending upon the character of the interpretive frameworks or conceptual lenses they use to bring order to these facts. Choices among alternative interpretive frameworks, in turn, are commonly dictated more by interests or ideological presuppositions than by unbiased assessments of conditions on the ground. It follows that the questions
posed in the preceding paragraph are likely to be controversial ones, subject more to the influence of political forces than to the persuasive power of analytic reasoning. We cannot, at this juncture, confidently predict the ultimate outcome of the resultant debate about different ways of thinking about the Arctic for purposes of policy analysis and public choice. Even so, we can deepen our understanding of the international significance of Arctic events by identifying the nature of the interests at stake in the debate, showing how these interests operate to structure the perspectives of the participants, and discussing the forces that shape interactions among those active in the debate.

Arctic Antinomies

It is surely significant that the essential facts regarding recent developments in the Arctic are not, for the most part, in dispute. But this is hardly sufficient to ensure that policymakers will reach consensus on treating the Arctic as a distinctive region for purposes of policymaking. Well-informed observers differ sharply in terms of the policy implications they ascribe to recent Arctic developments. Depending upon the interpretive framework they bring to the subject, individual observers conclude that the Arctic is well on its way toward taking its place among the world’s major regions or, conversely, that the Arctic does not require treatment as a distinctive region at all. A few concrete examples will convey a clear sense of the Arctic antinomies that arise when the same events are viewed through divergent conceptual lenses.

Some commentators see the Arctic as a predominantly marine area that fits comfortably into the comprehensive system of public order for such areas as articulated in the 1982 Convention on the Law of the Sea. As in other parts of the world, there are certain problems associated with demarcating Arctic baselines, determining the status of straits, and delimiting maritime boundaries between opposite and adjacent states in the Arctic. Because of the long-standing tendency to treat the Arctic with benign neglect, some of these problems are only now coming to public attention. Even so, there are no inherent obstacles to applying in the Arctic the general provisions of the law of the sea pertaining
to internal waters, territorial waters, and exclusive economic zones, along with the complementary regimes for transit passage and areas lying beyond the bounds of national jurisdictions.

Yet there is an alternative account that emphasizes the distinctiveness of the Arctic and suggests the need for a specialized regime for this region. The ice-covered waters of the Arctic pose severe problems, not only for navigation but also for efforts to cope with marine pollution (for example, oil spills or chronic discharges). The fragility of Arctic ecosystems and the slow pace of biodegradation under Arctic conditions ensure that pollutants that would cause only moderate damage under other conditions may prove profoundly destructive in the Arctic. Taken together, these considerations serve to justify the inclusion of Article 234, a special provision dealing with the protection of ice-covered waters, in the 1982 Convention on the Law of the Sea. More fundamentally, the basic distinction between land and water, a dichotomy on which much contemporary thinking about international order rests, tends to break down under Arctic conditions. Sea ice regularly serves as a stable platform for human enterprises that are conventionally thought of as land-based activities. Conversely, land underlain by permafrost is inhospitable to many common land-based activities. Consequently, the conventional practice of proceeding from a clear-cut distinction between land and water in addressing problems of international order does not serve us well in the Arctic.

A similar story emerges from a consideration of the strategic significance of the Arctic. Some observers have approached the Arctic as little more than a northern extension of the East/West confrontation centered on the European continent, a condition that suggests a declining strategic role for the region with the termination of the cold war. The significance of the buildup of Soviet forces on the Kola Peninsula, on this account, arose from the role these forces could play in disrupting the sea lines of communication (SLOCs) between Europe and North America. Viewed from this perspective, parts of Scandinavia, together with the waters surrounding the Greenland/Iceland/United Kingdom Gap have been properly regarded as NATO’s northern flank. Similarly, the American maritime strategy, with its emphasis on conventional attacks against Soviet forces in the Barents Sea and on
the Kola Peninsula, was rationalized as a response to the threat of a Soviet attack against NATO's central front.

But here too there is an alternative interpretation that accords independent strategic significance to events occurring in the Arctic. On this account, the Arctic has become a distinct and critically important theater of operations for strategic weapons systems, such as nuclear-powered ballistic missile submarines (SSBNs) carrying long-range SLBMs and high-endurance manned bombers equipped with air-launched cruise missiles (ALCMs), as well as for defensive systems, such as sophisticated attack submarines and air defense facilities (for example, the American/Canadian North Warning System). The Arctic is not, of course, unrelated to other theaters of military operations. On the contrary, the region now looms large in any realistic appraisal of the global strategic balance. It is possible, for example, that the unusually secure deployment zones afforded by Arctic conditions will seem particularly attractive to military planners seeking to implement strategies of finite or minimal deterrence in the aftermath of the cold war. Although uncertainties regarding the future abound, this account licenses the conclusion that any assessment of the strategic significance of the Arctic that treats it as nothing more than the northern flank of Europe will be wide of the mark.

Turning to industrial and commercial affairs, similar antinomies emerge. On one account, there are no Arctic economic systems as such. The Arctic is segmented into a number of economic peripheries, or hinterlands, each tied to a southern industrial core. Capital and technology flow north from these cores to facilitate the extraction of raw materials needed to fuel the industrial engines of southern societies. At the same time, the lion's share of the economic returns and rents derived from these activities flows south, and decision making regarding the development of Arctic resources remains in southern hands. What is more, there is relatively little interaction among the northern hinterlands of the Arctic Rim states.

Yet the Arctic can be approached, conversely, as a distinctive outpost in an increasingly global economy, where subsistence-based economic systems remain very much in evidence and where interesting alternatives to the prevailing socioeconomic arrangements of industrial societies are everyday realities. It is true
that everywhere in the Arctic Rim states these economic systems are now under siege, threatened with collapse as a result of the inroads of the modes of production and forms of socioeconomic organization characteristic of advanced industrial societies. Given the profound problems that currently plague these societies, however, this state of siege only reinforces the need to understand the distinctive socioeconomic systems of the Arctic and to take steps to protect the subsistence-based economies of this region.

If anything, this pattern of Arctic antinomies becomes even more pronounced when we turn our attention to environmental matters. On one account, the natural environment is strikingly homogeneous throughout the Arctic region. The ecosystems we associate with tundra and taiga biomes are so similar that knowledgeable individuals dropped blindfolded into the Arctic might well experience some difficulty ascertaining their location. Not only are the plant and animal communities of the Arctic typically circumpolar in their distribution, but the dynamics of Arctic ecosystems are also similar throughout the region. Phenomena like diminished biological productivity, coupled with occasional thermal oases, protracted cycles of regeneration, and lowered rates of biodegradation, are common to all Arctic ecosystems.

But others, emphasizing physical processes like ocean/ice/atmosphere interactions, have shown that the Arctic (like the Antarctic) is intimately linked to global dynamics; they generally conclude that it is not helpful to treat the Arctic as a distinctive region. Air pollution generated in the midlatitudes shows up in the Far North in the form of Arctic haze. The global warming trend, largely attributable to human activities far to the south, is expected to produce a rise in temperatures in the Far North two to three times the comparable temperature increases in the midlatitudes. This, in turn, could have dramatic consequences for the midlatitudes themselves, resulting partly from the simple mechanism of the melting of the Greenland icecap and partly from the determinative role of the Arctic in the climate system of the Northern Hemisphere. It will come as no surprise, then, that those who adopt this perspective stress the importance of the Arctic in systemic processes of the sort emphasized by the International Geosphere/Biosphere Programme (IGBP) even while
they reject proposals to treat the Arctic as a distinctive or separate region of the world.

Nor does this picture of Arctic antinomies change as we shift our focus to the peoples and cultures of the region. On one account, the Arctic is a well-defined cultural mediterranean. The indigenous cultures of the region are based on strikingly similar adaptations to the natural systems prevailing in the Arctic. The region is one of the few remaining strongholds of hunter/gatherer cultures. What is more, the indigenous peoples of the Arctic are becoming increasingly conscious of their common concerns and interests. We are witnessing today the emergence of effective transnational organizations among Arctic peoples in such forms as the Inuit Circumpolar Conference, Indigenous Survival International, and the Nordic Saami Council.

On the other hand, the indigenous peoples of the Arctic also form an integral part of the emerging Fourth World movement, a social force that has unleashed a rising tide of political consciousness among aboriginal peoples—estimated to number about 200 million worldwide—locked into states they can never hope to control. Whether we look to the work of the World Council of Indigenous Peoples, the International Working Group on Indigenous Affairs, or the Working Group on Indigenous Peoples of the United Nations Economic and Social Council, northern Natives have been quick to assume leadership roles in the Fourth World movement. The growing consciousness of the Arctic as a cultural mediterranean, therefore, is currently unfolding side by side with feelings of solidarity linking the indigenous peoples of the Arctic with their brethren in Australia, Central America, and elsewhere.

A Choice of Perspectives

What, then, prompts public officials or private analysts to adopt one or another of these interpretive accounts as a guide to thinking about the significance of the Arctic for purposes of policy analysis and public policy-making. In this section, I argue that interests (or perceptions of interests) hold the key to such choices. The perspectives identified in the preceding section are not neutral with respect to their implications for the interests of various
stakeholders in the Arctic. On the contrary, the acceptance of an interpretive framework can go far toward sustaining or undermining the causes espoused by specific groups. It should come as no surprise, therefore, that preferred perspectives on the Arctic vary across nations, groups, and individuals in a predictable fashion.

At least three distinct classes of interests figure prominently in choices among interpretive frameworks: (1) national interests, (2) bureaucratic interests, and (3) group interests. A brief discussion of each will help to concretize the argument regarding the place of the Arctic in terms of policy analysis and public decision making.

National Interests

Consider first the national interests of the principal Arctic states: Canada, the United States, and Russia (the Soviet Union's successor when it comes to Arctic affairs). Canada seeks to exercise authority over a huge, sparsely populated segment of the Arctic, but it lacks the capabilities required to compete effectively in the region in military or economic terms, a fact of increasing significance in the face of the militarization and industrialization of the Arctic. Canada's paramount interests in the Arctic, therefore, are to entrench Canadian sovereignty in the Far North through effective occupancy and to alleviate anxieties arising from the dangers of being sandwiched between the dominant powers in this increasingly important region of the world. By contrast, the United States, which exercises direct control over a relatively small segment of the Arctic, exhibits the interests of a superpower in maintaining freedom of access to all parts of the region and in opposing Arctic developments that could prove detrimental to American interests in other parts of the world.

The Arctic interests of Russia (as of the Soviet Union before it) are more complex and, on occasion, contradictory. Russia is undoubtedly the preeminent Arctic power. Almost half of the Arctic coastline is under Russian control; over 75 percent of the inhabitants of the Arctic are Russian citizens; no other Arctic Rim state depends on the Arctic economically or militarily to the extent that Russia does. It is perfectly natural, therefore, for the Russians to regard the Arctic as an international region that is distinctive in
many ways. Yet Russia has also inherited the mantle of the Soviet Union as a major world power with far-reaching interests extending to all corners of the globe. As a result, it cannot avoid concerning itself with the implications of Arctic developments for Russian interests worldwide.

How would we expect those endeavoring to promote these different interests to approach the Arctic in policy terms? For Canada, there is much to be said for treating the Arctic as a distinctive region. Such a perspective can provide a rationale for efforts to entrench Canada’s jurisdictional claims in the Far North. Arguments regarding the distinctiveness of the Arctic played a prominent role, for example, in justifying Canada’s Arctic Waters Pollution Prevention Act of 1970 as well as Canada’s successful campaign for the inclusion of Article 234 (the ice-covered waters provision) in the Law of the Sea Convention. Similarly, approaching the Arctic as a distinctive region can help to undergird economic policies (for example, the frontier development provisions of the Trudeau administration’s National Energy Program) designed to bolster Canadian control or effective occupancy in the Far North. Treating the Arctic as a distinctive region may even produce beneficial results for Canada in the field of security. As long as the Arctic is conceptualized as a northern extension of Europe, progress toward arms control arrangements tailored to Arctic conditions is unlikely, and the region will continue to seem attractive as a deployment zone for major weapons systems, a pattern that cannot work to Canada’s advantage. Accepting the Arctic as a distinctive theater of military operations, by contrast, opens up the prospect of promoting Arctic-specific arms control agreements (for example, arrangements imposing limits on anti-submarine warfare or air defense) that would alleviate Canada’s fears of being caught in the crossfire of an Arctic arms race involving the United States and a nuclear-armed Russia as the successor to the Soviet Union.

The United States, by contrast, can hardly avoid reacting with skepticism to arguments emphasizing the distinctiveness of the Arctic in policy terms. Because the United States is a superpower with worldwide interests, it is impelled to oppose initiatives that would not only restrict its freedom of access within a specific region but that could also inspire those in other regions seeking
strategems to protect themselves against superpower incursions. Emphasizing the distinctiveness of the Arctic seems suspect on both counts. It is understandable, for instance, that the United States has long rejected Canadian efforts to exploit the distinctive characteristics of the Arctic as a basis for Canadian jurisdictional claims in the waters of the Arctic archipelago and opposed occasional moves on the part of the Soviet Union to extend Soviet jurisdiction in the Kara, Laptev, and East Siberian seas (Russian policy in this area has yet to be formulated). In both cases, American freedom of access to Arctic waters and the superjacent airspace is at stake.

Should Canada succeed in its efforts to enclose the waters of the Arctic archipelago—including the Northwest Passage—by emphasizing the distinctive features of the Arctic region, moreover, a number of states could well be encouraged to make use of similar arguments applying to other regions. Indonesia and Singapore, for instance, might be tempted to reevaluate their attitudes toward the Straits of Malacca; Libya might renew its claims to the Gulf of Sidra. What is more, the fact that the United States has direct control over only a small segment of the Arctic means that it will frequently have reason to engage in economic or military activities (for example, the testing of cruise missiles) involving Arctic lands controlled by others. Under the circumstances, the United States is bound to reject arguments appealing to the distinctiveness of the Arctic as a rationale for developing policies, such as those that surfaced in Canada’s National Energy Program, that would have the effect of impeding American efforts to exploit Arctic resources or to operate military installations in Canada, Greenland, or Iceland.

Although Russia’s Arctic policies are still in embryonic form, it seems probable that the new Russia will inherit the Soviet Union’s somewhat ambivalent attitude toward treating the Arctic as a distinctive region. As the region’s preeminent power, Russia will exhibit an almost instinctive propensity to emphasize both the importance and the distinctive character of the Arctic. Whether this takes the form of efforts to justify expansive jurisdictional claims in the marginal Arctic seas or enthusiastic endorsements of the idea of the Arctic as an international zone of peace, Russian actions in the Arctic will reflect a profound in-
volvement in the region, an involvement that goes back to the early days of the Soviet Union and beyond. Indications of Soviet, and now Russian, sympathy for Canada's efforts to portray the region in distinctive terms to buttress Canadian jurisdictional claims in the Arctic may reasonably be read in a similar light.

Yet Russia has also inherited the Soviet Union's role as a great power with interests extending far beyond the confines of the Arctic region. The Russians therefore will find that they have good reasons to avoid lending credibility to restrictive measures initiated by states in other parts of the world that cite as precedents assertions of control over Arctic matters on the grounds that the Arctic is a distinctive region. This may account for the distinction the Soviets, and now the Russians, draw between the Northeast Passage, regarded as an international waterway, and the Northern Sea Route, treated as a Russian-owned and operated transportation system, as well as for the care they take to avoid articulating dubious jurisdictional claims in the Eurasian Arctic. It seems highly probable, therefore, that the Russians will follow the Soviets in becoming increasingly sensitive about arguments emphasizing the distinctiveness of the Arctic as their own international interests come to encompass matters extending well beyond the confines of the Arctic.

Bureaucratic Interests

It is widely understood today that individual government agencies, as well as factions operating within political systems, have well-defined interests of their own. These interests may coincide with or reinforce national interests, but they need not do so. The Arctic is no exception in these terms. In each of the Arctic Rim states there are individual agencies or factions that stand to benefit from emphasizing the distinctiveness and the importance of the Arctic in policy terms. But in each case there are also agencies or factions that have little or no interest in singling out the Arctic.

In Canada, the Department of Indian Affairs and Northern Development (DIAND) has much to gain from treating the Arctic as a distinctive region and viewing Canada as a northern nation that should devote considerable time and energy to the formulation of a coherent (and more activist) Arctic policy. Ultimately, devel-
opments along these lines could propel DIAND from its present secondary status into the front rank of Canadian government departments. But the same cannot be said of other government agencies in Canada. The Department of Fisheries and Oceans, for instance, deals with marine issues generally and has little interest in singling out the Arctic, where marine activities such as fishing are less significant in commercial terms than comparable activities in the Atlantic or the Pacific. The Ministry of External Affairs is heavily populated with Europeanists who have little knowledge of or interest in the Arctic. Certain elements in the Department of National Defense may see political opportunities in emphasizing the Canadian North. Witness the role assigned to the Arctic in efforts to sell the proposed acquisition of nuclear-powered submarines to the Canadian public in the late 1980s. But there is no indication that this will lead to any deep-seated commitment to the Arctic as a distinctive region in policy terms. Though Canada’s national interest may benefit from treating the Arctic as a distinctive region in policy terms, then, it is by no means apparent that this is an interest widely shared among the individual agencies that make up the Canadian government.

Similar comments are in order regarding the Arctic interests of government agencies in the United States. The United States Navy, profoundly concerned with maintaining freedom of movement for surface vessels throughout the world, certainly has reasons of its own to subscribe to the thesis that the Arctic is a marine area much like other marine areas in policy terms rather than a distinctive region requiring a specialized maritime regime. Yet there are government agencies in the United States that stand to benefit from treating the Arctic as a distinctive region. The Division of Polar Programs (DPP) located within the National Science Foundation, for instance, is founded on the premise that the polar regions are sufficiently distinctive to require specialized programs of scientific research set apart from the discipline-based programs that form the backbone of the foundation’s normal operations. For its part, the government of the state of Alaska sees itself as facing big problems with little political influence at the federal level. Its best hope is to convince others that the Arctic is a distinctive region requiring special treatment in policy terms. Without doubt, this was a motivating force behind the efforts of

Nor is the situation much different in the Eurasian Arctic, despite differences between the political systems operative in this part of the region and those at work in the North American Arctic. Because the newly emerging Russian system has no track record, a few observations drawn from the final phase of Soviet administration in the Arctic will serve to illustrate this point. The Soviet State Committee for Hydrometeorology (Hydromet), which administered the Arctic and Antarctic Scientific Research Institute (AANII), along with a number of other northern ventures, and the Ministry of Merchant Fleet, which encompassed the Northern Sea Route Administration (Glavsevmorput), had obvious interests in stressing the importance and the distinctiveness of the Arctic. Over time, the State Committee on Science and Technology (SCST) came to share these interests. Not only did SCST establish a separate Arctic section, it also acquired added Arctic interests as the organization responsible for the staff work associated with the Soviet Arctic “zone of peace” initiative first articulated publicly in Gorbachev’s Murmansk speech in October 1987.

Yet other Soviet government agencies had little reason to stress the distinctiveness of the Arctic. The Soviet Academy of Sciences, for instance, employed numerous individuals who worked in the North, but it never established a strong Arctic institute to serve as a locus of organized support for treating the Arctic as a distinctive region. Despite the buildup of military forces stationed on the Kola Peninsula, the Ministry of Defense seldom displayed any special interest in the Arctic. Nor was the Soviet Foreign Ministry organized along lines likely to give it an institutional interest in devoting increased attention to the Arctic in policy terms. With regard to bureaucratic interests, then, the situation prevailing at the end of the Soviet era tended to reinforce ambivalences regarding the treatment of the Arctic as a distinctive region arising from mainstream perspectives on the Soviet national interest.

Group Interests

All societies contain unofficial interest groups that work to influence public policies in the light of their own worldviews and
policy preferences. Some of these groups are functionally specific, encompassing physicians, educators, farmers, steelworkers, sport hunters, wilderness advocates, and so forth. Other interest groups form to promote distinctive social philosophies, such as those we associate with capitalism, socialism, or environmentalism. The concerns of these groups are particularly suggestive in connection with this discussion of the treatment of the Arctic in policy terms. A few concrete examples will serve to clarify this proposition.

In both the United States and Canada, Atlanticists have long exercised a powerful influence over the formulation of foreign policy. Treating Europe as the central arena of international relations, members of this group have staunchly supported NATO and generally approached the Arctic as little more than Europe's northern flank. By and large, the Atlanticists react to the suggestion that the Arctic deserves treatment as a distinctive region in policy terms as a mistake that can only detract from a clear-cut acknowledgment of the centrality of Europe in the global balance of power. To take another example, assimilationists favor the absorption of racial and ethnic minorities into the mainstream of the dominant social and political systems. They are apt to reject the idea of treating the Arctic as a distinctive region on the grounds that any such orientation will only add fuel to the growing demands for separate treatment or self-determination among the indigenous peoples of the Far North. Much the same is true of economic liberals, who see the world as a network of voluntary exchange systems open to all on essentially equal terms and who reject structuralist arguments pointing to built-in biases ensuring that certain groups are able to capture the bulk of the gains from trade associated with economic exchange. Because treating the Arctic as a distinctive region could easily serve to reinforce the arguments of those who speak of internal colonialism and advocate protecting the subsistence-based economies of the north from the inroads of industrial society, economic liberals can be counted on to react with skepticism to proposals that highlight the distinctiveness of the Circumpolar North.

As these comments imply, however, there are countervailing groups in each of the Arctic Rim states whose interests may well be promoted by a strategy of treating of the Arctic as a distinctive
region. Promoters of the rising international significance of the Pacific Rim and others desiring to dilute the influence of the Atlanticists may find it useful, at least in tactical terms, to support the treatment of the Arctic as a distinctive region. Those fighting to preserve the integrity of indigenous cultures against the forces of assimilationism may find that emphasizing the distinctiveness of the Arctic region provides an appealing rationale for claims on the part of ethnic groups to self-determination, home rule, or separate treatment in other realms. Likewise, the vision of the Arctic as an outpost of subsistence-based economies offering a viable alternative to the socioeconomic arrangements characteristic of advanced industrial societies can be expected to appeal to the appropriate technology movement as well as to other critics of industrial society. They will be attracted to treating the Arctic as a distinctive region in order to justify policies, such as income security programs, designed to protect the viability of the region's economies.

The Road Ahead

Can those whose interests would be served by treating the Arctic as a distinctive region in policy terms succeed in persuading others to adopt their point of view? Any effort to answer this question must begin with a clear appreciation of the obstacles to the acceptance of the Arctic as a distinctive region for purposes of policy analysis and public decision making. Traditional policies of benign neglect, which have long characterized southern thinking about the Arctic, remain firmly entrenched in many circles. Inertia, a powerful force in all large organizations, also favors the continuation of existing practices that relegate the Arctic to the status of a remote periphery in policy terms. It follows that we must inquire whether there are forces at work today of sufficient magnitude to alter existing practices in this area. The following paragraphs make a case that some forces of this sort do exist. But it is far from clear whether they will prevail in the sense of bringing about major shifts in the organization of public policy-making regarding Arctic issues during the near future.

Perhaps the most decisive way for a region to become distinctive in policy terms is for it to emerge as the site of one or more
severe regional conflicts that engage the interests of the great powers. It seems unlikely, for example, that the Middle East would loom so large as a policy region if it were not the cockpit of the festering Arab-Israeli conflict. The Vietnam war certainly put Southeast Asia on the map as a region in policy terms. Long-running conflicts in Nicaragua and El Salvador seem to have done the same for Central America during the past decade. Similar observations may be in order regarding the Iran-Iraq and Afghan conflicts in Southwest Asia and the conflicts in Angola, Mozambique, and South Africa in sub-Saharan Africa.

Yet it is not easy to visualize regional conflicts of this sort arising in the Arctic during the foreseeable future. To be sure, there are frictions between Russia and Norway over their maritime boundary in the Barents Sea as well as the regime governing areas of the outer continental shelf adjacent to Svalbard. Tensions could mount between the United States on the one hand and Greenland or Iceland on the other over the presence of American military installations in those countries. And there are a number of real or potential sources of conflict between the United States and Canada in the Arctic. But none of these issues has the potential to become a severe regional conflict of the sort referred to in the preceding paragraph. This may well be attributable to the fact that the great powers are so deeply involved in the Arctic that there is little scope for regional conflicts breaking out between lesser powers in the region. In one sense, this is a measure of the importance of the Arctic as a factor in the global balance of power. Paradoxically, however, this circumstance could serve as an impediment to the acceptance of the Arctic as a distinctive region in policy terms.

Short of becoming a locus of regional conflict, a geographically defined area may achieve the status of a distinctive region for purposes of policy analysis and public decision making when it enters a period of political turmoil or flux as a result of the impact of realigning forces. East Asia, for example, has become a focus of attention on the part of policymakers in recent years as a consequence of the Sino-American rapprochement, rather than because it has become a site of sharp regional conflicts. Any moves toward a Sino-Russian or Russian/Japanese rapprochement during the near future would only reinforce this situation. In much
the same way, the emergence of a multiplicity of new states in Africa during the 1950s and 1960s made that region a focus of increased attention. And the requirements of implementing the Antarctic Treaty System, negotiated in 1959 in the aftermath of the International Geophysical Year of 1957–1958, clearly played a major role in bringing Antarctica to the attention of policymakers as a distinctive region. In all of these cases, simple adherence to the status quo, much less reliance on policies of benign neglect, was out of the question. Policymakers were compelled to focus on the region in question in the search for adequate responses to realigning forces.

Something of this sort may well be occurring in the Arctic today. Through much of the postwar era, international relations among the ice states seemed simple and unambiguous. On one side stood the Soviet Union, controlling about half of the Arctic coastline but interested in the region primarily as a base from which to launch naval forces into the North Atlantic in conjunction with a potential war in central Europe. On the other side stood the rest of the ice states (that is, Canada, Denmark/Greenland, Iceland, Norway, and the United States), closely allied as members of NATO and primarily interested in deterring potential Soviet initiatives on the European continent. From this perspective, it was easy to treat the Arctic as a peripheral area presenting no distinctive issues in its own right.

By contrast, the situation now emerging as a result of the militarization and industrialization of the Arctic, the end of the cold war, and the breakup of the Soviet Union is far less straightforward and unambiguous. The end of the cold war has undermined the rationale for the long-standing pattern of alignments in the Circumpolar North. The Russians, as the successors to the Soviets in the Arctic, will almost certainly perceive opportunities for opening up friendly relations with several of the other ice states and be prepared to act on this perception. Some influential Canadians, fearful of the consequences of the militarization of the Arctic and increasingly disenchanted with American strategic thinking, have begun to espouse the idea that Canada should take the lead in efforts to form a bloc of lesser Arctic Rim states. Norway could easily find itself at odds with the United States, as well as with Russia, in connection with its interpretation of the
Svalbard regime. The Home Rule in Greenland, which has already declared all of Greenland (with the exception of the American base at Thule) a nuclear-free zone, could become more militant in its desire to opt out of strategic maneuvering in the Arctic. Should these or other realigning forces continue to unfold, policymakers in all of the Arctic Rim states are likely to experience growing pressures to focus on the Arctic as a distinctive region and to acquire the capability needed to deal with Arctic issues in an informed and sensitive manner.

Beyond this, there is the prospect that one or more of the Arctic states will launch policy initiatives that focus attention on the Arctic in such a way that governments in all of the Arctic Rim states experience growing pressure to treat the Arctic as a distinctive region in policy terms. Canada could become a catalyst in this connection. Pressures are mounting in a number of quarters for Canada to articulate a coherent northern or Arctic policy. One or more of the national political parties may fix on the role of the Arctic as an attractive vehicle in electoral terms. Under the circumstances, the Arctic could emerge as a focus of attention in Canadian electoral politics. Equally probable is the prospect that the leaders of the new Russia will fix on the idea of creating an Arctic zone of peace, launched initially by Gorbachev and pursued vigorously by the Soviet leadership during the intervening years. The concept of an Arctic zone of peace, configured in such a way as to underline the preeminent role of Russia in the Arctic region while avoiding both the costs and the dangers of an offense/defense arms race with the United States in the Far North, could easily emerge as a centerpiece of Russian foreign policy. Should this occur, the United States and the other ice states would all find themselves more or less compelled to focus on the Arctic in order to formulate coherent responses to the Russian initiative.

Where do these observations leave us with regard to the status of the Arctic in policy terms? In particular, do they justify an expectation that the Arctic will achieve acceptance as a distinctive region for purposes of policy analysis and public decision making during the foreseeable future? In my judgment, the jury remains out on this question. It is not difficult to sketch out good reasons for treating the Arctic as a distinctive region. But it is equally easy
to identify groups whose interests (at least as their members currently perceive them) would not be served by such a development. It would be a mistake, as well, to underestimate the role of organizational inertia with regard to matters of this sort. Even so, the rise of the Arctic has now progressed far enough to trigger a lively debate regarding the extent to which the Circumpolar North should be treated as a distinctive region in policy terms. The resultant debate itself is apt to strengthen the hand of those who champion the Arctic as a distinctive region by contributing to a kind of Arctic consciousness raising among both opinion leaders and the members of attentive publics throughout the Arctic region.
October 4, 2001, marks the tenth anniversary of the adoption of the Protocol on Environmental Protection to the Antarctic Treaty. This year also marks the fortieth anniversary of the entry into force of the Antarctic Treaty on June 23, 1961.

For forty years the Antarctic Treaty system has protected Antarctica for science and ensured that Antarctica is used only for peaceful purposes, free of international discord. The Treaty provides the governance structure for the region and a framework by which states are able to cooperate for the common good.

The Protocol provides additional protection of the environment by designating Antarctica as a natural reserve, devoted to peace and science. It sets forth principles and requirements applicable to all human activities in Antarctica. Its five annexes cover Environmental Impact Assessment, Conservation of Antarctic Fauna and Flora, Waste Disposal and Waste Management, Prevention of Marine Pollution, and Area Protection and Management. The Protocol, with 29 Parties including the United States, also prohibits all activities related to mineral resources other than scientific research. It entered into force on January 14, 1998.

Scientific cooperation by the Parties has shown how countries can work together for their mutual benefit and for the benefit of all humankind. The United States Antarctic Program, funded and managed by the National Science Foundation, supports scientists working in Antarctica to expand knowledge of the world’s climate system, obtain a better understanding of the origins of our planet and the universe, and advance understanding of living organisms in Antarctica and how they survive the extreme cold, dark, and drought. The United States maintains three year-round research stations in Antarctica: McMurdo on Ross Island, Amundsen-Scott South Pole, and Palmer on Anvers Island. In addition, the program operates two ice-capable research ships in Antarctic waters.

U.S. regulations to implement the requirements of the Protocol, developed primarily by the National Science Foundation, cover all U.S. citizens and expeditions; the regulations protect native animals and plants, regulate entry into Antarctic Specially Protected Areas, and prescribe procedures for the handling of hazardous materials and waste. The U.S. Antarctic Program's
longstanding commitment to environmental protection and stewardship has been demonstrated in a proactive program of careful waste management and recycling. All solid waste is removed from the continent and recycle rates consistently exceed 65 %, substantially better than any U.S. city.

Another initiative developed under the Antarctic Treaty system, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), provides ecosystem-wide management of the marine resources of the waters surrounding the continent. Parties adopted the Convention in 1980, and the United States signed it that year. The Convention, which entered into force in 1982, seeks to ensure that any harvesting of Antarctic marine living resources is consistent both with the health of the target population and with that of dependent and related species. The Convention protects toothfish and other finfish, krill, squid, crabs and, through the protection of their food sources, the marine mammals and birds of the Southern Ocean.

In keeping with its strong interest in preserving peaceful uses and environment protection in Antarctica, the U.S. Department of State earlier this year conducted its eleventh inspection of the Antarctic Treaty stations since the signing of the Treaty in 1961. The inspection was conducted from February 2 to 16, 2001, using RV Laurence M. Gould, an ice-strengthened research vessel under long-term charter to the National Science Foundation, which is tasked with funding and managing the U.S. Antarctic Program. The ten-person U.S. Inspection Team was lead by Raymond Amaudo of the Bureau of Oceans and International Environmental and Scientific Affairs, and included representatives from the Department of State, the Environmental Protection Agency, the Fish and Wildlife Service, the Coast Guard and the National Science Foundation. This was the first inspection of foreign bases and research stations conducted by the U.S. since the Protocol on Environmental Protection to the Antarctic Treaty entered into force in 1998.

For information about the U.S. Department of State's role in directing U.S. international relations regarding Antarctica, please contact Susan Povenmire, Bureau of Oceans and International Environmental and Scientific Affairs, at 202-647-3486. For information about the U.S. Antarctic Program, please see: http://www.nsf.gov/home/polar/.

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Abstract

This is a time of unprecedented change in the Arctic. It is also a time of unprecedented opportunity for international cooperation in order to evaluate an ocean in transition. Coastal erosion caused by sea level rise and warming is leading to loss of ice cover and habitat. Erosion of peat-filled coasts, along with their warming, and that of coastal waters is leading to the release of methane from gas hydrates either found on the seabed, or stored in the coastal permafrost. Diminishing ice-based productivity may lead to a loss of diversity and modification of sustainable trophic structure and food webs in shallow water coastal pelagic and benthic zones. Without precise data on the sizes of fish stocks, the effects on commercial fisheries are less obvious, more complex, and needing fundamental knowledge. As a consequence of increased fossil fuel combustion and addition of massive amounts of carbon dioxide to the atmosphere and oceans, changes to the ocean chemistry itself, in the acidity or pH, are occurring that will impact the calcareous organisms at primary production levels, and could lead to catastrophic effects on the higher organisms of the food chains. The collateral impacts of the addition of fossil fuel carbon dioxide to the atmosphere on fisheries desperately need further study. Only through an appreciation for the past and an understanding of the present, can we anticipate the future. The potential for that vision of the Arctic lies with the cooperation among the nations of the Arctic Ocean.
Introduction

Climatic conditions in the Arctic are changing faster than at any time in the past 10,000 years. Some of the changes influenced by rising sea levels and warming temperatures (Figure 1) are obvious. Globally, with increases in sea levels, potentially hundreds of millions of people will be affected and displaced from their homes; coastal cities will be flooded (Figure 2). Whereas the Arctic has fewer people directly affected by the impacts of global change, it receives less recognition for urgency to address issues on global change. However, such recognition is critical, because the Arctic has unique perspectives, owing to the more rapid nature and magnitude of the change that is presently occurring. Significant loss of Arctic coastal zones is already occurring as sea level rises and once permanent ice cover disappears (Figure 2); temperatures have already risen far more than the world average fraction of a degree (NAS, 2008).

With increases in global temperatures and loss of sea ice, certain modifications in the Arctic can be predicted along with their expected influences. Clearly, a potential exists for benefits in certain economic sectors. For example, less ice cover will certainly increase access to regions that have yet to be explored for hydrocarbons or other minerals. Once ownership in offshore regions is delineated, exploitation of these resources will occur. Lessening of sea ice will also allow increased avenues for maritime transport between the Atlantic and Pacific through the Northwest Passage, saving time and expense for international trade, although many issues involved with such passage presently remain to be resolved. Additionally, with increases in open water, the prospect for economic gain through enhanced tourism is clear. Other impacts involving the ecosystem of the Arctic itself and the scope of feedbacks from the Arctic to the global environment need to be delineated. The Arctic is especially vulnerable and understudied, owing to the great effort, expense and difficulty of obtaining a sufficient data set on any process or problems in this location. The impacts of global change on coastal mammals, birds and fish populations are far from understood. Some of the expected climatic changes clearly indicate a potential for significant negative effects, especially on animal populations already threatened by natural or human modifications of the environment, not only in the Arctic, but in other locations on the Earth. There is a clear need for additional research for resource management that is already complex.
Enhancement of Pollution in the Arctic

With increases in transport and tourism, as well as modifications in circulation and velocities of winds and currents in the Arctic come greater potential risks for introduction of environmental contaminants with potential effects on fisheries and also on terrestrial and coastal ecosystems. Greater transport of industrial pollutants from the south is expected. These contaminants will be become even more concentrated in higher trophic organisms given the long food chains of the Arctic. With exploration and production of petroleum in the Arctic, the potential for accidental releases of hydrocarbons from ships, drill rigs, and pipelines will increase. Compounded by ice cover, there are no simple solutions to cleanup and management of such releases, with the prospect of the residence of the materials remaining a source of toxic materials for many decades. Accidental releases will happen. In August, 2006, operations by BP in Prudhoe Bay, Alaska, were halted owing to corrosion in pipelines leading up to the Alaska pipeline. Over one million liters of oil were released on to the North Slope of Alaska. Corrosion caused leakage in the pipeline and resulted in a days-long spillage. The spill was caused by corrosion under sediment collecting in the bottom of the pipeline, thus protecting the corrosive bacteria from bactericides sent through the pipeline. Estimates are that about 5,000 barrels of oil were released. About 1,500 barrels of liquids, 4,000 m$^3$ of soiled snow and 250 m$^3$ of soiled gravel have been recovered. The difficulty of containing and remediating even the smaller spills such as this one is clear. A larger catastrophe over Arctic waters, partially covered by ice, is unthinkable. We remain essentially unprepared for such an eventuality, recognizing that it may not be presently possible to adequately prepare for it.

Global Warming, Rising Temperature and the Arctic Environment

The effects of global warming and climate change are of concern both for the environment and human life. Evidence of observed climate change includes the instrumental temperature record, rising sea levels, and decreased snow cover in the Northern Hemisphere. According to the IPCC Fourth Assessment Report (IPCC, 2007), most “of the observed increase in global average temperatures
Stephen A. Macko

since the mid-20th century is very likely due to the observed increase in human greenhouse gas concentrations." Even if this is not the case, with much of the increase being natural instead, warming in the Arctic remains an issue that must be addressed owing to global implications. It is estimated that future climate changes will include further increased global temperatures, sea level rise, and a probable increase in the frequency of some extreme weather events. Ecosystems are seen as being particularly vulnerable to climate change. With diminishing snow and ice cover, the albedo of the Arctic diminishes, and accelerates the impact of solar radiation, which goes into warming rather removed through reflection or evaporation. Warming is accelerated in the surface lands and waters which also accelerates the loss of sea ice cover. Sea ice cover in 2007 was the lowest on record at about half of the typical minimum 6 to 7 million square kilometers to nearly 3.5 million square kilometers (see Mayer, this volume). Under climate warming scenarios, the extent of current ice cover is expected to diminish further (Figure 5). On the timescales for present change, most human systems are likely able to adapt to future impacts of climate change. Changes seen in the Arctic today are not unprecedented in Earth’s history, nor are they outside the natural variability on long timescales. The present rate of this change is, however, unprecedented and may in fact preclude natural environments from keeping pace with the change. In a worst case scenario, the Arctic is faced with erasure of many ecosystems and a significant extinction of species.

Over the last hundred years or so, the instrumental temperature record has shown a trend in the climate for an increased global mean temperature. Other observed changes include Arctic ice cover shrinkage, Arctic methane release from permafrost regions and coastal sediments, and sea level rise. Global average temperature is predicted to increase over this century. The rise in temperatures of the Arctic will be greater than the global average, perhaps increasing 7-8°C. Sea level is expected to rise at least 18 to 59 cm by the end of the 21st century. Owing to a lack of full scientific understanding, this estimate does not include all contributions from the melting of glaciers and ice sheets. For a global warming of 1–4°C over the next 50 to 100 years, there is a moderate chance that partial deglaciation of the Greenland and West Antarctic ice sheets would occur with an eventual rise in sea level by 4–6 meters or more.
Changes in the Arctic Environment

Gas Hydrates

Gas hydrates are naturally-occurring ice-like crystals that form at high pressure and low temperature in marine sediments at water depths greater than 300m whenever there is sufficient methane and pore water. Gas hydrates are now known to be widespread around the world and are often underlain by potentially vast fields of free gas. Together the gas hydrate and underlying free gas reservoirs comprise perhaps one third of the Earth's stores of fossil organic carbon. In the Arctic, gas hydrate is widespread, trapped within marine sediments and permafrost. The polar regions of the Earth being highly sensitive to the effects of global change, and climatic warming in particular, could cause widespread dissociation of gas hydrate and subsequent release of methane, a greenhouse gas, into the atmosphere.

Globally, clathrates have been found to occur naturally in large quantities (Kvenvolden 1995). Around 2500 gigatons (gT) of carbon in the form of methane lies trapped in deposits in the ocean. The Arctic alone is estimated to have greater than 400gT. Such deposits are commonly found on the continental shelf, and likely exist in large reservoirs on the Arctic Ocean continental shelf (Figure 6). Clathrates can also exist as permafrost, as at the Mallik gas hydrate field in the Mackenzie Delta of the northwestern Canadian Arctic. These natural gas hydrates are seen as a potentially vast energy resource, but an economical extraction method has so far proven elusive. At the present time, however, knowledge about the distribution and stability of Arctic gas hydrates is sparse. Methane is a significant greenhouse gas and is many times more effective than carbon dioxide in causing climate warming, despite its short half life of approximately 7 years in the atmosphere. Methane has a global warming potential perhaps 20 times that of carbon dioxide (IPCC, 2007). Methane bound in hydrates amounts to approximately 3,000 times the volume of methane in the atmosphere. There is only emerging information regarding the processes that affect the stability of hydrates in sediments or peat, and the possible release of that methane into the atmosphere. Methane would be released from gas hydrates in Arctic sediments as they become warmer during a sea-level rise and would contribute to the greenhouse gas budget. Atmospheric concentrations of methane are currently increasing at rates of about one percent per year, leading to a concern that methane will become an increasingly significant factor in global warming. Gas hydrates are stable only within a limited range of temperatures and pressures;
outside these ranges, the structure breaks down and the gas molecules escape. The
size of the oceanic methane clathrate reservoir is poorly known, and estimates of
its size decreased since it was recognized that great abundances of clathrates
could exist in the oceans during the late 1900s. The highest estimates were based
on the assumption clathrates could exist over the entire floor of the deep ocean
(Buffet and Archer, 2004). However, improvements in the understanding of
clathrate chemistry and sedimentology have revealed that hydrates only form in a
narrow range of depths on continental shelves and only at some locations. In the
range of depths where they could occur they typically are found at low
concentrations. This current estimate, corresponding up to 2500gT of carbon is
smaller than the 5000gT of carbon estimated for all other fossil fuel reserves but
substantially larger than the slightly more than 200gT of carbon estimated for
other natural gas resources. The permafrost reservoir estimate at about 700gT of
carbon is in fact an under representation of the hydrate carbon of the Arctic, since
additional hydrate is stored offshore on the shelf. As a side note, such estimates
have not been made of possible Antarctic reservoirs. For comparison the total
carbon in the atmosphere is around 6000gT of carbon.

The Arctic is particularly rich with gas hydrates because conditions for
their occurrence are found in the offshore sediments of the continental shelf
margin having water depths between 500 meters and 3000 meters in a zone of
hydrate stability as well as onshore in areas of continuous permafrost or near
shore on the shallow continental shelf in relict permafrost from times of lower sea
levels. Changes in pressure and temperature modify the physical nature of these
environments and the gas hydrates destabilize to become sources of water column
or atmospheric methane. Recent research carried out in 2008 in the East Siberian
Arctic Shelf has shown millions of tons of methane already being released to the
water column with concentrations in some regions reaching up to 100 times above
normal (Shakhova et al. 2008). A region better studied for methane releases from
sediments, Svalbard Island, is a location with large amounts of gas sequestered in
the coastal sediments; a one degree Centigrade increase in those waters has been
suggested to be sufficient to increase methane releases to the water column by
20MT per year. Much of the Arctic remains unsurveyed for methane deposits but
the impact of even a small temperature increase on likely methane-rich coasts and
sea beds across the entire Arctic could result in enormous quantities of methane
being released to the water column and eventually to the atmosphere. There
would be potential for global feedbacks and forcings which may dramatically
Changes in the Arctic Environment

influence climate change by methane that would be far greater than the suggested impact of carbon dioxide. A release of large amounts of natural gas from methane clathrate deposits has been hypothesized as a cause of past and possibly future climate changes. Events thought to be possibly linked to large methane releases are the Permian-Triassic extinction event and the Paleocene-Eocene Thermal Maximum.

Habitat Loss, Species Diversity and Ecosystem Change

Climate change will likely result in reduced diversity of ecosystems and the extinction of many species. Adaptation potential for natural biological systems is estimated to be lower than that for human systems. Arctic sea ice could disappear within 70 years, and with it, ice dependent animals including some marine mammals such as polar bears that require the ice cover for hunting or some fish species that depend on ice for laying eggs or nurseries. Primary production by algae under coastal ice diminishes, as ice cover moves to deeper waters or falls off too early for nutrition by herbivores. Massive sea ice algal production supports the coastal community of the benthic environment. Diminished sea ice suggests significant loss of this production to coastal food webs. Perhaps 25% of Arctic primary production is associated with ice (Gradinger, 2009).

Global warming is expected to result in an acceleration of current rates of sea level rise, inundating many low-lying coastal and intertidal areas. This could have important implications for organisms that depend on these sites, including migratory shorebirds that rely on them for feeding habitat during their migrations and in winter. At present, hundreds of species of shorebirds, involving millions of birds, use the Arctic coastal zone for breeding. If one assumes a global warming of 2°C influencing sea level, over the next half century major coastal habitat loss will likely occur in these over-summering areas of the Arctic which serve as nesting and nursery areas. Receding sea ice along with potential earlier migration of coastal fisheries would add nutritional stress. Many of these already declining or threatened migratory populations will face severe consequences with further modification or loss of their Arctic habitat.
With the increased atmospheric concentration of carbon dioxide (Table 1) has come increased levels of dissolved carbon dioxide in the ocean as marine waters scavenge the gas out of the atmosphere thus increasing the amount dissolved in the ocean (Caldeira and Wickett, 2003). The ocean carbon cycle involves two forms of carbon: organic carbon and the inorganic carbon. The inorganic carbon cycle is particularly relevant when discussing ocean acidification for it includes the many forms of dissolved CO\(_2\). When CO\(_2\) dissolves, it reacts with water to form ions from the dissolved carbon dioxide: carbonic acid (H\(_2\)CO\(_3\)), bicarbonate (HCO\(_3^-\)) and carbonate (CO\(_3^{2-}\)). The relative abundance of these species depends on factors such as seawater temperature and alkalinity (Tyrrell, 2008).

Although the natural absorption of CO\(_2\) by the world's oceans has helped mitigate the atmospheric climatic effects of anthropogenic emissions of CO\(_2\), it is believed that increased levels in the ocean have caused a decrease in pH of approximately 0.15 units on the pH scale (Doney, 2006), or a 30% increase in acidity since this scale is logarithmic (Figure 7). This increase will likely have negative consequences, primarily for oceanic calcifying organisms. These span the food chain from autotrophs to heterotrophs and include organisms such as coccolithophores, corals, foraminifera, echinoderms, crustaceans and molluscs. The “skeletons” of these organisms are composed of calcite and aragonite (mineral forms of calcium carbonate) and are stable in surface waters since the carbonate ion is at supersaturating concentrations. However, as ocean pH falls further, so does the concentration of this ion, and when carbonate becomes undersaturated, structures made of calcium carbonate are vulnerable to dissolution (Feely et al. 2004). The ocean is approaching pH levels not seen in millions of years (Figure 8A). An important aspect of this “other carbon dioxide problem” is that, unlike models of climatic warming, which is based on complex models of many forcings and feedbacks, heightened acidity, or lower pH of the ocean, is fairly predictable. The mechanisms for increasing acidity are well-established, physical chemical processes: increasing of carbon dioxide in the atmosphere will increase the amount dissolved in the ocean. The pH is of the ocean is dependent on the amount of the dissolved CO\(_2\). The “unknowns” are simply the levels that atmospheric carbon dioxide will reach, and the rate at which the surface ocean
attains equilibrium with that level. As fossil fuels continue to contribute carbon dioxide to the atmosphere, the pH of the ocean will continue to decline (Figure 8B).

Most studies have found that coccolithophores, a type of planktonic algae, coralline algae, corals, shellfish, foraminifera, and pteropods all experience reduced calcification or increased dissolution under lower pH or elevated CO₂ (Raven et al. 2005). However, a few studies have suggested that with ocean acidification, the direction of the response, enhanced or declining, varies between species. While the full ecological consequences of these changes in calcification are still uncertain, it appears likely that many calcifying species will be adversely affected. Lower pH also appears to negatively impact non-calcifying larvae during planktonic stages, affecting hardening of chitin and resulting increased mortality.

Aside from calcification stress organisms may suffer other adverse effects, either directly as reproductive or physiological effects, including CO₂-induced acidification of body fluids, or indirectly through negative impacts on food resources. With diminished calcifying planktonic organisms, the entire food resource may be disrupted, with a cascading effect up the food chain, should no other primary food source be readily available (Kleypas et al. 2006). A change in any part of the food web may have consequences on the rest of the food web, ocean biogeochemistry and the whole ecosystem. Such a modification has already been observed in the Antarctic in the Southern Ocean GLOBEC study with diminishing krill. Predators of krill have turned to alternate foods, with associated potential loss of energy from longer food chains or foods not supplying appropriate levels of essential biochemical nutrients.

Ocean acidification may also force some organisms to reallocate metabolic energy away from feeding and reproduction in order to maintain internal cell pH. It has even been suggested that ocean acidification will alter the acoustic properties of seawater, allowing sound to propagate further, increasing ocean noise and impacting animals that use sound for echolocation or communication. However, as with calcification, as yet there is not a full understanding of these processes in marine organisms or ecosystems. Leaving aside direct biological effects, it is expected that ocean acidification in the future will lead to a significant decrease in the burial of carbonate sediments for several centuries, and even the dissolution of existing carbonate sediments (Ridgewell et al. 2007; Turley, 2008). Inclusion of biological effects suggests that the
ecosystem we know as the world’s ocean, an environment that provides one sixth of the protein consumed by humans, is dramatically changing. Millions of species of marine organisms will be affected directly by acidity, others by modification of the food chains on which they depend. At the extreme, large numbers of those species would be lost.

Assessment and Cooperation

As the Arctic warms, and is exposed to increasing modifications of ocean chemistry, a need for cooperation and better information has arisen unlike any since the beginning of human exploration and exploitation of the region (Berkman and Young, 2009). The Arctic is an area bounded by rim states, with strong scientific and economic interests from a number of states outside the rim. The potential for a seasonally ice-free Arctic in the near future dramatically calls for an international effort to understand the impact of the expected changes on the ecosystem, and a need to establish polar codes for, among other topics, investigative science, fisheries and shipping. The Antarctic Treaty is such a code. The initial Arctic Climate Impact Assessment (ACIA 2004) was a beginning of such an international program, placing the emphasis on the evaluation of the present state of knowledge of climate variability and global warming in the Arctic. An extension to include effects on the Arctic region ecosystems was also made. The need for new and better knowledge was clear.

In the Southern Ocean, Antarctica represents a similar dilemma with multinational interests, yet Antarctica is distinct from the Arctic in the lack of clearly defined “rim states.” Efforts to gain knowledge on an international basis are ongoing through GLOBEC (Global Ocean Ecosystem Dynamics), an effort to understand how global change will affect the abundance, diversity and productivity of marine populations, though a better appreciation for the structure of a complex ecosystem. The linkage of climate to modifications of food webs and ecosystems made the Southern Ocean a first study site for the GLOBEC program. Through an understanding of the physical and biological factors that influence all aspects of the Antarctic krill population, including competitors and predators, this Southern Ocean GLOBEC is a first in international interdisciplinary science for Antarctica. Through international scientific cooperation, a program within GLOBEC for the Arctic could begin to address the lack of knowledge on the structure and function of the Arctic ecosystem. While
Changes in the Arctic Environment

strong parallels exist between the food webs of the Antarctic and the Arctic, major distinctions may make the Arctic more challenging. In both polar areas, however, the goal will be similar: understanding the perturbations of global change and how it affects all of the components of the ecosystem. The scientific knowledge base on which predictions of the expected changes from modification of climate, ocean chemistry and ecosystem population rely is too limited to do otherwise. This is a time of unprecedented change globally. This is also a time of unprecedented opportunity for international environmental cooperation.

Acknowledgements

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Internet Resources

http://www.amap.no/acia/index.html

http://www.crrc.unh.edu/workshops/arctic_spill_summit/index.htm

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Figure 1. Average increase in global temperature over last century. Image: Robert A. Rohde / Global Warming Art. 
<http://www.globalwarmingart.com/wiki/Temperature_Gallery>
Figure 2a-e. Anticipated increase in sea level near heavily populated locations. Images: Robert A. Rohde / Global Warming Art.
Figure 3. Anticipated increase in sea level high Arctic locations. Images: Robert A. Rohde / Global Warming Art. <http://www.globalwarmingart.com/wiki/Sea_Level_Rise_Maps_Gallery>
Figure 4. Global average instrumented rise in sea level.
Figure 5. Observed and expected change in sea ice thickness on Arctic Ocean between 1950-2050. Images: Global Warming Art. http://www.globalwarmingart.com/wiki/Predictions_of_Future_Change_Gallery
Figure 7. Observed decline in seawater pH.
Figure 8. Decline in seawater pH. A) last 25 million years. B) absolute value of decrease in pH with rising carbon dioxide concentration of the atmosphere.
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Table 1. Declining pH of the Ocean: increasing acidity.
Abstract

This paper summarizes the current efforts by the Arctic littoral States and the international community working together to address the needs for safe navigation before commercial shipping through the Arctic becomes feasible. Consideration is given particularly to the results of the recently concluded Arctic Council meeting and the International Maritime Organization's Maritime Safety Committee meeting to be held the week following the conference. The paper has been updated to include developments through December 2009.

Let me begin by noting that consideration of these issues is timely now before commercial navigation becomes a reality. The recently released Arctic Marine Shipping Assessment has made a major contribution to identifying the steps that are needed to ensure the safety, security and environmental protection of the Arctic Ocean, the Arctic people and the Arctic environment. It will take some time to achieve agreement on the details of implementing those steps, and even more time to put them in place. As the Assessment properly points out, these issues are not just of concern to Canada and the United States. These issues are of concern to all five States bordering on the Arctic Ocean, the other states in the high north, and flag States whose ships might wish to ply these waters when they become suitable for commercial navigation.
The Assessment makes a number of recommendations in three broad and inter-related themes: Enhancing Arctic Marine Safety, Protecting Arctic People and the Arctic Environment, and Building Arctic Marine Infrastructure.

Recognizing that the Arctic Council Ministers have approved the Assessment, including its many recommendations, this paper will indicate the current state of action on those recommendations relating to navigation that are within the remit of the International Maritime Organization (IMO).

I. Enhancing Arctic Marine Safety

A. Linking with International Organizations

The first recommendation is that “the Arctic States decide to, on a case by case basis, identify areas of common interest and develop unified positions and approaches with respect to international organizations such as” the IMO (as well as the International Hydrographic Organization (IHO), World Meteorological Organization (WMO) and the International Mobile Satellite Organization (IMSO)), in order “to advance the safety of Arctic marine shipping; and encourage meetings, as appropriate, of member state national maritime safety organizations to coordinate, harmonize and enhance the implementation of the Arctic maritime regulatory framework.”

This recommendation reinforces the current practice of the Arctic States. This recommendation will certainly continue to be implemented as a matter of good governance.


B. IMO Measures for Arctic Shipping

The second recommendation of the Assessment is that “the Arctic states, in recognition of the unique environmental and navigational conditions of the Arctic, decide to cooperatively support efforts at the IMO to strengthen, harmonize and regularly update international standards for vessels operating in the Arctic.” Like the first recommendation, this recommendation reinforces current practices among the Arctic States.

Under this heading the recommendation lists two efforts. The first is to “support the updating and the mandatory application of relevant parts of the Guidelines for Ships Operating in Arctic Ice-covered Waters.” The second is to “augment global IMO ship safety and pollution prevention conventions with specific mandatory requirements or other provisions for ship construction, design, equipment, crewing, training and operations, aimed at safety and protection of the Arctic environment.” The Arctic Ministers, in the Tromsø Declaration, made the same recommendations.5

Let me pause here, and provide an update of the efforts that have been ongoing since 2007 to enhance the safety of navigation in the Arctic Ocean.

Revising the “Polar Code”

The United States previously participated actively in the development of, and supports, the IMO Guidelines. The Guidelines for Ships Operating in Arctic Ice-Covered Waters was developed under the leadership of Canada.6 They address construction, equipment, ship operation, and environmental protection and damage control. While they are presently non-binding, the United States has proposed that in due course they be made mandatory.7 They are presently being reviewed by the IMO for application in Antarctic waters.8

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7 IMO documents DE 52/9/2, 9 Jan. 2009; DE 53/18/1 (Germany).
8 See IMO documents MSC 86/WP.18 (Secretariat); DE 52/21; DE 52/21/Add.1; DE 51/11, 14 Dec. 2007 (Australia); DE 51/11/1, 14 Dec. 2007 (Canada and others); MSC 79/8/2 (Secretariat on behalf of Antarctic Treaty Consultative Parties); MSC 79/INF.2; DE 51/28, ¶¶ 11.3-11.4, 11.7; DE 52/9/1 and INF.4 (Canada).
More specifically, the meetings of the Maritime Safety Committee (MSC 86) and the Marine Environment Protection Committee (MEPC 59) in May-June and July 2009, respectively, approved a complete revision of the Guidelines for submission to the November 2009 meeting of the IMO’s Assembly (A 26), which adopted the revised Guidelines for Ships Operating in Polar Waters as resolution A.1024(26).9

In addition, on the initiative of Denmark, Norway and the United States, MSC 86 and MEPC 59 agreed to add to the agenda of the Sub-Committee on Ship Design and Equipment (DE), a new high-priority work program item on “Development of a mandatory Code for ships operating in polar waters,” with a target completion date of 2012. The sponsors recommended that this work include a review of older ships, which under other circumstances might have traditionally been grandfathered, to determine whether it is appropriate to maintain such grandfathering in the Polar Regions, given the harsh operating conditions in these regions and the potential on safety of life or the protection of the environment. I expect that the mandatory requirements would be achieved by amendments to appropriate regulations annexed to the International Convention for the Safety of Life at Sea, 1974 (SOLAS) and/or the International Convention for the Prevention of Pollution by Ships (MARPOL 73/78) and adopted by the expedited (tacit) amendment process. These amendments would not impact on the provisions relating to sovereign immunity and public vessels. The measures and would not necessarily be the same for application in each polar region.10

Revising the Shipboard Oil Pollution Emergency Plan (SOPEP)

The sponsors also recommend that work be undertaken to strengthen regulation 37 of MARPOL Annex I, to address equipment, procedures, training necessary for ships to operate in these regions. These ships are uniquely on their own with regard to cleaning up any spills for which they are responsible. The Shipboard Oil Pollution Emergency Plan (SOPEP) regulation should specify topics the SOPEP should include for operations in the Polar Regions. No separate action was taken on this recommendation by MEPC 59.

10 IMO documents MSC 86/26, ¶¶ 23.32, 23.33; MEPC 59/24, ¶¶ 20.4-20.9, 20.19.
Improving SAR Services in the Arctic

Denmark, Norway and the United States further recommended that COMSAR be tasked to consider the remoteness of the Polar Regions and the lack of search and rescue resources there. They have recommended that it should be tasked to develop appropriate measures for ships to serve as SAR resources for each other. They also recommend that a measure be developed that requires passenger ships to operate only in locations where adequate SAR resources are available. The sponsors note in their submission to MSC that SAR and environmental response capabilities are inadequate in both regions. Emergency response is critically limited by lack of infrastructure, distances to travel, weather and harsh operating conditions. I’ll have a bit more to say about Arctic SAR in just a moment. However, this may be a good time to mention the ongoing work to improve communications in the Arctic region.

At present, there is no common communications system available for ships in all of the Arctic Ocean. In particular there is at present no communications satellite providing coverage of the whole Arctic Ocean, particularly the area north of 76 degrees North latitude.

The IMO’s COMSAR sub-committee, in liaison with the International Hydrographic Organization (IHO) and the World Meteorological Organization (WMO), is developing new areas in Arctic waters for expansion of the World Wide Navigational Warning Service to provide navigational, meteorological and other (including SAR) information. This would be done through the establishment of a common Maritime Safety Information (MSI) broadcast system for the Arctic. The principal work is being done through a joint IMO/IHO/WMO Correspondence Group on Arctic MSI Services. The system is expected to be tested in the 2009-2010 timeframe with a view to it becoming fully operational in early 2011.

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11 See “Updates agreed on MSI and navigational warning services,” IMO News, No. 2, 2008, at 19-20 (reporting results of the 12th meeting of the Sub-Committee on Radio-communications and Search and Rescue (COMSAR 12)), http://www.imo.org
12 See IMO documents COMSAR 13/3/4, COMSAR 13/WP.3 Section 3, and COMSAR 13/14 ¶ 3.13-3.22.
13 IMO document COMSAR 13/14 ¶ 3.21.7.
Seafarer Training

The sponsors have also recommended that STW be tasked to consider appropriate training guidance and qualifications for personnel operating in the Polar Regions. These should include consideration of development of a model course and the need for amendments to the regulations annexed to the International Convention on the Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention) and STCW Code related to training requirements for navigators in the Polar Regions. There are presently no requirements for training and certification standards and crew qualifications for ships operating in the Arctic or Southern Oceans. The sponsors suggest that the requirements need not be the same for both regions. MSC 86 took no specific action on this recommendation.

In this connection, at the last meeting of STW in early February 2009, Norway, supported by the Russian Federation and Chile, proposed a new regulation for the STCW Convention and a new section for the STCW Code with a view to introduce mandatory minimum requirements for the training and qualifications of navigators serving on board ships operating in areas where ice or ice floes are likely to be present. However, in light of the on-going work to revise the Guidelines by DE that began in March 2007, the STW Sub-committee agreed to establish a correspondence group coordinated by Norway to develop a preliminary proposed text for training guidance for personnel operating in ice-covered waters and submit its report for consideration by the next meeting of the Sub-committee in January 2010.14

Cold Water Survival

Finally in this summary of IMO’s work on enhancing the safety of ships navigating in Arctic waters, in May 2006, the Maritime Safety Committee (MSC 81) approved the Guide for cold water survival (MSC.1/Circ.1185) that provides guidance for passenger ships operating in cold water areas. Let me now return to the other recommendations of the Assessment.

14 The report of the correspondence group is IMO document STW 41/7/39, 6 Nov, 2009.
C. Arctic Search and Rescue (SAR) Instrument

The Assessment recommended that the Arctic States decide to support developing and implementing a comprehensive, multi-national Arctic Search and Rescue instrument, including aeronautical and maritime SAR, among the eight Arctic nations and, if appropriate, with other interested parties in recognition of the remoteness and limited resources in the region.

In the Tromsø Declaration, the Arctic Council Ministers approved the establishment of a task force to develop and complete negotiation by the next Ministerial meeting in 2011 of an international instrument on cooperation on search and rescue in the Arctic. The first round of these negotiations is expected to be held in early 2010, led by the United States.

By way of background, the LOS Convention requires every coastal State 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 Arctic nations are all party to the IMO’s International Convention on Maritime Search and Rescue (1979). The SOLAS Convention requires each party to provide search and rescue (SAR) services for the rescue of persons in distress at sea around its coasts. The Arctic nations are also party to the Convention on International Civil Aviation (ICAO), Annex 12 of which addresses aeronautical SAR.

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15 LOS Convention, article 98(2).
17 SOLAS Convention, regulation V/7.
Both SAR Conventions require parties to establish SAR Regions (SRRs) and call on parties to cooperate in the establishment and provision of SAR services.\textsuperscript{19} The United States has a number of bilateral SAR agreements and memoranda of understanding (MOUs) with other countries, including a maritime SAR agreement with Russia (1988)\textsuperscript{20} and an aeronautical and maritime SAR MOU with Canada and the UK (1999).\textsuperscript{21} The United States is also developing a multilateral SAR MOU for the North Atlantic SRR region.

\textsuperscript{19} IMO SAR Convention, Annex ¶ 2.1.1; ICAO Annex 12, ¶ 2.2.1, 3.1.1.
\textsuperscript{21} Memorandum of Understanding for Co-operation among the Department of National Defence of Canada, the Department of Fisheries and Oceans of Canada, the United States Coast Guard, the United States Air Force, the United Kingdom Maritime and Coastguard Agency, the United Kingdom Civil Aviation Division of the Department of Environment, Transport and the Regions, and the United Kingdom Ministry of Defence Concerning
In the US Coast Guard’s experience, the nature of SAR cooperation does not require multilateral (or bilateral) SAR instruments to be binding international agreements. They have found that non-binding memoranda of understanding are quite sufficient to lay out the expectations of the cooperating countries. Frankly, what has often been harder in reaching agreement on the texts is identifying the relevant national agencies that will be identified in the MOU. This is particularly difficult when the cooperation contemplates both maritime and aeronautical cooperation, as well as a potential for terrestrial cooperation in the Arctic, where the responsibilities lie with different governmental agencies in each country. It remains to be seen just how the Arctic Council Ministers’ tasking will proceed.

In the Alaska region, the US Coast Guard has been operating SAR aircraft from forward operating bases in Nome and Barrow since the summer of 2008 and conducting patrols in the Arctic Ocean.

II. Protecting Arctic People and the Environment

There are eight recommendations under the second theme. Five of them implicate possible actions by the IMO and would impact navigation.

Search and Rescue, signed at Ottawa, Washington and London 1 February-14 September 1999.


A. Specially Designated Arctic Marine Areas

The Assessment recommends that “the Arctic states should, taking into account the special characteristics of the Arctic marine environment, explore the need for internationally designated areas for the purpose of environmental protection in regions of the Arctic Ocean.” The Assessment states that this could be done “through the use of appropriate tools, such as ‘Special Areas’ or Particularly Sensitive Sea Areas (PSSA) designation through the IMO and consistent with the existing international legal framework in the Arctic.” So far as I am aware, there are presently no efforts underway at the IMO to respond to this recommendation. Nevertheless it might be useful to summarize the IMO’s work on MARPOL Special Areas and PSSAs.

MARPOL Special Areas

Annex I to MARPOL 73/78 contains regulations for the prevention of pollution by oil. The Annex provides for the establishment of special sea areas where for recognized technical reasons in relations to its oceanographic and ecological condition and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil is required.24

In respect of the Antarctic area, any discharge into the sea of oil or oily mixtures, or noxious liquid substances or mixtures containing such substances, from any ship is prohibited.25 At MEPC 59, the Committee approved draft amendments to MARPOL Annex I setting out special requirements for the use or carriage of oils in the Antarctica area. These amendments will be considered for adoption at MEPC 60 in March 2010.26 The discharge of garbage into several special areas, including Antarctica, is also prohibited.27 Similar prohibitions might be found to be appropriate for the Arctic Ocean as well.28

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24 MARPOL 73/78, Annex I, regulation I/1.11.
25 MARPOL 73/78, Annex I, regulation I/15.4; Annex II, regulation II/13.8.2.
26 IMO documents MEPC 59/24, ¶¶ 10.18-10.20; MEPC 59/24/Add.1, Annex 28; BLG 13/18, ¶ 14.15 and Annex 22.
27 MARPOL 73/78, Annex V, regulation V/5.
28 A list of MARPOL Special Areas may be found at the IMO website, http://www.imo.org/, at the Marine Environment tab.
Particularly Sensitive Sea Areas (PSSA)

A PSSA is an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities. An application for PSSA designation should contain a proposal for an associated protective measure or measures aimed at preventing, reducing or eliminating the threat or identified vulnerability. Associated protective measures for PSSAs are limited to actions that are to be, or have been, approved and adopted by IMO, for example, a routeing system such as an area to be avoided.

The guidelines provide advice to IMO Member Governments in the formulation and submission of applications for the designation of PSSAs to ensure that in the process, all interests—those of the coastal State, flag State, and the environmental and shipping communities—are thoroughly considered on the basis of relevant scientific, technical, economic, and environmental information regarding the area at risk of damage from international shipping activities.

The IMO Assembly in November-December 2005 at its 24th session adopted revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (PSSAs) (resolution A.982(24)). The guidelines update resolution A.927(22) Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas.

A PSSA can be protected by ships routeing measures—such as an area to be avoided, i.e., an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or by certain classes of ships.

The IMO Publication Ships' Routeing includes the General Provisions on Ships' Routeing, first adopted by IMO in 1973, and subsequently amended over the years, which are aimed at standardizing the design, development, charted presentation and use of routeing measures adopted by IMO.²⁹

²⁹ Text from the IMO website for Marine Environment http://www.imo.org/ where a list of PSSAs may be found.

213
B. Protection from Invasive Species

In this recommendation the Assessment suggests that “the Arctic states should consider ratification of the IMO *International Convention for the Control and Management of Ships Ballast Water and Sediments*, as soon as practical.” The recommendation adds that “Arctic states should also assess the risk of introducing invasive species through ballast water and other means so that adequate prevention measures can be implemented in waters under their jurisdiction.”

The 2004 IMO International Convention for the Control and Management of Ships' Ballast Water and Sediments is not yet in force. Of the Arctic States, only Norway has ratified the convention as of the end of August 2009. Once it enters into force MEPC could consider specific ballast water rules under the convention.

C. Oil Spill Prevention

Under this topic the Assessment recommends that “the Arctic states decide to enhance the mutual cooperation in the field of oil spill prevention and, in collaboration with industry, support research and technology transfer to prevent release of oil into Arctic waters, since prevention of oil spills is the highest priority in the Arctic for environmental protection.”

The relevant IMO instrument is the 1990 IMO International Convention on Oil Pollution Preparedness, Response and Cooperation (OPPRC) to which all the Arctic States except Russia are party. Implementing this recommendation could include entering into oil pollution response agreements under OPPRC. (There also is a 2000 Protocol on Preparedness, Response and Co-operation to

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30 *International Convention for the Control and Management of Ships' Ballast Water and Sediments*, done at London 13 February 2004, not in force. As of 30 November 2009, only 20 States have consented to be bound by the Convention.

Pollution Incidents by Hazardous and Noxious Substances (HNS Protocol) to which only Denmark and Sweden are party.32)

D. Addressing Impacts on Marine Mammals

In this recommendation, the Assessment calls upon the Arctic States to “decide to engage with relevant international organizations to further assess the effects on marine mammals due to ship noise, disturbance and strikes in Arctic waters; and consider where needed, to work with the IMO in developing and implementing mitigation strategies.”

During the July 2009 meeting of the Marine Environment Protection Committee, the committee considered the first report of the correspondence group chaired by the United States under the agenda item “Noise from Commercial Shipping and its Adverse Impacts on Marine Life”.33 This effort is expected to take several more years and is not yet far enough advanced to consider the situation in different geographic locations.

E. Reducing Air Emissions

The Assessment recommends that “the Arctic states decide to support the development of improved practices and innovative technologies for ships in port and at sea to help reduce current and future emissions of greenhouse gases (GHGs), Nitrogen Oxides (NOx), Sulfur Oxides (SOx) and Particulate Matter (PM), taking into account the relevant IMO regulations.”

Prevention of air pollution from ships has been a major work program item of the Marine Environment Protection Committee since the 1990s. The IMO’s initial efforts resulted in adoption of the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, which entered into force on May 19, 2005, and has 56 parties as at 31 August 2009, including all of the Arctic

33 IMO documents MEPC 59/24, ¶¶ 19.1-19.11; MEPC 59/19; MEPC 59/19/1; MEPC 58/19.
J. Ashley Roach


Significantly more stringent standards than those contained in the Protocol of 1997 were adopted by MEPC 58 in October 2008 and are expected to enter into force on July 1, 2010. Of potential significance to this recommendation, the revised regulations 13 and 14 permit the establishment of Emission Control Areas (ECA) where even less NOx, SOx and PM would be permitted.

In April 2009 the United States and Canada submitted the first proposal to designate an Emission Control Area of specific portions of the coastal waters of the United States and Canada to be known as the North American ECA. While it does include waters off southeastern Alaska, it does not include any Arctic waters, the submission does provide an excellent example of the information needed to justify such a proposal. It was considered and approved at MEPC 59 with a view

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codemepc5823-Add-1.pdf
36 IMO documents MEPC 59/6/5, MEPC 59/INF.8 and MEPC 59/INF.13.
37 During MEPC 59 it was noted that the map at Annex III of the proposal included the French waters off Saint-Pierre and Miquelon, while the submission states that the ECA does not include an area under the sovereignty, sovereign rights or jurisdiction of a State other than Canada and the United States (Annex I page 5). Questions about this were raised during the plenary discussion of the proposal. IMO document MEPC 59/24, ¶ 4.15.2. During the proposal’s consideration by the Technical Group on ECA, France stated that “it was France’s intention to have the Saint-Pierre and Miquelon Archipelago included in the proposed North American emission control area.” The Technical Group agreed that there should be prior consultation with States bordering an ECA in any future application for the designation of an ECA affecting the interest of more than one State. IMO document MEPC 59/WP.10, ¶¶ 3.25-3.26. France repeated this statement during the plenary’s consideration of the report of the Technical Group. MEPC 59.24, ¶ 4.32.13. The plenary also noted that the 200 nautical mile breadth of the proposed ECA was “determined through application of the criteria in annex III to MARPOL Annex VI, and it
to its adoption at MEPC 60 in 2010 by which time Canada expects to have consented to be bound by the Protocol of 1997. The ECA would enter into force one year after its adoption by MEPC, and no earlier than one year following the entry into force of the 2008 amendments.38

**Greenhouse Gases Emissions**

A summary of the IMO’s current major effort to reduce GHG emissions from ships may be found at the IMO’s website.39 The present efforts are not Arctic specific. MEPC 59 did not address the Arctic during its deliberations.

**III. Building the Arctic Marine Infrastructure**

Three of the recommendations under this third and last theme of the Assessment will affect navigation in the Arctic and implicate the work of the IMO.

*A. Arctic Marine Traffic System*

The first recommendation in this theme provides that “the Arctic states should support continued development of a comprehensive Arctic marine traffic awareness system to improve monitoring and tracking of marine activity, to enhance data sharing in near real-time, and to augment vessel management service in order to reduce the risk of incidents, facilitate response and provide awareness of potential user conflict.” The recommendation also calls upon the Arctic states to “encourage shipping companies to cooperate in the improvement and development of national monitoring systems.”

**Routeing and Reporting Measures, Vessel Traffic Services**

The United States, Canada and Russia are party to the IMO’s International Convention for the Safety of Life at Sea (1974, as amended)

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38 A history of the IMO’s efforts to prevent air pollution from ships may be found at the IMO’s website, http://www.imo.org/ at the Marine Environment tab.

Chapter V of the annexed regulations provides for the establishment of ships’ routeing measures and ship reporting systems, which can be made mandatory if the IMO approves them (Regulations V/10 and 11). SOLAS regulation V/12 provides for the establishment by parties of vessel traffic services where the volume of traffic or the degree of risk justified such services.

On 27 August 2008, Canadian Prime Minister Harper announced plans to make the existing voluntary Arctic Ship Reporting System (NORDREG) mandatory, and extend the geographic scope of its application to Canada’s full Arctic 200-nautical mile EEZ. The amendments contained in Bill C-3 received royal assent on 11 June 2009, and came into force on 1 August 2009. The US Coast Guard is also considering the need for vessel traffic services in the Arctic waters off Alaska. It is not yet know if the United States, Canada and Russia will develop appropriate submissions to the IMO for the Bering Strait/Chukchi Sea/Beaufort Sea area, or what the other Arctic nations will do regarding the other sea areas in the Arctic Ocean.

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43 Coast Guard News, 16 October 2008, supra note 21.

44 International law permits a mandatory ship reporting scheme to be imposed in only two circumstances: unilaterally as a condition of port entry, and pursuant to IMO approval in accordance with SOLAS regulation V/11, the General Provisions on Ships’ Routeing, IMO resolutions A.826(19), MSC.43(64) as amended by resolutions MSC.111(73) and MSC.189(79), and MSC circular 1060 and Add.1 of 26 May 2006.
AIS and LRIT

SOLAS already requires all ships over 300 gross tons on international voyages and passenger ships irrespective of size to be equipped with automatic identification systems (AIS). The IMO’s system for long range identification and tracking (LRIT) of ships became operational on 31 December 2008. These systems, along with others in development, could enable coastal States to identify and track commercial ships heading for and in the Arctic Ocean if, among other things, the appropriate shore-based receivers (or buoys) were in place.

B. Circumpolar Environmental Response Capacity

The Assessment recommends that the Arctic States “decide to continue to develop circumpolar environmental pollution response capabilities that are critical to protecting the unique Arctic ecosystem,” suggesting that this can be accomplished “through circumpolar cooperation and agreement(s), as well as regional bilateral capacity agreements.”

Response is also dealt with in the OPPRC, so I refer back to our earlier discussion on preventing oil spills.

C. Investing in Hydrographic, Meteorological and Oceanographic Data

The final recommendation states that “the Arctic states should significantly improve, where appropriate, the level of and access to data and information in support of safe navigation and voyage planning in Arctic waters.” The Assessment notes that this “would entail increased efforts for: hydrographic surveys to bring Arctic navigation charts up to a level acceptable to support

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47 AIS and LRIT presently do not apply in the Arctic.

48 See text accompanying notes 30-31.
current and future safe navigation; and systems to support real-time acquisition, analysis and transfer of meteorological, oceanographic, sea ice and iceberg information.”

**Charting**

The preparation of nautical charts is normally the responsibility of national hydrographic offices. I do not know what efforts are underway, except to note that perhaps the results of the various Arctic nations’ bathymetric surveys for the extended continental shelf will provide useful data to those offices.

**Ice Conditions**

There are several sources of information on Arctic sea ice conditions. The US National Snow and Ice Data Center, at the University of Colorado, Boulder, provides a Web-based Arctic Sea Ice and News Analysis,\(^{49}\) providing monthly data.

The National Ice Center is a multi-agency operational center operated by the United States Navy, the National Oceanic and Atmospheric Administration, and the US Coast Guard. Its mission is to provide the highest quality, timely, accurate, and relevant snow and ice products and services to meet the strategic, operations, and tactical requirements of the United States interests across its global area of responsibility.\(^{50}\)

The International Arctic Research Center (IARC), in Fairbanks, Alaska, in conjunction with the Japan Aerospace Exploration Agency (JAXA), operate the IARC-JAXA Information System (IJIS). This is a geoinformatics facility for satellite image analysis and computational modeling/visualization in support of international collaboration in Arctic and global change research. One of the products posted by IJIS is the web-based Arctic Sea-Ice Monitor\(^{51}\) which is in turn produced by the Advanced Microwave Scanning Radiometer for EOS (AMSR-E) the Japan-based Earth Observation Research Center of JAXA.\(^{52}\)

A fourth source is the Polar Research Group of the Department of Atmospheric Sciences at the University of Illinois at Urbana-Champaign. They

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49. [http://www.nsidc.org/arcticseaicenews/](http://www.nsidc.org/arcticseaicenews/)
50. [http://www.natice.noaa.gov/nic_mission_main.htm](http://www.natice.noaa.gov/nic_mission_main.htm)
51. [http://www.ijis.iarc.uaf.edu/cgi-bin/sealice-monitor.cgi?lang=e](http://www.ijis.iarc.uaf.edu/cgi-bin/sealice-monitor.cgi?lang=e)
maintain a website The Cyrosphere Today, a Web space devoted to the current state of the cyrosphere, containing images and data of the polar regions.\textsuperscript{53}

It appears to me that each of these sources provide only a macro picture of Arctic sea ice conditions, and, while efforts are underway to improve the situation,\textsuperscript{54} not enough detailed local area coverage to determine the presence of sea ice, much less its type and size that would be suitable for navigational warnings of current conditions or forecasts.

\textbf{IV. Conclusions}

Let me end as I began.

Consideration of these issues is timely now before commercial navigation becomes a reality. The Arctic Marine Shipping Assessment has made a major contribution to identifying comprehensively the steps that are needed to ensure the safety, security and environmental protection of the Arctic Ocean, the Arctic people and the Arctic environment.

Fortunately much of that work is already underway, particularly in the International Maritime Organization, in advance of those recommendations. I have attempted to indicate the current state of action on them relating to navigation that is within the remit of the IMO.

Finally, the Assessment provides ample justification to begin work on the remaining recommendations, and to put them in place. I look forward to learning if and how that will occur. Thank you.

\textsuperscript{53} http://arctic.atmos.uiuc.edu/cryosphere/
\textsuperscript{54} See “Safer ice navigation: With more ships venturing into Arctic waters, new satellite technology may be useful in helping them avoid the fate of some high-profile casualties,” \textit{Safety at Sea International}, July 2009, at 34-35.
Testimony before the U.S. Ocean Commission

Arctic Science and Investment

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June 14, 2002

Admiral Watkins and Commissioners, thank you for giving me the opportunity to speak to you this morning.

I am the Director of the Applied Physics Laboratory of the University of Washington. My testimony concerns scientific research and development related to the Arctic Ocean and its marginal and adjacent seas. My Laboratory and the University of Washington have a long and distinguished history of scientific research and technology development relevant to the marine environment of the Arctic.

First, I'd like to draw your attention to a polar projection chart of the Arctic. The Arctic Ocean is hardly visible on most common map projections, such as a Mercator projection, and sometimes not even shown at all, so I think it is helpful to be reminded of its geography. It is mostly ice-covered. It is dark for nearly six months of the year, and it is the least explored ocean in the world. It is a sensitive, poorly understood eco-system. Yet it is absolutely key to the delicate heat balance of the Earth, and is ringed by mighty nations who for decades used it as a base for strategic military and economic purposes.

Two profound changes have occurred in the Arctic in the last decade, and it is important for you to understand them in order to assess the kind of research that needs to be done, and to recommend what resources need to be invested.

First there are the well-publicized environmental changes—changes in ice cover, shifts in water masses, and movements of atmospheric patterns—that have lead to speculation about much more consequential climate changes. This is the number one problem, the role of the Arctic marine environment in climate variability and climate change. The Arctic is recognized as both a link in global climate, and as a sensitive indicator of climate change. The short story is that we see changes, and we know they are important, but we do not fully understand their causes and consequences. They may only be part of an innocuous natural cycle with little long-term effect, or they may be the bell weather of processes that can upset the stability of the entire Earth system. Whichever it is, we can't afford leave the question unanswered.

Second, there are the geopolitical changes that came with the end of the Cold War. Navy underice operations have all but ceased, and Navy Arctic research has practically ended. The large investments made by the Navies of the United States and the Soviet Union to understand the Arctic Ocean have dwindled to zero. Soviet research that was once
motivated by economic interest in the Northern Sea Route and resource development has also ceased. Whatever the motivation, the U.S. and Soviet efforts constituted practically all the research done in the Arctic for the last fifty years. It was an investment in sustained, long-term observations, the kind we desperately need today to sort out the environmental changes we see. But with the military imperative gone, so are our long-term Arctic observations.

How has the Arctic Ocean changed, and why should we worry about it?

The influence of water from the Atlantic is becoming more widespread and intense. Data collected during several cruises in 1993–1995 indicate that in the upper ocean the boundary between the eastern, Atlantic-derived water-types and western, Pacific-derived water types has advanced westward towards Canada. The area occupied by the eastern water is nearly 20% greater than previously observed. This water also appears to be warmer than before. Historical data from the U.S.-Russian Arctic Oceanographic Atlas show a temperature over the Lomonosov Ridge (a bathymetric feature that nearly bisects the Arctic Ocean) almost 1°C lower than today. This change in temperature and salinity—the Atlantic is saltier than the Pacific—appears to have begun in the late 1980s, just about when we and the Russians stopped our Arctic research.

In the last 20 years there has also been an alarming reduction in ice thickness, as much as 43%, and there has been a reduction in ice extent. We believe this is due to the change in ocean circulation mentioned above which, with changes in atmospheric pressure has produced changes in sea ice drift. Ice drift and pressure fields for the 1990’s are shifted counterclockwise 40°–60° from the 1979–1992 pattern. More ice is carried directly from the Beaufort Sea region north of Alaska whereas the historical pattern draws ice primarily from the central Siberian quadrant leaving ice to circulate in the Beaufort Sea gyre. The decrease in sea ice extent may or may not be a fingerprint of greenhouse warming. One thing seems certain though. Less ice means less sunlight is reflected, and more solar radiation heats the Arctic waters and the atmosphere, which melts more ice, and so on.

There are other changes. In the North Atlantic, the Greenland Sea and the Laborador Sea are where waters flowing from the equator cool, become salty and dense, and sink, driving the so-called global ocean circulation “conveyor belt”. But the flow of fresh surface water and sea ice to the sub-Arctic seas has decreased and and this lowers surface salinity making the water less dense, and less apt to sink, thus inhibiting the general global ocean circulation and the transport of heat (about 10^{15} W) from the equator to high northern latitudes. Certainly if the global circulation were to be stopped entirely the consequences would be enormous. There is speculation that this could happen, and there is speculation that such circulation change is a driver for abrupt climate changes. Indeed, paleoclimate records and computer models suggest that changes in the strength of the circulation may occur rapidly, in a few decades. So if we think these changes take centuries and can be addressed leisurely, or by future generations, we could be dead wrong.

The physical changes are producing changes in the ecosystem and living resources and affecting the human population. Inhabitants of the Arctic live close to their environment and the recent changes in the marine environment are affecting their transportation,
safety, infrastructure, food gathering, and cultural practices. On a broader scale the changes are affecting economic activities such as shipping and fisheries worth billions of dollars.

The pattern of change we see in the Arctic marine environment has become apparent in the context of historical data collected prior to 1990, during the Cold War. Now, many of the operational observing programs that produced those data are gone. The extensive Russian hydrographic programs of the Cold War era have stopped. Many Russian and Canadian meteorological stations are being closed or automated. The Russian drifting ice stations which were manned continuously for decades, have been discontinued. No long-term manned U. S. ice stations are planned. The Navy has closed its Arctic Research Laboratory in Barrow. And the successful Navy submarine science cruises of the 1990s—which were highly instrumental in discovering the changes I have mentioned—have been sharply reduced. Just when we most need the data, we are no longer collecting it.

If changes in the Arctic marine environment are to be tracked and understood, we must rededicate effort to fundamental observations that continue on a regular basis, perhaps for decades into the future.

We cannot afford to continue to under sample the Arctic.

With the Navy gone, now NSF funds a large fraction of today’s Arctic research. Unfortunately, the proposal-driven, project-oriented approach of NSF is not ideally suited to the long-term, sustained observation we need to track and understand the decade long changes that are occurring. Without sustained operations, dependable access disappears. Every trip is a whole new enterprise, and has to be spun up from scratch. It takes special equipment and unique expertise to work successfully and safely in the Arctic. When you deposit people on the polar icecap, you don’t just drop them off. But the way things have evolved, logistics has become catch as catch can. The trend in government is towards hiring commercial support, but of course commercial support for science tends to be on a short-term contract-by-contract basis with a changing cast of characters. Just a few months ago we mounted an expedition to the pole and wound up having to rent a Russian runway from a French tour operator to land an aircraft we leased from Canadian operators. The lack of stable long-term support arrangements is a serious obstacle to programs of coherent long-term observation.

Ocean scientists have long understood that their needs are poorly met by commercial entities. As a result they have established and operated their own system of research ships, the University National Oceanographic Laboratory System, UNOLS. For Arctic research we used to have a less formal, but similar university-based system. But it is almost extinct. We’re losing expertise. We’re losing capability. And we’re short-changing our scientists.

The Arctic is difficult to access, and expensive, and there are few Arctic-ocean capable resources available. Contrast this with the tens of thousands of ships that ply the other oceans, or satellites, which even though they only see the top millimeter of the ocean, at
least see the ocean itself, not its ice cover. With access so difficult, planning and
coordination requirements take on an even more important role than they do elsewhere.

A commitment to sustained, long-term observations would begin to correct these
problems. It would acquire the needed data. It would ensure the development and
support of a solid logistics infrastructure. And it would spur the development of
measurement and observational techniques, and platforms, for Arctic research which are
now woefully less developed than those used in the temperate oceans.

There are a few other issues I would like to bring to your attention.

Within the U.S., we are presently completely dependent on the U.S. Coast Guard for ice-
breaker support. There are problems with this, easily appreciated by a community
accustomed to UNOLS support. There are several steps we might take to broaden the
logistical base, including prioritizing the construction of the new ice-capable UNOLS
vessel.

In terms of organized Arctic research, there hardly is any. While many agencies other
than NSF do things in the Arctic, like NASA and NOAA, each has its own agenda, and
rarely is there coordination, especially in the case of long term observations. An
exception that illustrates the problem is the SEARCH program (Study of Environmental
Arctic Change). In response to the perceived inadequacy of long-term observations in the
Arctic, the Arctic science community is presently engaged with an interagency group
(NSF, NOAA, NASA, DOD, DOE, DOI, and EPA) to develop SEARCH, a long-term
program of observations, analysis and modeling to understand the changing Arctic and its
impact on the ecosystem and society. Getting SEARCH going faces one anticipated
challenge, obtaining funding. But it also faces the unanticipated challenge of finding a
vehicle for an interagency group to pool their funding for a truly common effort.
Structural features of the various funding processes at institutions and in the federal
government make this difficult. The mandate of the Commission suggests it may be able
to help with these kinds of interagency funding issues.

Finally, there is the issue of research access to an ocean that is subject to a bewildering
set of jurisdictional claims by countries, native peoples, and other claimants. A larger
fraction of the Arctic Ocean is within the 200 mile EEZ of its bordering nations than any
other ocean, and this adds political complications to already complex science problems,
which range from the survival of the stellar sea lion to global heating. Any future plan
for Arctic Ocean research has to include a diplomatic element at an appropriately high
level to ensure scientific research access.

I have tried to make several points.

1) The Arctic is changing. There has been an observed decrease in ice thickness
and ice cover. Whether this is a harbinger of serious planetary warming, or
simply a natural, cyclic variation is unknown, and disputed, although the
evidence at the moment points to serious warming. **WE NEED TO
UNDERSTAND WHAT IS HAPPENING IN THE ARCTIC, AND WHY.**
2) The end of the Cold War and under ice submarine operations has set our Arctic Ocean research program back a decade or more, and unless something is done about it, it will only get worse. **WE NEED TO REINVIGORATE OUR ARCTIC OCEAN RESEARCH PROGRAM.**

3) We can't answer the most basic questions about why the Arctic has changed without sustained, continuous observations, and we have stopped making them. **WE NEED TO DEVELOP AND EXECUTE A PLAN FOR SUSTAINED, LONG-TERM OBSERVATION.**

4) Whatever research is now being done by U.S. agencies – NSF, NOAA, NASA—is not coordinated, and is not part of an integrated observation plan. **WE NEED TO ESTABLISH AN INTERAGENCY AUTHORITY FOR ARCTIC OCEAN RESEARCH.** The National Ocean Research Leadership Council might be the right vehicle.

5) We are losing logistic capability. **WE NEED TO PRIORITIZE CONSTRUCTION OF A UNOLS ICE-CAPABLE VESSEL, AND WE NEED TO SUPPORT REGULAR, CONTINUOUS OPERATIONS RATHER THAN SPORADIC FORAYS.**

6) The Arctic Ocean is split by national jurisdictional claims, making research access difficult, and the trend is towards even more claimants **WE NEED TO INCLUDE A HIGH LEVEL DIPLOMATIC COMPONENT IN OUR PLANS FOR FUTURE ARCTIC RESEARCH TO ASSURE RESEARCH ACCESS.**

Mr. Chairman and Commissioners, I am grateful for your attention. Thank you for listening to me this morning.
Sea level has been rising in the Russian Arctic for 50 years

Permafrost temperatures in Alaska have been rising for 20 years
The Broecker "Conveyor Belt".
Summary

- The Arctic is changing. There has been an observed decrease in ice thickness and ice cover. Whether this is a harbinger of serious planetary warming, or simply a natural, cyclic variation is unknown, and disputed, although the evidence at the moment points to serious warming.

**WE NEED TO UNDERSTAND WHAT IS HAPPENING IN THE ARCTIC, AND WHY.**

- The end of the Cold War and under ice submarine operations has set our Arctic Ocean research program back a decade or more, and unless something is done about it, it will only get worse.

**WE NEED TO REVIGORATE OUR ARCTIC OCEAN RESEARCH PROGRAM.**

- We can't answer the most basic questions about why the Arctic has changed without sustained, continuous observations, and we have stopped making them.

**WE NEED TO DEVELOP AND EXECUTE A PLAN FOR SUSTAINED, LONG-TERM OBSERVATION.**

- Whatever research is now being done by U.S. agencies – NSF, NOAA, NASA—is not coordinated, and is not part of an integrated observation plan.

**WE NEED TO ESTABLISH AN INTERAGENCY AUTHORITY FOR ARCTIC OCEAN RESEARCH.** (The National Ocean Research Leadership Council might be the right vehicle.)

- We are losing logistic capability.

**WE NEED TO PRIORITIZE CONSTRUCTION OF A UNOLS) ICE-CAPABLE VESSEL, AND WE NEED TO SUPPORT REGULAR, CONTINUOUS OPERATIONS RATHER THAN SPORADIC FORAYS.**

- The Arctic Ocean is split by national jurisdictional claims, making research access difficult, and the trend is towards even more claimants.

**WE NEED TO INCLUDE A HIGH LEVEL DIPLOMATIC COMPONENT IN OUR PLANS FOR FUTURE ARCTIC RESEARCH TO ASSURE RESEARCH ACCESS.**
Acts of the Parliament of Canada

Passed in the session held in the eighteenth and nineteenth years of the Reign of Her Majesty QUEEN ELIZABETH II

Second Session of the Twenty-Eighth Parliament

Begun and held at Ottawa on the twenty-third day of October, 1969, and prorogued on the seventh day of October, 1970

His Excellency the Right Honourable ROLAND MICHENER Governor General

Lois du Parlement du Canada

Adoptées pendant la session tenue les dix-huitième et dix-neuvième années du Règne de Sa Majesté LA REINE ELIZABETH II

Deuxième session de la vingt-huitième Législature

Commencée et tenue à Ottawa le vingt-troisième jour d'octobre 1969 et prorogée le septième jour d'octobre 1970

Son Excellence le très honorable ROLAND MICHENER Gouverneur général

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333
CHAPTER 47

An Act to prevent pollution of areas of the arctic waters adjacent to the mainland and islands of the Canadian arctic

[Assented to 28th June, 1970]

Preamble

Whereas Parliament recognizes that recent developments in relation to the exploitation of the natural resources of arctic areas, including the natural resources of the Canadian arctic, and the transportation of those resources to the markets of the world are of potentially great significance to international trade and commerce and to the economy of Canada in particular;

And whereas Parliament at the same time recognizes and is determined to fulfill its obligation to see that the natural resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the mainland and islands of the Canadian arctic are navigated only in a manner that takes cognizance of Canada’s responsibility for the welfare of the Eskimo and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic;

Now therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

1. This Act may be cited as the Arctic Waters Pollution Prevention Act.

CHAPITRE 47

Loi sur la prévention de la pollution des zones des eaux arctiques contigües au continent et aux îles de l’Arctique canadien

[Sanctionnée le 26 juin 1970]

Préambule

Considérant que le Parlement reconnaît que des événements récents se rattachant à l’exploitation des ressources naturelles des zones arctiques, notamment les ressources naturelles de l’Arctique canadien, et au transport de ces ressources sur les marchés mondiaux sont, en puissance, de la plus haute importance pour le commerce international et pour l’économie du Canada, en particulier;

Et considérant que le Parlement a, en même temps, conscience et est déterminé à s’acquitter de son obligation de veiller à ce que les ressources naturelles de l’Arctique canadien soient mises en valeur et exploitées et à ce que les eaux arctiques contigües au continent et aux îles de l’Arctique canadien ne soient ouvertes à la navigation que d’une façon qui tienne compte de la responsabilité du Canada quant au bien-être des Esquimaux et des autres habitants de l’Arctique canadien et quant à la conservation de l’équilibre écologique particulier qui existe actuellement dans les zones qui forment les eaux, les glaces et les terres de l’Arctique canadien;

A ces causes, Sa Majesté, de l’avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

TITRE ABRÉGÉ

1. Le présent loi peut être citée sous le Titre abrégé titre: Loi sur la prévention de la pollution des eaux arctiques.
Definitions

"Analyzer" (a) "analyzer" means a person designated as an analyzer pursuant to the Canada Water Act or the Northern Inland Waters Act;

"Icebreaker" (b) "icebreaker" means a ship specially designed and constructed for the purpose of assisting the passage of other ships through ice;

"Owner" (c) "owner" in relation to a ship, includes any person having for the time being, either by law or by contract, the same rights as the owner of the ship as regards the possession and use thereof;

"Pilot" (d) "pilot" means a person licensed as a pilot pursuant to the Canada Shipping Act;

"Pollution prevention officer" (e) "pollution prevention officer" means a person designated as a pollution prevention officer pursuant to section 14;

"Ship" (f) "ship" includes any description of vessel or boat used or designed for use in navigation without regard to method or lack of propulsion;

"Shipping safety control zone" (g) "shipping safety control zone" means an area of the arctic waters prescribed as a shipping safety control zone by order of the Governor in Council made under section 11; and

"Waste" (h) "waste" means

(i) any substance that, if added to any waters, would degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man, and

(ii) any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any waters, degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that

INTERPRETATION

2. In this Act,

a) "analyse" signifie une personne désignée à titre d'analyste en application de la Loi sur les ressources en eau du Canada et de la Loi sur les eaux intérieures du Nord;

b) "brise-glace" désigne un navire spécialement conçu et construit aux fins d'aider au passage des autres navires à travers les glaces;

c) "propriétaire", relativement à un navire, comprend une personne ayant, à l'époque considérée, soit aux termes de la loi, soit aux termes d'un contrat, les mêmes droits que le propriétaire du navire en ce qui a trait à la possession et à l'usage de ce navire;

d) "pilote" désigne une personne brevetée à titre de pilote en application de la Loi sur la marine marchande du Canada;

e) "fonctionnaire chargé de la prévention de la pollution" signifie une personne désignée à titre de fonctionnaire chargé de prévention de la pollution en application de la troisième alinea de l'article 14;

f) "navire" comprend toute espèce de bâtiment ou bateau utilisé ou conçu pour la navigation indépendamment de son mode de propulsion ou même s'il n'en a pas;

g) "zone de contrôle de la sécurité de la navigation" signifie une zone à l'intérieur de laquelle la sécurité des eaux arctiques désignée par décret est garantie;

h) "déchet", désigne

(i) une substance qui, si elle était ajoutée à des eaux, dégraderait ou modifierait ou contribuerait à dégrader ou modifier la qualité de ces eaux dans une mesure telle que leur utilisation par l'homme ou par des animaux, des poissons ou des plantes utiles à l'homme en serait affectée, et

(ii) toute eau qui contient une substance en une quantité ou concentration telle, ou qui, à partir de son état naturel a été traitée, transformée ou
is detrimental to their use by man or by any animal, fish or plant that is useful to man,
and without limiting the generality of the foregoing, includes anything that, for the purposes of the Canada Water Act, is deemed to be waste.

APPLICATION OF ACT

3. (1) Except where otherwise provided, this Act applies to the waters (in this Act referred to as the "arctic waters") adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles; except that in the area between the islands of the Canadian arctic and Greenland, where the line of equidistance between the islands of the Canadian arctic and Greenland is less than one hundred nautical miles from the nearest Canadian land, there shall be substituted for the line measured seaward one hundred nautical miles from the nearest Canadian land such line of equidistance.

(2) For greater certainty, the expression "arctic waters" in this Act includes all waters described in subsection (1) and, as this Act applies to or in respect of any person described in paragraph (a) of subsection (1) of section 6, all waters adjacent thereto lying north of the sixtieth parallel of north latitude, the natural resources of whose adjacent submarine areas Her Majesty in right of Canada has the right to dispose of or exploit, whether the waters so described or such adjacent waters are modified by the chaleur or d'autres moyens d'une façon telle que si elle était ajoutée à des eaux, elle dégraderait ou modifierait ou contribuerait à dégrader ou à modifier la qualité de ces eaux dans une mesure telle que leur utilisation par l'homme ou par des animaux, des poissons ou des plantes utiles à l'homme en serait affectée et, sans restreindre la portée générale de ce qui précède, comprend tout ce qui, aux fins de la Loi sur les ressources en eau du Canada, est censé être un déchet.

APPLICATION DE LA LOI

3. (1) Sauf disposition contraire, la présente loi s'applique aux eaux, (dans la présente loi appelées «eaux arctiques») contiguës au continent et aux îles de l'Arctique canadien à l'intérieur de la zone délimitée par le soixantième parallèle de latitude nord, le cent quarante et unième méridien de longitude et une ligne en mer dont chaque point se trouve à une distance de cent milles marins de la plus proche terre canadienne; avec cette restriction que, dans la zone sise entre les îles de l'Arctique canadien et le Groenland, là où la ligne d'équidistance entre les îles de l'Arctique canadien et le Groenland, est à moins de cent milles marins de la plus proche terre canadienne, cette ligne d'équidistance sera substituée à la ligne en mer dont chaque point se trouve à cent milles marins de la plus proche terre canadienne.

(2) Pour plus de certitude, l'expression Idem «eaux arctiques», dans la présente loi, comprend toutes les eaux visées au paragraphe (1) et, alors que la présente loi s'applique à toute personne visée à l'alinéa a) du paragraphe (1) de l'article 6 ou à son égard, comprend toutes les eaux qui leur sont contiguës au nord du soixantième parallèle de latitude nord couvrant les zones sous-marines des richesses naturelles desquelles Sa Majesté du chef du Canada a le droit de disposer ou celui de les exploiter, que
in a frozen or a liquid state, but does not include inland waters.

DEPOSIT OF WASTE

Prohibition

4. (1) Except as authorized by regulations made under this section, no person or ship shall deposit or permit the deposit of waste of any type in the arctic waters or in any place on the mainland or islands of the Canadian arctic under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters.

Application of subsection (1)

(2) Subsection (1) does not apply to the deposit of waste in waters that form part of a water quality management area designated pursuant to the Canada Water Act if the waste so deposited is of a type and quantity and is deposited under conditions authorized by regulations made by the Governor in Council under paragraph (a) of subsection (2) of section 16 of that Act with respect to that water quality management area.

Regulations

(3) The Governor in Council may make regulations for the purposes of this section prescribing the type and quantity of waste, if any, that may be deposited by any person or ship in the arctic waters or in any place on the mainland or islands of the Canadian arctic under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters, and prescribing the conditions under which any such waste may be so deposited.

5. (1) Any person who (a) has deposited waste in violation of subsection (1) of section 4, or (b) carries on any undertaking on the mainland or islands of the Canadian arctic or in the arctic waters that, by reason of any accident or other occurrence, is in the eaux ainsi visées ou de telles eaux contiguës soient gelées ou non, mais ne comprend pas les eaux intérieures qui sont enfermées dans les terres.

DÉPÔT DE DÉCHETS

4. (1) Sauf dans la mesure où l'auto-interdiction risent les règlements établis en vertu du présent article, aucune personne ni aucun navire ne doit déposer ni permettre de déposer des déchets d'aucune sorte dans les eaux arctiques ni en aucun endroit sur le continent ou les îles de l'Arctique canadien dans des conditions telles que ces déchets ou tout autre déchet résultant du dépôt puissent atteindre les eaux arctiques.

(2) Le paragraphe (1) ne s'applique pas au dépôt de déchets dans des eaux qui font partie d'une zone de gestion qualitative des eaux désignée en application de la Loi sur les ressources en eau du Canada, s'il s'agit d'un dépôt qui, étant donné le genre et la quantité des déchets déposés et les conditions dans lesquelles ils sont déposés, est autorisé par des règlements établis par le gouverneur en conseil en vertu de l'alinéa a) du paragraphe (2) de l'article 16 de cette loi relativement à cette zone de gestion qualitative des eaux.

(3) Le gouverneur en conseil peut établir, aux fins du présent article, des règlements prescrivant la nature et la quantité des déchets, le cas échéant, qui peuvent être déposés par une personne ou un navire dans les eaux arctiques ou en tout endroit sur le continent ou les îles de l'Arctique canadien, dans des conditions telles que ces déchets ou tout autre déchet résultant du dépôt peuvent atteindre les eaux arctiques et prescrivant les conditions dans lesquelles ces déchets peuvent être déposés.

5. (1) Quiconque (a) a déposé des déchets en violation du paragraphe (1) de l'article 4, ou (b) entreprend sur le continent ou les îles de l'Arctique canadien ou dans les eaux arctiques une opération qui, du fait d’un accident ou de tout autre événement,
Prevention de la pollution des eaux arctiques

danger of causing any deposit of waste described in that subsection otherwise than of a type, in a quantity and under conditions prescribed by regulations made under that section,

shall forthwith report the deposit of waste or the accident or other occurrence to a pollution prevention officer at such location and in such manner as may be prescribed by the Governor in Council.

(2) The master of any ship that has deposited waste in violation of subsection (1) of section 4, or that is in distress and for that reason is in danger of causing any deposit of waste described in that subsection otherwise than of a type, in a quantity and under conditions prescribed by regulations made under that section, shall forthwith report the deposit of waste or the condition of distress to a pollution prevention officer at such location and in such manner as may be prescribed by the Governor in Council.

6. (1) The following persons, namely:
(a) any person who is engaged in exploring for, developing or exploiting any natural resource on any land adjacent to the arctic waters or in any submarine area subjacent to the arctic waters,
(b) any person who carries on any undertaking on the mainland or islands of the Canadian arctic or in the arctic waters, and
(c) the owner of any ship that navigates within the arctic waters and the owner or owners of the cargo of any such ship,
are respectively liable and, in the case of the owner of a ship and the owner or owners of the cargo thereof, are jointly and severally liable, up to the amount determined in the manner provided by regulations made under section 9 in respect of the activity or undertaking so engaged in or carried on or in respect of that ship, as the case may be,

menace de provoquer un dépôt de déchets visé à ce paragraphe, dont la nature, la quantité et les conditions seraient autres que celles prescrites par les règlements établis en vertu de cet article,
doit immédiatement signaler le dépôt de déchets, l’accident ou autre événement à un fonctionnaire chargé de la prévention de la pollution, au lieu et de la manière que peut prescrire le gouverneur en conseil.

(2) Le capitaine de tout navire qui a déposé des déchets en violation du paragraphe (1) de l’article 4 ou qui est en détresse et qui, pour cette raison, menace de provoquer un dépôt de déchets visé à ce paragraphe dont la nature, la quantité et les conditions seraient autres que celles prescrites par les règlements établis en vertu de cet article, doit immédiatement signaler le dépôt de déchets ou l’état de détresse à un fonctionnaire chargé de la prévention de la pollution, au lieu et de la manière que peut prescrire le gouverneur en conseil.

6. (1) Les personnes suivantes, savoir:
a) toute personne qui s’occupe de prospection, de mise en valeur ou d’exploitation d’une ressource naturelle sur toute terre contiguë aux eaux arctiques ou dans toute zone sous-marine des eaux arctiques,
b) toute personne qui entreprend une opération sur le continent ou les îles de l’Arctique canadien ou dans les eaux arctiques; et
c) le propriétaire de tout navire qui navigue dans les eaux arctiques et le ou les propriétaires de la cargaison d’un tel navire,
sont respectivement responsables et, s’il s’agit du propriétaire d’un navire et du ou des propriétaires de sa cargaison, sont solidairement responsables jusqu’à concurrence du montant déterminé de la manière prévue par les règlements établis en vertu de l’article 9 quant à l’activité ou à l’opération ainsi poursuivie ou quant à ce navire, selon le cas,
(d) for all costs and expenses of and incidental to the taking of action described in subsection (2) on the direction of the Governor in Council, and

(e) for all actual loss or damage incurred by other persons resulting from any deposit of waste described in subsection (1) of section 4 that is caused by or is otherwise attributable to that activity or undertaking or that ship, as the case may be.

(2) Where the Governor in Council directs any action to be taken by or on behalf of Her Majesty in right of Canada to repair or remedy any condition that results from a deposit of waste described in subsection (1), or to reduce or mitigate any damage to or destruction of life or property that results or may reasonably be expected to result from such deposit of waste, the costs and expenses of and incidental to the taking of such action, to the extent that such costs and expenses can be established to have been reasonably incurred in the circumstances, are, subject to this section, recoverable by Her Majesty in right of Canada from the person or persons described in paragraph (a), (b) or (c) of that subsection, with costs, in proceedings brought or taken therefor in the name of Her Majesty.

(3) All claims pursuant to this section against a person or persons described in paragraph (a), (b) or (c) of subsection (1) may be sued for and recovered in any court of competent jurisdiction in Canada, and all such claims shall rank firstly in favour of persons who have suffered actual loss or damage as provided in paragraph (e) of subsection (1) (which said claims shall among themselves rank pari passu) and secondly to meet the costs and expenses described in subsection (2), up to the limit of the amount determined in the manner provided by regulations made under section 9 in respect of the activity or undertaking engaged in or carried on:

(d) de tous les frais et dépenses directs et indirects relatifs à des mesures visées au paragraphe (2) et prises sur les directives du gouverneur en conseil, et
e) de l'intégralité de la perte ou des dommages réels subis par d'autres personnes,

résultant d'un dépôt de déchets visé au paragraphe (1) de l'article 4 qui est dû à cette activité, cette opération ou ce navire, ou leur est autrement attributable, selon le cas.

(2) Lorsque le gouverneur en conseil ordonne que des mesures soient prises par Sa Majesté du chef du Canada ou pour son compte en vue de redresser la situation qui résulte d'un dépôt de déchets visé au paragraphe (1) ou d'y remédier ou en vue de réduire ou d'atténuer tout dommage causé à la vie ou aux biens ou toute destruction de ceux-ci qui résultent ou risquent normalement de résulter de ce dépôt de déchets, les frais et dépenses directs ou indirects relatifs à ces mesures, pour autant que l'on puisse établir qu'ils ont été normalement encourus dans les circonstances, peuvent, sous réserve du présent article, être recouvrés par Sa Majesté du chef du Canada sur la ou les personnes visées aux alinéas a), b) ou c) de ce paragraphe, en même temps que les frais des poursuites intentées ou engagées à cette fin au nom de Sa Majesté.

(3) Toutes les réclamations en application du présent article contre une ou des personnes visées aux alinéas a), b) ou c) du paragraphe (1) peuvent être portées en réclamations de recouvrement devant tout tribunal compétent au Canada; et toutes les réclamations prendront rang premièrement en faveur des personnes qui ont subi des pertes ou dommages réels visés à l'alinéa e) du paragraphe (1) (qui déclare que les réclamations viennent toutes au même rang) et deuxièmement, pour subvenir aux frais et dépenses visés au paragraphe (2), jusqu'à concurrence du montant déterminé de la manière prévue par les règlements établis en vertu de l'article 9,
ried on by the person or persons against whom the claims are made, or in respect of the ship of which any such person is the owner or of all or part of whose cargo any such person is the owner.

Limitation period

(4) No proceedings in respect of a claim pursuant to this section shall be commenced after two years from the time when the deposit of waste in respect of which the proceedings are brought or taken occurred or first occurred, as the case may be, or could reasonably be expected to have become known to those affected thereby.

Nature and extent of liability

7. (1) The liability of any person pursuant to section 6 is absolute and does not depend upon proof of fault or negligence, except that no person is liable pursuant to that section for any costs, expenses or actual loss or damage incurred by another person whose conduct caused any deposit of waste described in subsection (1) of that section, or whose conduct contributed to any such deposit of waste, to the degree to which his conduct contributed thereto, and nothing in this Act shall be construed as limiting or restricting any right of recourse or indemnity that a person liable pursuant to section 6 may have against any other person.

Idem

(2) For the purposes of subsection (1), a reference to any conduct of “another person” includes any wrongful act or omission by that other person or by any person for whose wrongful act or omission that other person is by law responsible.

Limitation on liability of cargo owner

(3) Notwithstanding anything in this Act, no person is liable pursuant to section 6, either alone or jointly and severally with any other person or persons, by reason only of his being the owner of all or any part of the cargo of a ship if he can es-

quant à l'activité ou à l'opération poursuivie par la ou les personnes contre lesquelles les réclamations sont faites ou quant au navire dont une de ces personnes est propriétaire ou de la cargaison duquel une de ces personnes est propriétaire, en tout ou partie.

(4) Aucune procédure relative à une réclamation en application du présent article ne doit être intentée après deux années à compter du moment où le dépôt de déchets ayant motivé les procédures engagées est intervenu ou est intervenu pour la première fois, selon le cas, ou à compter du moment où on aurait pu raisonnablement s'attendre à ce qu'il soit connu de ceux qui en ont été affectés.

7. (1) La responsabilité de toute personne en application de l'article 6 est une responsabilité absolue, et non subordonnée à la preuve d'une faute ou d'une négligence, avec cette restriction qu'à aucune personne n'est responsable, en application de cet article, des frais, dépenses, pertes ou dommages réels encourus par une autre personne dont la conduite a provoqué un dépôt de déchets visé au paragraphe (1) de cet article, ou dont la conduite a contribué à un tel dépôt, dans la mesure où sa conduite y a contribué, et rien dans la présente loi ne doit être interprété comme limitant ou restreignant tout droit de recours ou droit à une indemnité qu'une personne responsable en application de l'article 6 peut avoir contre une autre personne.

(2) Aux fins du paragraphe (1), lorsqu'il idem est fait mention de la conduite d'une «autre personne», cela s'entend d'un acte ou d'une omission dommageable imputable à cette autre personne ou à toute personne dont cette autre personne répond légalement.

(3) Nonobstant toute disposition de la présente loi, aucune personne n'est responsable, en application de l'article 6, soit seule soit solidairement avec une autre ou d'autres personnes, du seul fait qu'elle est le propriétaire de tout ou partie de
establish that the cargo or part thereof of which he is the owner is of such a nature, or is of such a nature and is carried in such a quantity that, if it and any other cargo of the same nature that is carried by that ship were deposited by that ship in the arctic waters, the deposit thereof would not constitute a violation of subsection (1) of section 4.

8. (1) The Governor in Council may require
(a) any person who engages in exploring for, developing or exploiting any natural resource on any land adjacent to the arctic waters or in any submarine area subjacent to the arctic waters,
(b) any person who carries on any undertaking on the mainland or islands of the Canadian arctic or in the arctic waters that will or is likely to result in the deposit of waste in the arctic waters or in any place under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters,
(c) any person, other than a person described in paragraph (a), who proposes to construct, alter or extend any work or works on the mainland or islands of the Canadian arctic or in the arctic waters that, upon completion thereof, will form all or part of an undertaking described in paragraph (b), or
(d) the owner of any ship that proposes to navigate or that navigates within any shipping safety control zone specified by the Governor in Council and, subject to subsection (3) of section 7, the owner or owners of the cargo of any such ship,

to provide evidence of financial responsibility, in the form of insurance or an indemnity bond satisfactory to the Governor in Council, or in any other form satisfactory to him, in an amount determined in the manner provided by regulations made under section 9.

8. Le gouverneur en conseil peut exiger Preuve de solvabilité
a) de toute personne qui s'occupe de prospection, de mise en valeur ou d'exploitation d'une ressource naturelle sur toute terre contiguë aux eaux arctiques ou dans toute zone sous-marine des eaux arctiques;
b) de toute personne qui se livre à une opération sur le continent ou les îles de l'Arctique canadien ou dans les eaux arctiques qui entraînera ou aura vraisemblablement pour effet d'entraîner le dépôt de déchets dans les eaux arctiques ou dans un lieu et dans des conditions où ces déchets ou d'autres déchets résultant du dépôt peuvent atteindre les eaux arctiques;
c) de toute personne, autre qu'une personne visée à l'alinéa a), qui se propose de construire, modifier ou agrandir sur le continent ou dans les îles de l'Arctique canadien ou dans les eaux arctiques un ou plusieurs ouvrages qui, une fois terminés constitueront tout ou partie d'une opération visée à l'alinéa b), ou
d) du propriétaire de tout navire qui se propose de naviguer ou qui navigue à l'intérieur d'une zone de contrôle de la sécurité de la navigation spécifiée par le gouverneur en conseil et, sous réserve du paragraphe (3) de l'article 7, du ou des propriétaires de la cargaison d'un tel navire,
de fournir une preuve de leur solvabilité sous forme d'une assurance, d'un cautionnement ou autre forme, qui satisfasse le gouverneur en conseil, d'un montant déterminé de la manière prévue par les règlements établis en vertu de l'article 9.
(2) Evidence of financial responsibility in the form of insurance or an indemnity bond shall be in a form that will enable any person entitled pursuant to section 6 to claim against the person or persons giving such evidence of financial responsibility to recover directly from the proceeds of such insurance or bond.

9. The Governor in Council may make regulations for the purposes of section 6 prescribing, in respect of any activity or undertaking engaged in or carried on by any person or persons described in paragraph (a), (b) or (c) of subsection (1) of section 6, or in respect of any ship of which any such person is the owner or of all or part of whose cargo any such person is the owner, the manner of determining the limit of liability of any such person or persons pursuant to that section, which prescribed manner shall, in the case of the owner of any ship and the owner or owners of the cargo thereof, take into account the size of such ship and the nature and quantity of the cargo carried or to be carried by it.

10. (1) The Governor in Council may require any person who proposes to construct, alter or extend any work or works on the mainland or islands of the Canadian Arctic or in the arctic waters that, upon completion thereof, will form all or part of an undertaking the operation of which will or is likely to result in the deposit of waste of any type in the arctic waters or in any place under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters, to provide him with a copy of such plans and specifications relating to the work or works as will enable him to determine whether the deposit of waste that will or is likely to occur if the construction, alteration or extension is carried out in accordance therewith would

9. Le gouverneur en conseil peut établir des règlements aux fins de l'article 6 prescrivant, quant à toute activité ou opération poursuivie par une ou des personnes visées aux alinéas a), b) ou c) du paragraphe (1) de l'article 6, ou quant à tout navire dont une telle personne est le propriétaire ou de la cargaison duquel une telle personne est le propriétaire en tout ou partie, la méthode de détermination de la limite de la responsabilité d'une telle ou de telles personnes en application de cet article, ladite méthode prescrite devant, lorsqu'il s'agit du propriétaire d'un navire et du ou des propriétaires de sa cargaison, tenir compte de la dimension du navire et de la nature et la quantité de la cargaison transportée ou à transporter par le navire.
constitute a violation of subsection (1) of section 4.

(2) If, after reviewing any plans and specifications provided to him under subsection (1) and affording to the person who provided those plans and specifications a reasonable opportunity to be heard, the Governor in Council is of the opinion that the deposit of waste that will or is likely to occur if the construction, alteration or extension is carried out in accordance with such plans and specifications would constitute a violation of subsection (1) of section 4, he may, by order, either

(a) require such modifications in those plans and specifications as he considers to be necessary, or

(b) prohibit the carrying out of the construction, alteration or extension.

SHIPPING SAFETY CONTROL ZONES

11. (1) Subject to subsection (2), the Governor in Council may, by order, prescribe as a shipping safety control zone any area of the arctic waters specified in the order, and may, as he deems necessary, amend any such area.

(2) A copy of each order that the Governor in Council proposes to make under subsection (1) shall be published in the Canada Gazette; and no order may be made by the Governor in Council under subsection (1) based upon any such proposal except after the expiration of sixty days following publication of the proposal in the Canada Gazette.

12. (1) The Governor in Council may make regulations applicable to ships of any class or classes specified therein, prohibiting any ship of that class or of any of those classes from navigating within any shipping safety control zone specified therein.
(a) unless the ship complies with standards prescribed by the regulations relating to
(i) hull and fuel tank construction, including the strength of materials used therein, the use of double hulls and the subdivision thereof into watertight compartments,
(ii) the construction of machinery and equipment and the electronic and other navigational aids and equipment and telecommunications equipment to be carried and the manner and frequency of maintenance thereof,
(iii) the nature and construction of propelling power and appliances and fittings for steering and stabilizing,
(iv) the Manning of the ship, including the number of navigating and look-out personnel to be carried who are qualified in a manner prescribed by the regulations,
(v) with respect to any type of cargo to be carried, the maximum quantity thereof that may be carried, the method of stowage thereof and the nature or type and quantity of supplies and equipment to be carried for use in repairing or remedying any condition that may result from the deposit of any such cargo in the arctic waters,
(vi) the freeboard to be allowed and the marking of load lines,
(vii) quantities of fuel, water and other supplies to be carried, and
(viii) the maps, charts, tide tables and any other documents or publications relating to navigation in the arctic waters to be carried;

(b) without the aid of a pilot, or of an ice navigator who is qualified in a manner prescribed by the regulations, at any time or during any period or periods of the year, if any, specified in the regulations, or without icebreaker assistance of a kind prescribed by the regulations; and

(a) à moins que le navire ne satisfasse aux normes prescrites par les règlements ayant trait
(i) à la construction de la coque et de la soute à combustible, notamment à celles relatives à la résistance des matériaux employés, à l’usage de coques doubles et à leur subdivision en compartiments étanches;
(ii) à la construction de la machinerie et de l’équipement ainsi qu’aux aides à la navigation et à l’équipement, électroniques ou non, et à l’équipement de télécommunications devant être à bord de même qu’à leur mode d’entretien et à la fréquence de l’entretien;
(iii) à la nature et à la construction de l’organe de propulsion et des appareils et installations nécessaires à la manœuvre de la barre et à la stabilisation du navire,
(iv) à l’équipage du navire, notamment au nombre des membres du personnel de navigation et de veille qui doivent être à bord et dont la compétence est établie de la manière prescrite par les règles,
(v) pour tout type de cargaison à transporter, à la quantité maximale qui peut être transportée, à la méthode d’armage et à la nature ou au type et à la quantité des fournitures et de l’équipement devant être à bord en vue de redresser toute situation qui peut résulter du dépôt d’une telle cargaison dans les eaux arctiques ou d’y remédier,
(vi) au franc-bord autorisé et au marquage des lignes de charge,
(vii) aux quantités de combustible, d’eau et autres fournitures devant être à bord, et
(viii) aux cartes marines et autres, aux tables des marées et à tous autres documents ou toutes autres publications se rapportant à la navigation dans les eaux arctiques devant être à bord;
(c) during any period or periods of the year, if any, specified in the regulations or when ice conditions of a kind specified in the regulations exist in that zone.

(2) The Governor in Council may by order exempt from the application of any regulations made under subsection (1) any ship or class of ship that is owned or operated by a sovereign power other than Canada where the Governor in Council is satisfied that appropriate measures have been taken by or under the authority of that sovereign power to ensure the compliance of such ship with, or with standards substantially equivalent to, standards prescribed by regulations made under paragraph (a) of subsection (1) that would otherwise be applicable to it within any shipping safety control zone, and that in all other respects all reasonable precautions have been or will be taken to reduce the danger of any deposit of waste resulting from the navigation of such ship within that shipping safety control zone.

(3) The Governor in Council may make regulations providing for the issue to the owner or master of any ship that proposes to navigate within any shipping safety control zone specified therein, of a certificate evidencing, in the absence of any evidence to the contrary, the compliance of such ship with standards prescribed by regulations made under paragraph (a) of subsection (1) that are or would be applicable to it within that shipping safety control zone, and governing the use that may be made of any such certificate and the effect that may be given thereto for the purposes of any provision of this Act.
13. (1) Lorsque le gouverneur en conseil a des raisons de croire qu'un navire qui se trouve dans les eaux arctiques et qui est en état de dégrisacé, échoué, naufragé, coulé ou abandonné est en train de déposer des déchets, il peut faire détruire le navire ou toute cargaison ou objets à bord du navire, si cela est nécessaire, ou le faire enlever, si cela est possible et l'acheminer en un lieu et le faire vendre de la manière qu'il peut ordonner.

(2) Le produit de la vente d'un navire ou de toute cargaison ou de tous autres objets effectuée en application du paragraphe (1), doit être affecté au règlement des dépenses encourues par le gouvernement du Canada enlevant et en vendant le navire, la cargaison ou les autres objets et tout excédent doit être versé au propriétaire de ce navire, de cette cargaison ou de ces autres objets.

POLLUTION PREVENTION OFFICERS

FONCTIONNAIRES CHARGÉS DE LA PRÉVENTION DE LA POLLUTION

14. (1) Le gouverneur en conseil peut désigner toute personne à titre de fonctionnaire chargé de la prévention de la pollution avec ceux des pouvoirs énoncés aux articles 15 et 23, qui sont indiqués dans son certificat de désignation.

(2) Un fonctionnaire chargé de la prévention de la pollution doit être pourvu d'un certificat de sa désignation spécifiant les pouvoirs énoncés aux articles 15 et 23 qui lui sont conférés, et un fonctionnaire chargé de la prévention de la pollution doit, en exerçant un de ses pouvoirs, produire s'il en est requis, le certificat à toute personne responsable qui est concernée et qui lui demande de le faire.
signed to be used and is being used as a permanent or temporary private dwelling place) occupied by any person described in paragraph (a) or (b) of subsection (1) of section 8, in which he reasonably believes

(i) there is being or has been carried on any activity that may result in or has resulted in waste, or

(ii) there is any waste that may be or has been deposited in the arctic waters or on the mainland or islands of the Canadian arctic under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters in violation of subsection (1) of section 4;

(b) examine any waste found therein in bulk or open any container found therein that he has reason to believe contains any waste and take samples thereof; and

(c) require any person in such area, place or premises to produce for inspection or for the purpose of obtaining copies thereof or extracts therefrom, any books or other documents or papers concerning any matter relevant to the administration of this Act or the regulations.

Powers in relation to works

(2) A pollution prevention officer may, at any reasonable time,

(a) enter any area, place or premises (other than a ship, a private dwelling place or any part of any area, place or premises other than a ship that is designed to be used and is being used as a permanent or temporary private dwelling place) in which any construction, alteration or extension of a work or works described in section 10 is being carried on; and

(b) conduct such inspections of the work or works being constructed, altered or extended as he deems necessary in order to determine whether any plans and specifications provided to the Government by or on behalf of the owner are being complied with.

(2) Un fonctionnaire chargé de la prévention de la pollution peut, à tout moment raisonnable,

a) entrer dans toute zone, tout lieu ou local (autre qu’un navire, qu’une résidence particulière ou qu’une partie d’une zone, d’un lieu ou local autre qu’un navire, qui est conçu pour être utilisée et est utilisée à titre de résidence particulière ou permanente) où l’on réalise une construction, une modification ou un agrandissement d’un ou plusieurs ouvrages visés à l’article 10; et

b) diriger les inspections de l’ouvrage ou des ouvrages que l’on construit, modifie ou agrandit selon qu’il le juge nécessaire en vue de déterminer si l’on se con-
error in Council, and any modifications required by the Governor in Council, are being complied with.

(3) A pollution prevention officer may
(a) go on board any ship that is within a shipping safety control zone and conduct such inspections thereof as will enable him to determine whether the ship complies with standards prescribed by any regulations made under section 12 that are applicable to it within that shipping safety control zone;

(b) order any ship that is in or near a shipping safety control zone to proceed outside such zone in such manner as he may direct, to remain outside such zone or to anchor in a place selected by him,

(i) if he suspects, on reasonable grounds, that the ship fails to comply with standards prescribed by any regulations made under section 12 that are or would be applicable to it within that shipping safety control zone,

(ii) if such ship is within the shipping safety control zone or is about to enter the zone in contravention of a regulation made under paragraph (b) or (c) of subsection (1) of section 12, or

(iii) if, by reason of weather, visibility, ice or sea conditions, the condition of the ship or its equipment or the nature or condition of its cargo, he is satisfied that such an order is justified in the interests of safety; and

(c) where he is informed that a substantial quantity of waste has been deposited in the arctic waters or has entered the arctic waters, or where on reasonable grounds he is satisfied that a grave and imminent danger of a substantial deposit of waste in the arctic waters exists,

(i) order all ships within a specified area of the arctic waters to report their positions to him, and

(ii) order any ship to take part in the clean-up of such waste or in any action to control or contain the waste.

forme à tous plans et devis fournis au gouverneur en conseil et à toutes modifications requises par le gouverneur en conseil.

(3) Un fonctionnaire chargé de la prévention de la pollution peut
a) monter à bord de tout navire se trouvant dans une zone de contrôle de la sécurité de la navigation et y diriger les inspections qui lui permettront de déterminer si le navire satisfait aux normes prévues dans des règlements établis en vertu de l'article 12 et qui lui sont applicables dans cette zone de contrôle de la sécurité de la navigation;

b) ordonner à tout navire se trouvant dans une zone de contrôle de la sécurité de la navigation ou près de cette zone, d'en sortir de la manière qu'il peut ordonner, de rester en dehors de cette zone ou de mouiller dans un endroit choisi par lui

(i) s'il soupçonne en se fondant sur des motifs raisonnables que le navire a omis de satisfaire aux normes prévues dans des règlements établis en vertu de l'article 12 qui lui sont ou lui auraient été applicables dans cette zone de contrôle de la sécurité de la navigation,

(ii) si le navire se trouve dans la zone de contrôle de la sécurité de la navigation ou est sur le point d'y entrer, en violation d'un règlement établi en vertu de l'alinéa b) ou c) du paragraphe (1) de l'article 12, ou

(iii) si, en raison des conditions atmosphériques, de la visibilité, de l'état des glaces ou de la mer, de l'état du navire ou de son équipement ou de la nature ou de l'état de sa cargaison, il est convaincu que cet ordre se justifie dans l'intérêt de la sécurité; et

c) lorsqu'il est informé qu'une quantité importante de déchets a été déposée dans les eaux arctiques ou a atteint ces eaux, ou s'il est convaincu en se fondant sur des motifs raisonnables qu'il y a grave et imminent danger que se pro-
16. The owner or person in charge of any area, place or premises entered pursuant to subsection (1) or (2) of section 15, the master of any ship boarded pursuant to paragraph (a) of subsection (3) of that section and every person found in the area, place or premises or on board the ship shall give a pollution prevention officer all reasonable assistance in his power to enable the pollution prevention officer to carry out his duties and functions under this Act and shall furnish the pollution prevention officer with such information as he may reasonably require.

17. (1) No person shall obstruct or hinder a pollution prevention officer in the carrying out of his duties or functions under this Act.

(2) No person shall knowingly make a false or misleading statement, either verbally or in writing, to a pollution prevention officer engaged in carrying out his duties or functions under this Act.

18. (1) Any person who violates subsection (1) of section 4 and any ship that violates that subsection is guilty of an offence and liable on summary conviction to a fine not exceeding, in the case of a person, five thousand dollars, and in the case of a ship, one hundred thousand dollars.

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duise un dépôt important de déchets dans les eaux arctiques,

(i) ordonner à tous les navires se trouvant dans une zone spécifiée des eaux arctiques, de lui signaler leur position, et

(ii) ordonner à tout navire de participer au nettoyage de ces déchets ou à toute opération pour contrôler les déchets ou les circonstances.

16. Le propriétaire ou la personne en charge d'une zone, d'un lieu ou d'un local, où un fonctionnaire chargé de la prévention de la pollution est entré en conformité du paragraphe (1) ou (2) de l'article 15, le capitaine d'un navire à bord duquel un fonctionnaire chargé de la prévention de la pollution est monté en application de l'alinéa c) du paragraphe (3) de l'article 15 et toute personne qui se trouve dans la zone, le lieu ou le local ou à bord du navire, doivent fournir au fonctionnaire chargé de la prévention de la pollution toute l'aide raisonnable en leur pouvoir pour lui permettre d'exercer ses fonctions en vertu de la présente loi et lui fournir les renseignements qu'il peut raisonnablement exiger.

17. (1) Nul ne doit faire obstacle à un fonctionnaire chargé de la prévention de la pollution dans l'exercice des fonctions que lui confère la présente loi.

(2) Nul ne doit faire sciemment, oralement ou par écrit, une déclaration fausse ou trompeuse à un fonctionnaire chargé de la prévention de la pollution dans l'exercice des fonctions que lui confère la présente loi.

18. (1) Toute personne ou tout navire Dépôt de qui enfreint le paragraphe (1) de l'article 4 est coupable d'une infraction et passible de sur déclaration sommaire de culpabilité, ou des amendes de cinq mille dollars au plus, et s'il s'agit d'une personne, d'une amende de cent mille dollars au plus.
(2) Where an offence is committed by a person under subsection (1) on more than one day or is continued by him for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

19. (1) Any person who
(a) fails to make a report to a pollution prevention officer as and when required under subsection (1) of section 8,
(b) fails to provide the Governor in Council with evidence of financial responsibility as and when required under subsection (1) of section 8,
(c) fails to provide the Governor in Council with any plans and specifications required of him under subsection (1) of section 10, or
(d) constructs, alters or extends any work described in subsection (1) of section 10
(i) otherwise than in accordance with any plans and specifications provided to the Governor in Council in accordance with a requirement made under that subsection, or with any such plans and specifications as required to be modified by any order made under subsection (2) of that section, or
(ii) contrary to any order made under subsection (2) of that section prohibiting the carrying out of such construction, alteration or extension,
is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five thousand dollars.

19. (1) Est coupable d'une infraction et commises par des personnes passible sur déclaration sommaire de culpabilité d'une amende de vingt-cinq millions dollars au plus, quiconque
a) omet de faire rapport au fonctionnaire chargé de la prévention de la pollution dans les conditions et au moment où il en est requis en vertu du paragraphe (1) de l'article 8;
b) omet de fournir au gouverneur en conseil la preuve de sa solvabilité dans les conditions et au moment où il en est requis en application du paragraphe (1) de l'article 8;
c) omet de fournir au gouverneur en conseil les plans et les devis qu'il exige en application du paragraphe (1) de l'article 10; ou
d) construit, modifie ou agrandit un ouvrage visé au paragraphe (1) de l'article 10,
(i) autrement que conformément à des plans et devis fournis au gouverneur en conseil conformément à une condition imposée en vertu de ce paragraphe, ou à de tels plans et devis qu'un décret pris en vertu du paragraphe (2) de cet article exige de changer, ou
(ii) contrairement à un décret pris en vertu du paragraphe (2) de cet article, et interdisant la réalisation de cette construction, de cette modification ou de cet agrandissement.

(2) Any ship
(a) that navigates within a shipping safety control zone while not complying with standards prescribed by any regulations made under section 12 that are applicable to it within that shipping safety control zone,

(2) Est coupable d'une infraction et commises par des navires passible sur déclaration sommaire de culpabilité d'une amende de vingt-cinq millions dollars au plus, tout navire
a) qui navigue dans une zone de contrôle de sécurité de la navigation, sans se conformer aux normes prévues par
(b) that navigates within a shipping safety control zone in contravention of a regulation made under paragraph (b) or (c) of subsection (1) of section 12, 
(b) qui navigue dans une zone de contrôle de la sécurité de la navigation en violation d’un règlement établi en vertu des alinéas b) ou c) du paragraphe (1) de l’article 12;
(c) that, having taken on board a pilot in order to comply with a regulation made under paragraph (b) of subsection (1) of section 12, fails to comply with any reasonable direction given to it by the pilot in carrying out his duties, 
(c) qui, ayant pris à bord un pilote pour se conformer à un règlement établi en vertu de l’alinéa b) du paragraphe (1) de l’article 12, omet de se conformer à une instruction raisonnable à lui donnée par le pilote dans l’exercice de ses fonctions, en vertu de la présente loi; 
(d) that fails to comply with any order of a pollution prevention officer under paragraph (b) or (c) of subsection (3) of section 15 that is applicable to it, 
(d) omet de se conformer à un ordre d’un fonctionnaire chargé de la prévention de la pollution, en vertu des alinéas b) ou c) du paragraphe (3) de l’article 15, qui lui sont applicables; 
(e) the master of which fails to make a report to a pollution prevention officer as and when required under subsection (2) of section 5, or 
e) dont le capitaine omet de faire rapport à un fonctionnaire chargé de la prévention de la pollution dans les conditions et au moment où il en est requis en vertu du paragraphe (2) de l’article 5; ou 
(f) the master of which or any person on board which violates section 17, 
f) dont le capitaine ou toute personne à bord contravient à l’article 17.

(3) Any person, other than the master of a ship or any person on board a ship, who violates section 17 is guilty of an offence punishable on summary conviction.

(3) Quiconque, autre que le capitaine d’un navire ou toute personne à bord d’un navire, contravient à l’article 17 est coupable d’une infraction sur déclaration sommaire de culpabilité.

20. (1) In a prosecution of a person for an offence under subsection (1) of section 18, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

20. (1) Dans la poursuite d’une personne pour une infraction prévue au paragraphe (1) de l’article 18, il suffit, pour établir l’infraction, de démontrer qu’elle a été commise par un employé ou un mandataire de l’accusé, que cet employé ou mandataire soit ou non identifié ou qu’il ait ou non été poursuivi pour cette infraction, à moins que cet accusé n’établisse d’une part que l’infraction a été commise sans qu’il le sache ou y consente et d’autre part qu’il s’est dûment appliqué à prévenir sa commission.

(2) In a prosecution of a ship for an offence under this Act, it is sufficient proof that the ship has committed the offence les règlements établis en vertu de l'article 12 qui lui sont applicables dans cette zone;

(2) Dans la poursuite d’un navire pour une infraction prévue à la présente loi, il suffit, pour établir que l'infraction est impu-
to establish that the act or neglect that constitutes the offence was committed by the master or any person on board the ship, other than a pollution prevention officer or a pilot taken on board in compliance with a regulation made under paragraph (b) of subsection (1) of section 12, whether or not the person on board the ship has been identified; and for the purposes of any prosecution of a ship for failing to comply with any order or direction of a pollution prevention officer or a pilot, any order given by such pollution prevention officer or any direction given by such pilot to the master or any person on board the ship shall be deemed to have been given to the ship.

21. (1) Subject to this section, a certificate of an analyst stating that he has analysed or examined a sample submitted to him by a pollution prevention officer and stating the result of his analysis or examination is admissible in evidence in any prosecution for a violation of subsection (1) of section 4 and in the absence of evidence to the contrary is proof of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

(2) The party against whom a certificate of an analyst is produced pursuant to subsection (1) may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

(3) No certificate shall be received in evidence pursuant to subsection (1) unless the party intending to produce it has given to the party against whom it is intended to be produced reasonable notice of such intention together with a copy of the certificate.

22. (1) Where any person or ship is charged with having committed an offence under this Act, any court in Canada that

21. (1) Sous toute réserve prévue au présent article, un certificat d’un analyste déclarant qu’il a analysé ou examiné un échantillon que lui a soumis un fonctionnaire chargé de la prévention de la pollution indiquant le résultat de son analyse ou examen est admissible en preuve dans toute poursuite d’une violation du paragraphe (1) de l’article 4 et, en l’absence de preuve contraire, fait preuve des déclarations contenues dans le certificat sans qu’il soit nécessaire de prouver la signatu de la personne par laquelle il paraît avoir été signé ni la qualité officielle de cette personne.

(2) La partie contre laquelle un certificat d’un analyste est produit en application du paragraphe (1) peut, avec l’autorisation du tribunal, exiger la présence de l’analyste pour le contre-interroger.

(3) Aucun certificat ne doit être reçu en Avis de preuve en application du paragraphe (1), à moins que la partie qui entend le produire n’ait donné à la partie à laquelle elle entend l’opposer, un avis suffisant de son intention de le faire, assorti d’une copie du certificat.
would have had cognizance of the offence if it had been committed by a person within the limits of its ordinary jurisdiction has jurisdiction to try the offence as if it had been so committed.

(2) Where a ship is charged with having committed an offence under this Act, the summons may be served by leaving the same with the master or any officer of the ship or by posting the summons on some conspicuous part of the ship, and the ship may appear by counsel or agent, but if it does not appear, a summary conviction court may, upon proof of service of the summons, proceed ex parte to hold the trial.

SAUSSIE ET CONFISCATION

23. (1) Chaque fois qu’un fonctionnaire chargé de la prévention de la pollution soupçonne, en se fondant sur des motifs raisonnables,

a) qu’une disposition de la présente loi, ou des règlements a été enfreinte par un navire, ou

b) qu’une infraction prévue à l’alinéa b) du paragraphe (1) de l’article 19 a été commise par le propriétaire d’un navire ou par le ou les propriétaires de toute partie de sa cargaison,

il peut saisir, avec l’accord du gouverneur en conseil, le navire et sa cargaison partout dans les eaux arctiques ou ailleurs dans la mer territoriale du Canada ou dans les eaux intérieures au Canada.

(2) Sous réserve du paragraphe (3) et de Garde l’article 24 un navire et une cargaison saisis en vertu du paragraphe (1) doivent rester sous la garde du fonctionnaire chargé de la prévention de la pollution qui a fait pratiquer la saisie ou être confiée à la garde de la personne que le gouverneur en conseil nomme.

(3) Lorsque la totalité ou une partie d’une cargaison saisie en vertu du paragraphe (1) est périsable, le fonctionnaire
24. (1) Where a ship is convicted of an offence under this Act, or where the owner of a ship or an owner of all or part of the cargo thereof has been convicted of an offence under paragraph (b) of subsection (1) of section 19, the convicting court may, if the ship and its cargo were seized under subsection (1) of section 23, in addition to any other penalty imposed, order that the ship and cargo or the ship or its cargo or any part thereof be forfeited, and upon the making of such order the ship and cargo or the ship or its cargo or part thereof are or is forfeited to Her Majesty in right of Canada.

(2) Where any cargo or part thereof that is ordered to be forfeited under subsection (1) has been sold under subsection (3) of section 23, the proceeds of such sale are, upon the making of such order, forfeited to Her Majesty in right of Canada.

(3) Where a ship and cargo have been seized under subsection (1) of section 23 and proceedings that could result in an order that the ship and cargo be forfeited have been instituted, the court in or before which the proceedings have been instituted may, with the consent of the Governor in Council, order redelivery thereof to the person from whom they were seized upon security by bond, with two sureties, in an amount and form satisfactory to the Governor in Council, being given to Her Majesty in right of Canada.

charged de la prévention de la pollution ou toute autre personne en ayant la garde peut vendre la cargaison ou sa partie périssable, selon le cas, et le produit de la vente doit être versé au receveur général ou être déposé à son compte dans une banque à charte.

24. (1) Lorsqu’un navire est déclaré coupable d’une infraction prévue par la présente loi, ou lorsque le propriétaire d’un navire ou un propriétaire de la totalité ou d’une partie de sa cargaison a été déclaré coupable d’une infraction prévue par l’alinéa b) du paragraphe (1) de l’article 19, la cour qui prononce la condamnation peut, si le navire et sa cargaison ont été saisis en vertu du paragraphe (1) de l’article 23, en sus de toute autre peine infligée, ordonner que le navire et sa cargaison ou que le navire ou tout ou partie de sa cargaison soient confisqués et, dès le prononcé d’une telle ordonnance, le navire et sa cargaison ou le navire ou tout ou partie de sa cargaison sont confisqués au profit de Sa Majesté du chef du Canada.

(2) Lorsqu’une cargaison ou une partie de celle-ci ayant fait l’objet d’une ordonnance de confiscation en vertu du paragraphe (1), a été vendue en vertu du paragraphe (3) de l’article 23, le produit de cette vente, dès que cette ordonnance est rendue, est confisqué au profit de Sa Majesté du chef du Canada.

(3) Lorsqu’un navire et une cargaison ont été saisis en vertu du paragraphe (1) de l’article 23 et que des poursuites, pouvant avoir pour résultat une ordonnance de confiscation du navire et de la cargaison, ont été intentées, la cour devant laquelle les poursuites ont été intentées peut, avec l’accord du gouverneur en conseil, en ordonner la remise à la personne saisie contre dépôt auprès de Sa Majesté du chef du Canada d’une garantie sous forme de cautionnement souscrit par deux garants, en la forme et d’un montant que le gouverneur en conseil juge satisfaisants.
(4) Any ship and cargo seized under subsection (1) of section 23 or the proceeds realized from a sale of any perishable cargo under subsection (3) of that section shall be returned or paid to the person from whom the ship and cargo were seized within thirty days from the seizure thereof, unless, prior to the expiration of the thirty days, proceedings are instituted in respect of an offence alleged to have been committed by the ship against this Act or in respect of an offence under paragraph (b) of subsection (1) of section 19 alleged to have been committed by the owner of the ship or an owner of all or part of the cargo thereof.

(5) Where proceedings referred to in subsection (4) are instituted and, at the final conclusion of those proceedings, a ship and cargo or ship or cargo or part thereof are or is ordered to be forfeited they or it may, subject to section 25, be disposed of as the Governor in Council directs.

(6) Where a ship and cargo have been seized under subsection (1) of section 23 and proceedings referred to in subsection (4) have been instituted, but the ship and cargo or ship or cargo or part thereof or any proceeds realized from the sale of any part of the cargo are not at the final conclusion of the proceedings ordered to be forfeited, they or it shall be returned or the proceeds shall be paid to the person from whom the ship and cargo were seized, unless there has been a conviction and a fine imposed in which case the ship and cargo or proceeds may be detained until the fine is paid, or the ship and cargo may be sold under execution in satisfaction of the fine, or the proceeds realized from a sale of the cargo or any part thereof may be applied in payment of the fine.

25. (1) The provisions of section 64A of the Fisheries Act apply, with such modifications as the circumstances require, in respect of any ship and cargo forfeited.

25. (1) Les dispositions de l'article 64A de la Loi sur les pêcheries s'appliquent, avec les modifications qui s'imposent, à un navire et une cargaison saisis en vertu de la
under this Act as though the ship and cargo were, respectively, a vessel and goods forfeited under subsection (5) of section 64 of that Act.

(2) References to "the Minister" in section 64A of the Fisheries Act shall, in applying that section for the purposes of this Act, be read as references to the Governor in Council and the phrase "other than a person convicted of the offence that resulted in the forfeiture or a person in whose possession the vessel, vehicle, article, goods or fish were when seized" shall be deemed to include a reference to the owner of the ship where it is the ship that is convicted of the offence that results in the forfeiture.

Idem

(2) Les mentions du « Ministre » à l'article 64A de la Loi sur les pêcheries doivent se lire pour l'application de cet article aux fins de la présente loi, comme des mentions du gouverneur en conseil, et les mots « autre qu'une personne déclarée coupable de l'infraction ayant entraîné la confiscation ou qu'une personne en la possession de qui le vaisseau, véhicule, article, effet ou poisson se trouvaient au moment où ils ont été saisis » sont censés comprendre une mention du propriétaire du navire dans le cas où c'est le navire qui est déclaré coupable de l'infraction ayant entraîné la confiscation.

DELEGATION

26. (1) The Governor in Council may, by order, delegate to any member of the Queen's Privy Council for Canada designated in the order the power and authority to do any act or thing that the Governor in Council is directed or empowered to do under this Act; and upon the making of such an order, the provision or provisions of this Act that direct or empower the Governor in Council and to which the order relates shall be read as if the title of the member of the Queen's Privy Council for Canada designated in the order were substituted therein for the expression "the Governor in Council".

Limitation

26. (1) Le gouverneur en conseil peut déléguer, par décret, à tout membre du Conseil privé de la Reine pour le Canada, qui désigne le décret, le pouvoir et l'autorité de faire tout acte ou toute chose que le gouverneur en conseil a le devoir ou le pouvoir de faire, en vertu de la présente loi, et lorsque ce décret est pris, la ou les dispositions de la présente loi relatives aux devoirs et pouvoirs du gouverneur en conseil et que le décret concerne, doivent se lire comme si le titre du membre du Conseil privé de la Reine pour le Canada désigné dans le décret y était substitué à l'expression «le gouverneur en conseil».

26. (2) This section does not apply to authorize the Governor in Council to delegate any power vested in him under this Act to make regulations, to prescribe shipping safety control zones or to designate pollution prevention officers and their powers, other than pollution prevention officers with only those powers set out in subsection (1) or (2) of section 15.

DÉLÉGATION

26. (1) Le présent article ne s'applique pas à déléguer tout pouvoir que lui confère la présente loi pour établir des règlements, prévoir des zones de contrôle de la sécurité de la navigation ou désigner, en fixant leurs pouvoirs, des fonctionnaires chargés de la prévention de la pollution, autres que des fonctionnaires chargés de la prévention de la pollution ne détenant que les pouvoirs indiqués au paragraphe (1) ou (2) de l'article 15.
27. All fines imposed pursuant to this Act belong to Her Majesty in right of Canada and shall be paid to the Receiver General.

27. Toutes les amendes infligées en application de la présente loi appartiennent à payer au chef du Canada et doivent être versées au receveur général du Canada.

28. This Act shall come into force on a day to be fixed by proclamation.

28. La présente loi entrera en vigueur à une date qui sera fixée par proclamation.
The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?

Jane Gilliland Dalton

In May 1991, Admiral Jorge Martinez Busch, Commander in Chief of the Chilean Navy, introduced a new concept which he entitled El Mar Presencial, or The Presencial Sea. Perhaps best translated as "The Sea in Which We are Present", the Mar Presencial encompasses a vast triangle of ocean area of approximately 19,967,337 square kilometres. While not unprecedented, the Mar Presencial represents a disturbing development in the Law of the Sea as reflected in the LOS Convention concluded in 1982. Consequently, this paper will analyse the new concept from two perspectives: as presented by Admiral Martinez and as it conflicts or is consistent with the current Law of the Sea. The paper will then discuss the implications of the Mar Presencial for both Chile and the international community.

The Mar Presencial: A Vision for Chile's Future

The Mar Presencial consists of a very precise physical description and a very broad doctrinal content. Physically, it is located in the high seas between the limit of Chile's EEZ and the meridian, which, passing through the western edge of the continental shelf of Easter Island, extends from the parallel of marker number 1...
(Hito No. 1) of the international boundary that separates Chile and Peru to the South Pole (see Map 1).

Doctrinally, Admiral Martinez presents the Mar Presencial as the driving force for effective occupation of Chile's ocean territories which will achieve the growth and development of the Chilean nation. This occupation has two aspects: first, Chile should be physically present in that part of the high seas, observing and participating in activities that lead to development; and second, acting within the norms established by the Convention, Chile should engage in economic and scientific activities that both contribute to the development of the country and halt foreign interests, either direct or indirect, which can affect Chile's maritime heritage and national security. This doctrinal aspect of the Mar Presencial includes concerns about geopolitics, economic development, strategic security, national identity and even the role of the Chilean Navy in Chile's future. Following is a brief discussion of each of these concerns.

A. Geopolitics

Admiral Martinez states that it is time for Chileans to recognize their true geographic identity. It is time to discard the old notion that Chile is a long, narrow strip of land and to look at Chile in its true dimensions as Tri-Continental Chile: land borders (composed of the Chilean mainland in the east, Easter and Sala y Gomez Islands in the west, and the Antarctic in the south) surrounding Chile's ocean territory (composed of the territorial sea, the EEZ or Patrimonial Sea, and the Mar Presencial).

Two Chilean naval officers, Captains Vergara and Thauby, writing in the Chilean naval periodical Revista de Marina, describe the oceanic legal regimes thus: Internal waters as delimited by Chile's straight baselines over which the state exercises complete sovereignty; 12 n.m. territorial sea in which innocent passage for merchant vessels is permitted; the contiguous zone extending 24 n.m. from the coast in which the state has competence over customs and sanitation; the EEZ, out to 200 n.m., where Chile only exercises control over resources; and the Mar Presencial, which "is not in opposition to international law but is no more than an area where we want to see and be seen".

This ostensibly harmless geopolitical description, however, masks a much

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3 Martinez, "El Mar Presencial", 231. See also Chilean Law No. 19.080, Amending Law No. 18.892 on Fisheries and Agriculture. Copy on file with author.

4 "Patrimonial waters" or "Patrimonial Sea" began as a phrase referring to an undefined expanse of ocean over which the coastal state maintained some form of jurisdiction. "It is patrimonial sea includes both the territorial sea as well as a zone beyond it the extension of which is determined unilaterally—but not arbitrarily—by the coastal state. The jurisdiction of the coastal state to regulate the exploitation, conservation, and exploitation of the marine resources contained within the patrimonial sea is extended over the adjacent waters, the seabed and subsoil thereof." Edmundo Vargas Carreno, quoted in Francisco Oregue Vicuna, The Exclusive Economic Zone (1989), p. 11. The Patrimonial Sea concept figured importantly in the law of the sea discussions and negotiations. Today, since the conclusion of the 1982 Convention, the Patrimonial Sea generally refers to the 200 n.m. EEZ.

5 "Estar y mirar", literally, "to be and to look". Vergara and Thauby, "El Factor Naval", p. 574.
more far-reaching economic and strategic vision—a vision which threatens the very consensus underpinning the Convention. The basis for the concept appears to be Chile's dissatisfaction with the results of the negotiations as codified in Montego Bay, Jamaica. Admiral Martinez seems troubled by the compromise solutions of the Convention, where the legal often gave ground to the political, and where ambiguity was a sought-after result to reach agreements which otherwise would have been impossible. The provisions dealing with maritime areas under coastal state jurisdiction or sovereignty contain “generally acceptable solutions”, largely because they merely codified existing customary law.

The Convention had very patchy results, however, in those areas where no customary law was established. With respect to the regulation of mineral resources in areas outside national jurisdiction, the Convention established a legal regime completely different from anything previously known. With respect to exploitation of the living resources of the high seas, the Convention retained the pre-Convention mentality: enunciating the duty of states to adopt measures to conserve the resources of the high seas, but leaving the means of establishing the measures to the will of the states. Finally, the Convention simply failed to deal with issues of state security. It is apparently because of Chile's dissatisfaction with these results that she feels compelled to create a new geopolitical entity in which to preserve her economic, security and naval interests.

B. Economic Development

Two aspects of the Law of the Sea Convention are particularly important to Admiral Martinez. First, the major maritime powers of the world have not ratified the Convention. Second, because only the major maritime nations will have the technological capacity to exploit the resources of the high seas, only those nations will be in a position knowledgeably to influence the implementation of the regulatory provisions of the Convention. When the Convention comes into effect, there will be a power void which will be rapidly filled by the major maritime nations. If Chile is to preserve her place in the future international order, she must act and act now to fill the power void in the Southeast Pacific. She must assume an active role in the exploitation and regulation of high seas fisheries, marine scientific research, and mineral exploitation/regulation. The Mar Presencial is the means by which she will achieve that end.

C. Strategic Security and the Role of the Chilean Navy

Just as Admiral Martinez perceives that Chile must act to preserve her economic interests in the Southeast Pacific, so he also perceives that she must act to pre-

serve her national strategic interests in that area. First, the presence of foreign fishing fleets is a strategic threat creating serious geopolitical tensions. Fleets from the Americas, Europe and Asia are placing great pressure on the resources of the Southeast Pacific as they support themselves from Chile's territory (the Mar Presencial).

Second, since the dismemberment of the Soviet Union, the world is moving toward unipolarity. Chile is threatened by this increasingly unipolar world because she sits over the strategically critical Strait of Magellan and Drake Passage—where the sea lanes of communication between the east, the west and the Antarctic converge. The Strait of Magellan has been of growing importance in recent years as some vessels are too large to use the Panama Canal, and the slow, poorly maintained works there are encouraging other vessels, also, to use the Straits. Should, for some reason, the Canal be closed—whether by accident, war or deliberately—most of its traffic would pass through the Strait of Magellan. In addition, the United States has shown an interest in the Southeast Pacific by its use of Easter Island as an alternate landing-site for the Space Shuttle programme.

Finally, Admiral Martinez cautions against being too optimistic about the developments in the former Soviet Union. It remains to be seen whether the changes are truly philosophical, or only structural. Nuclear weapons issues have yet to be resolved, and the huge conventional army may still be a threat to NATO.

Admiral Martinez sees the Chilean Navy as the first line of defence against these strategic threats to Chile's national security. The defence will be mounted within the Mar Presencial, which is the juridical concept supporting the framework for future development. The Navy must remain strong, well-equipped, well-trained, mobile and technologically sophisticated. The Navy must maintain and improve its ocean-going capabilities. Chile must abandon the idea that medium-sized powers should have only coastal navies. Chile simply must not surrender her oceanic territory to the navies of other continents.

Admiral Martinez' proposal for an expanded port on Easter Island is especially important in this regard. It would not only provide an incentive for maritime transportation, commerce and the exploitation of oceanic resources, but would also permit the Navy to exercise a greater presence in the EEZ and the Mar Presencial. Easter Island could thus become the “point of the spear” in the defence of Chile's interests or in the projection of her interests toward Asia and Oceania.

D. National Identity

When Admiral Martinez speaks of strategic security, he is speaking not only of naval or military strategy. He has a vision of a far-reaching national strategy in which military and civil authorities work together to assure the growth and development of the nation and the national identity. Once again, geography dictates that this new national strategic vision be focused toward the oceans and, specifically, the Mar Presencial.

Admiral Martinez proposes several actions: improving the port at Easter...
Island; building a high seas fishing fleet; adopting legislation to favour investments in the production of products from the Mar Presencial; and granting preferential credits and technical assistance to activities tending to promote the occupation of Chile's ocean territories. Education at all levels must teach the geography of Chile's ocean territories so as to create in the youth of the 21st century an enterprising spirit toward the oceans. All this is directed toward creating a "national maritime consciousness." And the task for all Chileans is to integrate oceans objectives into their activities, which will move Chile into the 21st century with a concrete oceans policy.

With this in mind, the Mar Presencial, and Admiral Martinez' vision for Chile's future, this paper will now discuss how the Mar Presencial relates to the Law of the Sea.

II. The Mar Presencial and International Law

Part of the difficulty in determining whether and how the Mar Presencial comports with international law is that neither the Mar Presencial nor international law is fully defined. It is fair to say that the navigational and maritime zone provisions of the 1982 Convention are codifications of customary law. Yet there is still much disagreement as to the precise nature of even these fairly well-accepted concepts.

As for the Mar Presencial, a review of the available evidence indicates the concept may be consistent with the legal regime outside and beyond the EEZ, that is, the high seas. For example, Chile's 1991 fishing law defines the Mar Presencial as "that part of the high seas existing for the International community..." Admiral Martinez specifically emphasizes that the concept of the Mar Presencial "in no way signifies a failure to recognize the legal regime that governs the maritime spaces that make up the Mar Presencial", but is simply an acknowledgment of Chile's tri-continental nature and the need to take action to protect Chile's interests in that area. Captains Vergara and Thauby list as a permanent national objective that Chile should exercise sovereignty in all areas of maritime jurisdiction in accordance with international law.

In this light, Admiral Martinez' suggestions appear to be consistent with the high seas regime: Chile should expand her fishing industry beyond the EEZ; she should concentrate on scientific and oceanographic investigations outside the EEZ; she should work toward an acceptable international regime for exploitation of the deep seabed outside areas of national jurisdiction; she should continue to protect the sea lanes of communication in the southern area and maintain watchfulness over events in the Southeast Pacific from her location on Easter Island.

Yet there are other aspects of the Mar Presencial which seem less benign. One recalls that Chile is not satisfied with the results of the 1982 Convention with respect to the regulation of mineral resources outside national jurisdiction, the administration and exploitation of the living resources of the high seas, and threats to state security. Although Admiral Martinez strongly encourages the establishment of universally accepted norms to impose a just regime governing the exploitation of living resources, he concludes that such norms simply do not currently exist. In that light, certain statements may take on a different meaning. Exactly what do Captains Vergara and Thauby mean when they say Chile should be aware of ongoing activities in the Mar Presencial so as to permit "selective, timely intervention by the Government? By what method does Admiral Martinez intend for Chile to halt foreign interests in the Mar Presencial which could affect Chile's maritime heritage and national security? What regional, subregional or unilateral actions does Admiral Martinez contemplate to deal with the "abusive, indiscriminate" exploitation of the living resources of the high seas?

A review of Admiral Martinez' writings suggests these activities could all be accomplished within the provisions of the 1982 Convention. Accordingly, it will be helpful to discuss each of the problem areas identified by Admiral Martinez in relation to the relevant Convention provisions.

A. Over-exploitation of Living Resources

The 1982 Convention provisions dealing with conservation of living resources create a largely coastal state regime, with exceptions for certain types of species. Within the EEZ, the coastal state shall determine the allowable catch (Article 61(1)), taking into account the best scientific evidence available and maintaining the maximum sustainable yield, with certain qualifications. The coastal state shall promote optimum utilization (Article 62(1)) of the living resources in the EEZ. As to specific types of species, various provisions apply.

Stocks Occurring Within and Outside the EEZ

For stocks occurring within the EEZ and outside and adjacent to the EEZ, the coastal state and the states fishing for such stocks "shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks..." (Article 63(2)). This provision appears to be merely an "agreement to agree." The parties are bound to negotiate but not necessarily to arrive at an agreement. The value of such a provision depends entirely on how seriously the parties want to reach an agreement. One commentator has suggested, however, that in the context of the 1982 Convention, these provisions are more than a mere "undertaking to negotiate". Reynaldo Galindo Pohl argues that these provisions should be seen as having binding effect i.e. an obligation and duty to achieve results, so as fully to give effect to the spirit of the 1982 Convention to contribute to establishing peace in the oceans.

1 E.g. in March 1983 President Reagan announced that the Convention contained provisions "with respect to traditional uses of the oceans which generally confirm existing maritime law and practice...". He said the United States would accept and act consistently with the provisions of the Convention dealing with navigation, overflight, high seas freedoms and the EEZ. Proclamation No. 5031, 46 Fed. Reg. 10, 601 (1983). See also Restatement (Third) of Foreign Relations Law, Part V, introd. note (1987).

Marine Mammals

Coastal states may prohibit, limit or regulate the exploitation of marine mammals within the EEZ. States "shall co-operate" and shall "work through the appropriate international organizations" for their conservation, management, and study (Article 65). Again, we see the more mandatory "shall co-operate" language, with an additional requirement to work with international organizations. However, the provision also gives the coastal state great authority over marine mammals within the EEZ.

Interestingly, as recently as 1989, Professor Francisco Orrego Vicuna expressed the opinion that coastal states' sovereign rights over living resources were "fully safeguarded" within the framework of the above-discussed special fishing regimes. The regimes guarantee compatibility of states' rights with the scientific and economic realities that characterize the various species. National practice reveals a high degree of conformity with the Convention provisions, which is the "natural outcome of the compatibility of those regimes with the sovereign rights of the coastal state".

Perhaps in the intervening years Chile has become less confident that the cooperative regime will meet her needs. Certainly Professor Orrego has expressed dissatisfaction with the ability of the Inter-American Tropical Tuna Commission to create workable mechanisms for tuna fisheries. He does point to the South Pacific Forum Fisheries Agency as an organization which achieved positive results, largely due to United States willingness to make concessions to economic interests of member states. After several years of serious tension between the United States and the South Pacific Island countries over tuna fishing grounds, a successful treaty was concluded in 1987. The treaty recognizes coastal state sovereignty over the resources of the EEZ, and provides for licences, enforcement mechanisms and compliance with national legislation related to the EEZ. This treaty established a valuable precedent for the United States which could perhaps be duplicated in the South American tuna fishing grounds.

The appropriate organization to that end, as suggested by Admiral Martinez, could be the Permanent Commission of the South Pacific, of which Chile, Colombia, Ecuador and Peru are members. Originally created to monitor the implementation of the Santiago Declaration, it is now an organization for technical and legal co-ordination of maritime issues. It organized an International Symposium on Fisheries and Living Resources in 1988 and in 1990 sponsored a...
meeting of Pacific-rim nations in Papua New Guinea to discuss the establishment of a consultative committee on fishing co-operation. The Secretary General has held talks with Japan concerning the taking of species beyond the 200 n.m. EEZ.

The Convention’s extension of coastal state jurisdiction over fisheries resources within the EEZ naturally encourages coastal states to develop a national policy of fisheries management. In Chile, fisheries enforcement has traditionally been assigned to the Navy through the Maritime and Port Authority. In a small country, with relatively few means, it is not surprising or unusual that the Navy should be assigned that task. In this capacity, the Navy acts as a Maritime Police Force or Coast Guard. Such an arrangement is also not unusual among larger maritime powers. The United Kingdom, for example, assigns to the Royal Navy responsibility for fisheries observation, inspection and enforcement at sea.

It should not be surprising or alarming, therefore, that Chile’s new fisheries law assigns observation of fishing activities and record-keeping responsibilities to the Navy and the Sub-Secretariat of Fishing, both within and outside the EEZ. Through observation and data collection, Chile may be able to obtain evidence to support the theory that fishing outside the EEZ is depleting stocks within the EEZ. Such evidence would strengthen Chile’s negotiating position with respect to Articles 87 and 116 concerning high seas fishing of stocks which occur within and outside the EEZ.

The new fisheries law also allows fisheries authorities to refuse the transshipment through Chilean ports of fish caught on the high seas if the fish are part of a population found both within and outside the EEZ and the fishing on the high seas is found to have an adverse impact within the EEZ. If applied to stocks found within and outside the EEZ, other than highly migratory species, this provision appears to be consistent with Article 63(2). That article requires states to seek agreement as to conservation of the stocks, but has no impact on a coastal state’s ability to regulate the use of its ports and shipping facilities. As applied to highly migratory species, again there seems to be no conflict with the Convention.

Even if one accepts the argument of the distant water fishing nations that Article 64 creates an exception to coastal states’ rights within the EEZ, Article 64 applies to conservation and optimum utilization of the species. It does not affect the coastal state’s regulation of its ports and shipping facilities.

It is hoped that Chile will apply such measures non-discriminately to foreign and Chilean fishing fleets, so as to demonstrate that her concern is not merely parochial but is for the benefit of the international community’s interest in high seas fishing freedoms. And, of course, Chile must make the tactical decision whether such a law will result in the willingness of distant water nations to negotiate or will simply drive their fleets to use other, less restrictive, shipping facilities, if any are available. So long as Chile’s domestic legislation concerning fishing activities in the Mar Presencial is carefully crafted to comply with 1982 Convention provisions, her actions within the Mar Presencial do not threaten the Convention regime.

B. Marine Scientific Research

The 1982 Convention creates a modified coastal state consent regime for marine scientific research, with a presumption in favour of allowing such research within the EEZ and continental shelf (Article 246). Freedom to conduct marine scientific research is a specific high seas freedom, subject to the continental shelf regime and certain other requirements such as that research shall be conducted for peaceful purposes (Article 87(1)(f)).

Marine scientific research has long been a concern of Chile and the Chilean Navy, especially as they view research by major powers as a means to gain a strategic advantage over other countries. Nevertheless, Admiral Martinez’ suggestions about marine scientific research in the Mar Presencial appear to be consistent with the 1982 Convention. He suggests that Chile concentrate on oceanographic investigations outside the EEZ under the auspices of the Chilean National Oceanographic Committee. Recognizing that Chile cannot compete joint ventures or technology transfer for research conducted outside the EEZ or the continental shelf, it is certainly within Chile’s legitimate goals to seek to join them.

C. Protection of the Marine Environment

States have an obligation to protect and preserve the marine environment (Article 192). They have the duty to prevent, reduce and control pollution of the marine environment from land-based sources (Article 207), from sea-bed activities and artificial islands and installations within their jurisdictions (Article 208(1)), and from dumping within the territorial sea, EEZ or continental shelf (Article 210(5)). Flag states shall adopt regulations to prevent pollution from their flag vessels (Article 211(2)). Coastal and port states may establish regulations for vessels transiting the territorial sea or calling at their ports (Article 211(3)(4)); however, such regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards (Article 211(2)). Coastal states may adopt regulations for pollution control within their EEZes, provided the regulations conform to generally accepted rules and standards established through competent international organizations (Article 211(5)), or through the establishment of special pollution control zones in accordance with Article 211(6). States bordering straits may regulate pollution prevention and control by giving effect to international regulations regarding the discharge of oil, oily wastes and other noxious substances (Article 42(1)(b)). In
sum, the Convention creates a comprehensive system for pollution prevention and control, although specific normative standards are to be developed in the future through unspecified international organizations and international cooperation.  

Admiral Martinez presents marine pollution as a problem, but gives few details as to his specific concerns or proposed actions. Chile’s concerns about pollution by ships transiting the Strait of Magellan or operating within the EEZ may be resolved by working toward International standards in accordance with Articles 42(1)(b) and 211(5). Her concerns, if any, of pollution from vessels operating outside the EEZ but having an effect within the EEZ are best addressed with the particular flag state concerned. In any event, the Convention makes no provision for unilateral enforcement of Convention provisions against a foreign flag vessel outside the EEZ of the coastal state, with one exception. Article 221(1) provides:

Nothing in this Part shall prejudice the right of States, pursuant to international law... to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastlines or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty... which may reasonably be expected to result in major harmful consequences.

Chile has established a record of working toward International environmental agreements. In 1981 Chile, Colombia, Peru and Ecuador collaborated with the United Nations Environment Program to approve an action plan for protection of the marine environment in the Southeast Pacific. In addition, a 1976 study, sponsored by the Institute of International Studies of the University of Chile, proposed two actions with respect to the protection of the Chilean marine environment. First, it suggested the establishment of “sanctuaries” in the southern coastal regions, to protect the fragile environment from oil pollution by transiting tankers. This proposal could be accomplished utilizing Article 211(6) for areas within the EEZ. Second, the study proposed that Chile encourage efforts toward international regulations establishing liability for oil pollution of the sea. This suggestion, also, appears consistent with the 1982 Convention.

D. National Security

For the most part, Admiral Martinez’ suggestions to enhance national security within the Mar Presencial encourage Chile to build an ocean-going Navy, a fleet that concentrates on maintaining a presence on the high seas and patrolling in support of the sea lanes of communication is far more effective in identifying and countering threats to one’s national security than a coastal-defense fleet. In this effort, Chile should receive encouragement and support from other ocean-going navies. There are, however, three aspects to the Mar Presencial which give cause for concern.

First, Captains Vergara and Thauby recognized in the 12 n.m. territorial sea only the right of innocent passage of merchant vessels. If that is Chile’s position, it is clearly inconsistent with the 1982 Convention which provides for innocent passage of all vessels (Part II(A), Articles 17-26). More likely their statement is a reference to Chile’s regulations on the admission of foreign warships in Chilean territorial waters, which require advance notification, except in case of emergency, of between 6 weeks and 48 hours. This regulation, which was not modified by Chile’s legislation creating a 12 n.m. territorial sea, provides that the foreign warship may not enter territorial waters until permission has been received from the Chilean government. The law imposes limits on how many warships from one country may enter simultaneously into territorial waters without additional special permission (three), and limits to 15 days the amount of time a warship can spend in territorial waters. Those provisions are inconsistent with Article 19 (meaning of innocent passage), and Article 21 (laws and regulations of the coastal state relating to innocent passage). The remainder of the law appears consistent with Articles 17-26 and 29-32 governing innocent passage of warships.


Allowing coastal states to adopt special regulations for pollution control from vessels in areas of special oceanographical and ecological conditions after co-ordination with competent international organizations and the submission of scientific and technical evidence supporting their regulations.

Gallardo, Chile’s National Interest in the Ocean, p. 54.

Vergara and Thauby, “El Factor Naval”, p. 574: “Siguen las 12 millas de mar territorial, en las que no esta permitida el paso inoocente de buques mercantes.”

Supreme Decree No. 1385 of 18 October 1951, as modified by Supreme Decree No. 2623 of 16 September 1955, reprinted in Francisco Orrego Vicuna, Chile y El Derecho del Mar (1972), pp. 195-200.


Articles 19 and 21 do not specifically forbid a coastal state from requiring advance notification.
Recognizing that some states believe there is a right to require prior notification of warships engaging in innocent passage, Chile's position is somewhat surprising when one recalls that she considered, but, in accordance with Article 33 specifically, to include special claims relating to security when she promulgated a contiguous zone. It is also somewhat inconsistent for a country with designs of creating an ocean-going navy and whose international spokesmen have frequently reiterated her commitment to navigational freedoms, to take a restrictive view of innocent passage.

Second, Chilean writers, including Admiral Martinez, frequently link security concerns to control of the Strait of Magellan and the Drake Passage. It must be remembered, however, that the two passages exist under very different regimes. The Strait of Magellan arguably comes within one of two Convention straits provisions: (i) Article 35(c) governing legal regimes regulated by long-standing international conventions specifically relating to such straits; or (ii) Article 38(1) applying to straits formed by an island of a state bordering the strait and its mainland.

If Article 38(1) applies, the applicable regime is non-suspendable innocent passage. If Article 35(c) applies, as Chile maintains, she is bound by the Treaty of 1881 with Argentina which provides the Strait shall be neutralized "forever" and "free navigation assured to the flags of all nations." During the Convention negotiations, Chile supported the concept of transit passage as a means of ensuring the needs of international navigation were compatible with the rights of the coastal state. Therefore if neither of the above provisions apply, Chile may be expected to honour the transit passage regime.

Importantly, Chile does not have jurisdiction over navigation or other high seas freedoms through the Drake Passage. The Drake Passage consists of a high seas corridor bordered on each side by EEZs in which high seas navigational freedoms extend from foreign warships. The assumption that notification is not an appropriate requirement for innocent passage is well-grounded in customary law, however. For example, the Annex to Part B—Territorial Seas—of the Final Act of the Conference for the Codification of International Law, March-April 1930, to which Chile is a signatory, recommended the following provision: Article 12: "As a general rule, a Coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification." Article 234. Am. J. Int'l L. Supp. 187.

Article 33 provides that where the contiguous zone coastal states may exercise control necessary to prevent and punish infringement of its customs, fiscal, immigration and sanitary laws, but provides no special competence to regulate for security reasons. This article leads most nations to agree that the only legitimate security zone under the 1982 Convention and customary law is the territorial sea.

Law No. 18,565 Amending the Civil Code with Regard to Maritime Space, 13 October 1986, reprinted in United Nations, Law of the Sea Bulletin, 1-2 (April 1987). Chile considered enacting legislation, as have several states, claiming jurisdiction related to security in the Contiguous Zone, but determined it was not pertinent to include such a clause, Vicuna, The Exclusive Economic Zone, p. 151.


Vicuna, "La Proyección Extrcontinental de Chile", in Francisco Orrego Vicuna, Muria Teresa Infante Coffi, Pillar Armanet (eds), Política Antártica de Chile (1984), pp. 10-19.

See "The Antarctic" below for a discussion whether EEZs exist within the limits of the Antarctic Treaty.
Admiral Martinez calls for Chile to take the lead in designing a system of acceptable international agreements to establish an equitable regime for the development of deep sea-bed resources. He is calling for no more than many other countries are demanding. In fact, the renegotiation of the deep sea-bed mining provisions could be exactly what is needed to put the entire Convention back on track.

Admiral Martinez also suggests that Chile adopt legislation to favour investments in the investigation, extraction, production and commercialization of products from the Mar Presencial. If he means by this suggestion to refer to the living resources of the high seas, there is no conflict with the 1982 Convention. If he means to refer to the deep sea-bed resources or the resources of the continental shelf, a conflict with the Convention may exist. (See "Continental Shelf" below for a discussion of the continental shelf.) There is some disagreement as to the regime governing the deep sea-bed resources while the Convention has not yet taken effect, and as to non-parties after it takes effect. While some would argue the common heritage of mankind is customary law and no state may validly claim a portion of the sea-bed and its resources, others would respond that mining sea-bed resources is a traditional high seas freedom unless and until the conventional regime takes effect.

Chile's long-standing commitment to the concept of the deep sea-bed resources as the common heritage of mankind indicates she will not take actions prejudicial to that commitment. Especially so, since Chile is a signatory to the Convention and therefore has a duty under international law not to defeat the purposes of the Convention during its pendency.

More likely, Chile's interest in deep sea-bed mining, as expressed by Admiral Martinez, is that of a land-based producer which sees a threat to her economic well-being from the development of sea-bed resources, and which seeks a sea-bed

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49 In 1979 and 1980 Chile presented an informal proposal to the Law of the Sea negotiations that the common heritage be recognized as jus cogens. FCIL, 20 August 1979 and GPP, 5 August 1980, reprinted in Renate Platzeder, Third United Nations Conference on the Law of the Sea: Documents Vol. XII (1987), pp. 302-309. Although the proposal was not accepted, when Chile signed the 1982 Convention she made a Declaration thereto identifying the common heritage as jus cogens, and reiterating the legal concept of the common heritage "which the present Convention defines as jus cogens. Any action taken in contravention of this principle outside the framework of the seabed regime would . . . be totally invalid and illegal". Reprinted in UN Law of the Sea Bulletin, 9 (1983).

50 See n. 33, below. Additionally, the current Civil Code contains a provision, dating from the Bello Code of December 14, 1855 which states: "The things that nature has made common for all mankind, such as the high seas, are not liable to ownership, and no nation, enterprise or individual has the right to appropriate them. Their use and enjoyment are determined among individuals of a nation by its laws, and among different nations by international law". (Civil Code, Article 585, quoted in F. V. Garcia-Amador, Latin America and the Law of the Sea (1972), p. 12. That nature has provided resources which are common to all mankind does not necessarily preclude their exploitation for the benefit of mankind. This law clearly did not prevent Chile's pioneering role in the movement to exert control state jurisdiction and sovereignty over the resources of the water, sea-bed and ocean floor of the high seas. Perhaps Chile's position is best explained by her statement at the Law of the Sea negotiations that the common heritage of mankind is an "invisible property with fruits that can be divided". Said Msmdoudi, The Law of Deep Sea-Bed Mining (1987), p. 129 (A/C.1 P/W.715, par. 13).
regime protective of her interests. The challenge for Chile is to recognize that the international community as a whole will benefit from the most efficient production of mineral resources, whether that production is land or sea-based, through lower prices on finished goods. Rather than seeking to inhibit or make more costly the production of sea-bed resources to protect her national industry, she should seek to obtain special assistance for retraining workers and for softening the economic impact domestically if and when sea-bed production becomes more cost-effective than land-based production. The United States and other developed nations must not overlook the concerns of land-based producers, and must work toward a resolution which links efficient production of raw materials with assistance to national economies negatively affected thereby.

G. Continental Shelf

The western boundary of the Mar Presencial is the western edge of the 350 n.m. continental shelf Chile claims around Easter Island. This claim is based on Article 76(6) which provides that, notwithstanding the methods of delineating the outer limit of the continental shelf under Article 76(5) (350 n.m. from the territorial sea baselines or 100 n.m. from the 2500 metre isobath), on submarine ridges the continental shelf shall not exceed 350 n.m. from territorial sea baselines. In analysing the 350 n.m. claim, Professor Orrego suggests the Government proclamation was applying conventional law, not in the sense of the LOS Convention, but of Article 18 of the Vienna Convention on the Law of Treaties. He objects that the US protest to Chile's proclamation, though invoking customary law, is actually based on the conventional law of the LOS Convention to which the United States does not intend to become a party. Nevertheless, Professor Orrego also recognizes legal and technical difficulties with the precise application of the 350 n.m. criteria. He suggests that precise implementation of the proclamation be undertaken only after extended legal and technical consultations, and by co-ordination with the Commission on the Limits of the Continental Shelf and the International Seabed Authority.

H. High Seas

The 1982 Convention is explicit about the high seas regime. The high seas comprise "all parts of the sea" that are not included in the EEZ, the territorial sea, internal waters or the archipelagic waters of an archipelagic State (Article 86). The high seas are open to all states, which may exercise the freedoms of navigation, overflight, laying submarine cables, and all other high seas freedoms (Article 87). No state may validly purport to subject any part of the high seas to its sovereignty (Article 89). In addition, Chile's Civil Code specifically categorizes the high seas

as something nature has made common to all mankind, which no individual, enterprise or state has the right to appropriate.

Merely stating the nature of the high seas does not resolve how competing freedoms and uses of the high seas will be accommodated, since certain high seas freedoms are made "subject to" other parts of the Convention, and all freedoms are to be exercised with "due regard" for the interests of other states (Article 87). Nevertheless, the physical extent of the high seas is clear, and it includes a major portion of the Mar Presencial.

The previous discussion has demonstrated that it is possible for Chile to accomplish her national goals within the Mar Presencial consistently with the provisions of the 1982 Convention. The following section will discuss why it is in her best interests to do so.

III. The Mar Presencial: A Harmless Concept or a Dangerous Precedent?

In the worst light, the Mar Presencial appears to be a very disturbing precedent. The reader will recall that the EEZ was based largely on the Patrimonial Sea concept—an ocean area that presupposed an interrelationship and interdependence between the geological and biological characteristics of the land and its adjacent waters. Yet even one of the strongest proponents of the Patrimonial Sea, Edmundo Vargas Carreno, believed that extension of the Sea beyond 200 n.m. could not be justified based on state competences derived from geographical, biological or geological factors. The concept of the Mar Presencial asserts historical, national and security factors to build upon and extend coastal state interests to limits which can only be determined by reference to the unique history, economy, national identity and military strengths of any particular state. Built as much upon hopes and aspirations as upon any concrete criteria, the Mar Presencial is a type of contiguous zone to the EEZ in which the state will prevent (and perhaps punish) infringements of its fishing, research, and resource exploitation interests in the EEZ. It is the extension of the justification for the EEZ—economic and social advancement, self-defence based on national necessity—to unknown and unknowable limits. The territorial and power vacuum of the Southeast Pacific permits Chile to make her claims without infringing on other nations' potential claims of a similar nature (except Argentina in the Southeast Pacific/Southwest Atlantic and other nations with claims to Antarctica). It would presumably permit a tri-continental United States Sea encompassing all the area between Alaska, Hawaii and the West Coast. But could we also extend our United States Sea to encompass American Samoa? This example is not meant to be facetious, but simply to demonstrate there are no rational conditions by which to limit the concept.

99 Civil Code Article 585, n. 51, above.
98 Edmundo Vargas Carreno, América Latina y Los Problemas Contemporáneos del Derecho del Mar (1973), pp. 74-75.
The answer to the question posed above depends on Chile. It depends on which of Chile's historical and national traditions takes precedence: the extracontinental, oceans-oriented, outward-looking tradition; or the indifferent, insular, inward-looking one. It depends on whether Chile uses the Mar Presencial to create an integrated oceans policy which will project her into the international arena as an oceans power, or whether she sees it as the opening salvo in a new round of national jurisdictional claims.

The scales appear fairly evenly balanced. The characteristics of the opposing tendencies are briefly listed below for review. For the oceans-oriented outlook:

1. The largely non-territorialist tradition, which emphasizes Chile's interest in navigational freedoms.
2. The functional approach to national concerns which denominates the EEZ as a sui generis regime, and recognizes there must be a balance between traditional high seas freedoms and coastal State competences.
3. Acknowledgement by the proponents of the Mar Presencial that the area is, in fact, the high seas, and that Chile's interests there will be asserted within the regime of the 1982 Convention.
4. Chile's long-held desire to be an active, important player on the international scene, especially in the Pacific. The similarity of her national goals with those of other maritime nations, such as open sea lanes of communication in the southern passages.
5. Chile's duty as a signatory of the 1982 Convention not to take actions which would defeat the purpose of the Convention before it takes effect.
6. Aspirations to have an ocean-going, as opposed to a coastal-defence, Navy. The traditions and professionalism of the Navy make this an attainable goal.

For the insular tradition:

1. The very human tendency not to argue with success. What worked in the past for the EEZ may work in the future for the Mar Presencial, especially if other nations acquiesce in the assertion.
2. The illimitable nature of the principles underlying functionalism—necessity, economics, social well-being—and the Mar Presencial.
3. The dissatisfaction expressed by Admiral Martinez and Professor Orrego with the current Law of the Sea regime and the perceived power voids created thereby.
4. The use of geographical characteristics to justify maritime claims, i.e. the tri-continental nature of Chile to justify the need for the Mar Presencial.
5. Chile's apparent frustration at the perceived inability to manage living resources of the seas through bi- or multi-lateral negotiations.
6. The emphasis on security threats and, particularly, the perceived vulnerability of the claimed Antarctic territory to threats from the Southeast Pacific.

Which approach will best allow Chile to attain her national goals? This author respectfully suggests that her long-term, overall goals can best be achieved within the 1982 Convention regime as modified by a renegotiation of the deep sea-bed mining provisions.

Chile does not desire to be isolated from the world community. Through bold and unprecedented actions beginning in 1947, she and other nations asserted their right to exploit natural resources in the EEZs. The Convention allows for this, with reservations, but does not specifically address the issue of exploitation. Chile seeks to further her national interests through the Convention, but without compromising her sovereignty over the EEZ.

The Convention provides for the establishment of international regulations governing the exploitation of resources in the EEZs. Chile, like other coastal nations, seeks to have a say in the management of these resources. The Convention also provides for the establishment of international fisheries management organizations, and Chile seeks to have a say in the management of these fisheries.

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recognized over vast areas of the high seas, with positive benefits to coastal states' concerns of jurisdiction over natural resources. Yet if Chile truly intends to develop an integrated national oceans policy—encompassing distant-water fishing, marine scientific research outside the EEZ, an ocean-going Navy to provide greater State security—then her interests lie in freedoms of the seas and not in ever-increasing jurisdictional assertions.

Chile's desires to be a major player in Pacific ocean politics and policies demand that she work co-operatively, and not unilaterally, to achieve national goals. Once again, Chilean scholars already appear to recognize that fact. Professor Orrego, for example, says that many very specific interests, both economic and political, are in play in the Pacific. Each country which seeks to maintain an active role there must precisely identify its objectives and methods of action by means of which particular modalities of cooperation will be developed. He gives several examples of international co-operation among Pacific nations on commerce, economics and other matters. He hopes on that base will be built a true Pacific community, in which Chile will take a lead. Surely, unilateral assertions of national jurisdiction over vast Pacific areas will not be conducive to the co-operative climate he seeks to encourage.

The Mar Presencial is a juridical concept offered to support Chilean national aspirations. The challenge to Chile and the international community is to attain Chilean aspirations within the framework of the existing Convention regime. The Mar Presencial may be the tool which will enable Chile to do so. It must not be the tool by which the erosion of the regime begins.
CANADA TAKES ACTION TO END FOREIGN OVERFISHING

OTTAWA -- Foreign Affairs Minister André Ouellet and Fisheries and Oceans Minister Brian Tobin today announced the introduction in the House of Commons of legislation which will enable Canada to take action to protect important fish stocks on the high seas which straddle Canada's 200-mile limit.

The legislation would give the Government of Canada the legal authority to make regulations for the conservation on the high seas of straddling stocks that exist both within the Canadian 200-mile limit and in the adjacent high seas area beyond the 200-mile limit. The regulations will list the straddling stocks to be protected, establish conservation and management measures, and list the classes of foreign fishing vessels to which these measures will apply. The legislation will also provide for the arrest of vessels if necessary and for procedures to ensure that this is done reasonably and responsibly.

"With this legislation, the government is keeping its promise to the Canadian people to take the steps necessary to end foreign overfishing," said Minister Tobin. "This new law will strengthen Canada's ability to protect straddling stocks on the Nose and Tail of the Grand Banks of Newfoundland."

"The government is preparing regulations to act against vessels without nationality (stateless vessels) and flag-of-convenience vessels," said Mr. Ouellet. "Stateless and flag-of-convenience vessels currently constitute the major threat to the conservation of straddling stocks."

Canada has today amended its acceptance of the compulsory jurisdiction of the International Court of Justice in the Hague to preclude any challenge which might undermine Canada's ability to protect the stocks. This is a temporary step in response to an emergency situation.
Atlantic groundfish stocks inside and outside Canada's 200-mile limit have declined drastically in recent years. Under Canada's Atlantic Groundfish Management Plan for 1994, all of the major cod fisheries inside the Canadian zone were closed and quotas for most other groundfish species were sharply restricted. Total allowable catches of groundfish across the region have been reduced by 75 percent since 1988.

Although conservation decisions taken by the Northwest Atlantic Fisheries Organization (NAFO) are consistent with the measures applied by Canada inside the Canadian zone, serious threats to stocks on the Nose and Tail continue. Fishing activities by vessels that carry flags of convenience and by stateless vessels are conducted without regard for international conservation controls. Such vessels are targeting fish stocks now subject to NAFO and Canadian moratoria.

"Canada is sending a clear message that we are prepared to act against vessels that undermine sound conservation measures," said Minister Tobin.

"Canada will continue to work in the United Nations to develop international law for the protection of straddling stocks outside 200 miles," said Minister Ouellet.

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200 MILE FISHING ZONE
AND NAFO FISHING BOUNDARIES
ZONE DE PÊCHE DE 200 MILLES
ET LIMITES DE PÊCHE DE L'OPANO
CONSERVATION OF FISH STOCKS ON THE HIGH SEAS – 
THE EVOLVING INTERNATIONAL LEGAL FRAMEWORK

Canada's proposed legislation is an important step in international developments towards a new regime to control high seas fisheries, and to prevent overfishing of stocks on the high seas.

The starting point for these developments is the United Nations Convention on the Law of the Sea (UNCLOS), which was developed in the mid-1970s, adopted in 1982, and will come into force on November 16, 1994. Most of the UNCLOS fisheries provisions are now considered as customary international law. Regarding high seas fisheries, UNCLOS provides conservation principles and obligations for a regime that allows for freedom of fishing on the high seas subject to the rights, duties and interests of coastal states for straddling stocks and highly migratory species.

The implementation of these principles and obligations has been the subject of growing debate since the mid 1970s. They have been implemented in international practice through multilateral conventions such as the Northwest Atlantic Fisheries Organization Convention, and in bilateral agreements around the world.

This ongoing process to strengthen high seas fisheries conservation is currently focused on two recent major developments.

One is the compliance agreement approved in November 1993, by the United Nations Food and Agricultural Organization. This agreement requires that its parties control their vessels to prevent any activity that undermines conservation measures established by regional fisheries conservation organizations such as NAFO. This agreement was a breakthrough in providing international recognition that all states must comply with their measures. It will come into force when 25 states deposit their acceptances.

The other major development is the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, which has been under way since 1993, aimed at developing new global rules to prevent high seas overfishing of the stocks concerned.
Over the past two years, NAFO has recognized the crisis in the Northwest Atlantic by adopting moratoria on most of the major groundfish stocks available on the high seas in the Northwest Atlantic.

This is the context in which Canada has adopted its new legislation. The legislation will allow Canada to take action on the high seas against foreign vessels that are destroying valuable fish stocks that straddle our 200-mile limit.

May 1994
THREATS TO CONSERVATION BY STATELESS AND FLAGS-OF-CONVENIENCE FISHING VESSELS

Vessels that come from countries that are not members of NAFO continue to undermine NAFO regulations in the NAFO Area, outside Canada's 200-mile zone. Most of these vessels carry "flags of convenience", meaning that they are registered in countries that exercise no controls over the fishing activities of these vessels. The flags of Panama, Honduras, and Belize are the most prominent in the Northwest Atlantic.

In 1993 a total of 33 vessels from non-NAFO countries were sighted fishing in the NAFO Regulatory Area (Panama, Belize, Honduras, USA, Sierra Leone, St. Vincent and Grenadines, Korea and Vanuatu). Following Canada's strong diplomatic representations, Korea withdrew its vessels from the area April 30, 1993. Vessels registered in Morocco, Vanuatu and Venezuela were also withdrawn during 1993.

As of May 2, there were 11 ocean trawlers in the area which were stateless or registered in flag-of-convenience countries.

The current flag-of-convenience problem is largely caused by vessels from Panama, Honduras and Belize. Increased surveillance by Canadian ships and aircraft, analysis of data, and intensified diplomatic representations will be used to encourage withdrawal of vessels registered by these countries.

On both the Nose and Tail of the Grand Banks, these vessels are fishing for vulnerable cod, flounder and redfish stocks that are subject to international bans or strict quota limits. Fishermen from Canada and other NAFO-member states are required to comply with conservation controls which are enforced by an extensive surveillance and inspection program. No such controls apply to flag of convenience vessels.

Participants at the September 1993 NAFO Annual Meeting agreed to make a high level joint démarche (Canada, the European Union, Japan, Russia) to non-NAFO states fishing in the NAFO area, requesting them to stop fishing. This démarche took place in Panama and Honduras in February with both Governments undertaking to address the problem on a priority basis.

.../2
Canadian and other international diplomatic efforts have led to the
deregistration of some vessels. As a result, they become
stateless, and do not have the benefit of flag state protection.
Canada is implementing a domestic legislative framework to proceed
against these stateless vessels and flag-of-convenience vessels.
New legislation tabled in Parliament will, when passed and put into
effect, enable Canada to undertake enforcement of conservation
measures outside the Canadian 200-mile zone, to ensure that vital
fish stocks are protected effectively.

May 1994
HIGHLIGHTS OF THE NEW LEGISLATION

The purpose of the new proposed legislation is to give the Government of Canada the legal authority to make a wide variety of different regulations to provide for the conservation of stocks that occur both within the Canadian 200-mile zone and in the adjacent high seas area beyond the 200-mile limit. These are called "straddling stocks". Specifically, the Government will be able to make regulations

a) listing the straddling stocks to be protected;

b) establishing the conservation and management measures that will apply on the high seas to protect the listed stocks; and

c) listing the classes of foreign fishing vessels to which these measures will apply, such as stateless vessels (vessels not entitled to fly the flag of any state) or the vessels of particular designated states.

The legislation will also provide for the use of force if necessary to arrest vessels, and for regulations establishing the procedures to ensure that force is used reasonably.

Regulations are in preparation to

a) list the relevant straddling stocks;

b) establish, for these stocks on the high seas, measures to ensure that the conservation and management measures that have been adopted by the Northwest Atlantic Fisheries Organization (NAFO) are not undermined; and

c) specify that these measures will be enforced against stateless and flag-of-convenience vessels.

May 1994
THE FISHERIES CRISIS IN THE NORTHWEST ATLANTIC

From the earliest settlement of Canada, commercial fishing has provided the economic base for most Atlantic coastal communities. Fish stocks such as cod were once abundant, but in the mid-1960s they began to decline sharply due to excessive fishing by both foreign and domestic fleets.

In 1977, in accordance with developments at the United Nations Law of the Sea Conference, Canada declared a 200-mile exclusive fishing zone and imposed strict controls on fishing inside this zone. However, the 200-mile zone does not encompass the entire Grand Banks, which extend off the southeast coast of Newfoundland. About 10 per cent of the Banks, known as the Nose and Tail, are beyond Canada's 200-mile limit. Important stocks of cod, flounder and redfish straddle this limit, and have been fished commercially in international waters outside Canada's control.

In 1979, the conservation of northwest Atlantic fish stocks outside Canada's 200-mile limit became the responsibility of the Northwest Atlantic Fisheries Organization (NAFO). NAFO currently has 15 Contracting Parties: Canada, Bulgaria, Cuba, Denmark (for the Faroe Islands and Greenland), Estonia, the European Union (EU), Iceland, Japan, Korea, Latvia, Lithuania, Norway, Poland, Romania and Russia. On the basis of advice from scientists from all NAFO countries, NAFO sets total allowable catch limits and other conservation measures for the stocks it manages and allocates quotas to NAFO Contracting Parties.

The groundfish stocks managed by NAFO have declined drastically in recent years. For example, the NAFO Scientific Council has reported that southern Grand Banks (3NO) cod is at the lowest level recorded. Stocks entirely inside Canada's 200-mile limit have also suffered severe declines. In July 1992, the Canadian government declared a two-year moratorium on northern (2J3KL) cod, Atlantic Canada's most important commercial fish stock. Despite this stringent conservation measure, this stock has not yet recovered and the moratorium is being continued in 1994.
On December 20, 1993, with the announcement of Canada's Atlantic Groundfish Management Plan for 1994, all of the major cod fisheries inside the Canadian zone were closed and quotas for most other groundfish species were sharply restricted. Total allowable catches of groundfish across the region were reduced to 250,000 tonnes, a seventy-five per cent decline from 1988.

In response to this fisheries crisis, the Canadian government has committed more than $1.9 billion over the next five years towards relieving the social and economic consequences. This provides income replacement and retraining for fishermen and plant workers in Atlantic Canada and Quebec unemployed due to the moratoria on commercial groundfish species.

The precarious state of Northwest Atlantic straddling fish stocks is being recognized internationally. In 1992, for example, the European Union ceased fishing northern cod on the Nose of the Banks, and agreed to accept all NAFO conservation decisions outside 200 miles. In 1993, Korea withdrew its vessels from the NAFO Regulatory Area. In late 1993, NAFO imposed moratoria on three flounder stocks that are found on the Tail of the Banks.

At a special meeting in February 1994, NAFO reviewed the 3NO cod stock at Canada's request. It imposed an international moratorium on this stock, consistent with the ban already in place for Canadian fishermen (NAFO's 3NO cod moratorium reversed a decision made at the regular annual meeting in September 1993, which had approved catches up to 6,000 tonnes for 1994).

Despite the conservation decisions taken by NAFO in recent years, which parallel the measures applied by Canada inside the Canadian zone, serious threats to stocks on the Nose and Tail are continuing. Fishing activities by vessels that carry flags of convenience and by several stateless vessels are conducted without regard for international conservation controls. Such vessels are targeting fish stocks now subject to NAFO and Canadian moratoria. Catches are mainly of juvenile, undersize fish that are the remaining base for any future re-building of these once valuable stocks.

May 1994
A Bill to amend the Coastal Fisheries Protection Act

First reading, 1994

The Minister of Fisheries and Oceans
7292—9.5.94
1st Session, 35th Parliament,  
42-43 Elizabeth II, 1994

THE HOUSE OF COMMONS OF CANADA

BILL C-

An Act to amend the Coastal Fisheries Protection Act

1. Section 2 of the Coastal Fisheries Protection Act is amended by adding the following in alphabetical order:

"NAFO Regulatory Area" means that part of the following area, being the Convention Area of the Northwest Atlantic Fisheries Organization, that is on the high seas:

(e) the waters of the Northwest Atlantic Ocean north of 35°00' north latitude and west of a line extending due north from 35°00' north latitude and 42°00' west longitude to 59°00' north latitude, 15 thence due west to 44°00' west longitude, and thence due north to the coast of Greenland, and

(b) the waters of the Gulf of St. Lawrence, Davis Strait and Baffin Bay south 20 of 78°10' north latitude;

"straddling stock" means a prescribed stock of fish.

2. The Act is amended by adding the following after section 5:

The Loi modifiant la Loi sur la protection des pêches côtieres

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-

Loi modifiant la Loi sur la protection des pêches côtieres

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte:

1. L'article 2 de la Loi sur la protection des pêches côtieres est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit:

« stock chevauchant » Stock de poissons déterminé par règlement.

« zone de réglementation de l'OPAN » La 10 partie en haute mer de la zone de compétence de l'Organisation des pêches de l'Atlantique nord-ouest, laquelle comprend, d'une part, les eaux du nord-ouest de l'océan Atlantique situées au nord de 15 25° de latitude nord et à l'ouest d'une ligne s'étendant plein nord à partir d'un point situé par 35° de latitude nord et 42° de longitude ouest jusqu'à 59° de latitude nord, puis plein ouest jusqu'à 44° de longité ouest, et de là, plein nord jusqu'à la côte du Groenland et, d'autre part, les eaux du golfe du Saint-Laurent, du détroit de Davis et de la baie de Baffin situées au sud de 78°10' de latitude nord.

2. La même loi est modifiée par adjonction, après l'article 5, de ce qui suit:
EXPLANATORY NOTES

This enactment amends the Coastal Fisheries Protection Act to prohibit classes of foreign fishing vessels from fishing for straddling stocks in the NAFO Regulatory Area in contravention of certain conservation and management measures.

The Regulatory Area of the Northwest Atlantic Fisheries Organization ("NAFO") is established by Article 1 of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, done at Ottawa on October 24, 1978, Canada Treaty Series 1979 No. 11. The definition "NAFO Regulatory Area" in this enactment is based on that Article.

Moreover, this enactment adds provisions empowering the Governor in Council to make regulations providing for the classes of foreign fishing vessels to which the prohibition would apply, the species of straddling stocks in respect of which the prohibition would apply and the conservation and management measures with which the vessels must comply. These measures may be taken by the Governor in Council to ensure that the effectiveness of NAFO conservation and management measures is not undermined.

This enactment also amends the enforcement provisions of the Coastal Fisheries Protection Act in support of the prohibition.

Clause 1: New.

NOTES EXPLICATIVES

Le texte modifie la Loi sur la protection des pêches côtières en vue d'interdire aux bateaux de pêche étrangers d'une classe réglementaire de pêcher, dans la zone de réglementation de l'Organisation des pêches de l'Atlantique nord-ouest (OPAN), des stocks chevauchants en contravention avec certaines mesures de conservation et de gestion.

La zone de réglementation de l'OPAN est établie par l'article 1 de la Convention sur la future coopération multilatérale dans les pêches de l'Atlantique nord-ouest, faite à Ottawa le 24 octobre 1978 et figurant au numéro 11 du Recueil des traités du Canada (1979). La définition de "zone de réglementation de l'OPAN" est basée sur cet article.

En outre, le texte ajoute des dispositions en vue de permettre au gouverneur en conseil de prendre des règlements déterminant les stocks chevauchants faisant l'objet de l'interdiction et désignant les classes de bateaux de pêche étrangers visés par cette interdiction ainsi que les mesures de conservation et de gestion que ces bateaux doivent observer. Ces mesures peuvent être ainsi prises pour éviter que l'efficacité des mesures de conservation et de gestion de l'OPAN ne soit compromis.

Le texte modifie également, pour l'application de l'interdiction, les dispositions relatives à la mise en œuvre de la Loi sur la protection des pêches côtières.

Article 1. — Nouveau.

Clause 2: New.

Article 2. — Nouveau.
Coastal Fisheries Protection

Purpose

5.1 Parliament, recognizing
(a) that straddling stocks on the Grand Banks of Newfoundland are a major renewable world food source having provided a livelihood for centuries to fishermen,
(b) that those stocks are threatened with extinction,
(c) that there is an urgent need for all fishing vessels to comply in both Canadian fisheries waters and the NAFO Regulatory Area with sound conservation and management measures for those stocks, notably those measures that are taken under the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, done at Ottawa on October 24, 1978, Canada Treaty Series 1979 No. 11, and
(d) that some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of sound conservation and management measures,
declares that the purpose of section 5.2 is to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding, while continuing to seek effective international solutions to the situation referred to in paragraph (d).

5.2 No person, being aboard a foreign fishing vessel of a prescribed class, shall, in the NAFO Regulatory Area, fish or prepare to fish for a straddling stock in contravention of any of the prescribed conservation and management measures.

3. Section 6 of the Act is amended by adding the following after paragraph (b):

(b.1) prescribing as a straddling stock, for the purposes of section 5.2, any stock of fish that occurs both within Canadian fisheries waters and in an area beyond and adjacent to Canadian fisheries waters;
(b.2) prescribing any class of foreign fishing vessel for the purposes of section 5.2;

Déclaration

5.1 Le Parlement, constatant que les stocks chevauchants du Grand Banc de Terre-Neuve constituent une importante source mondiale renouvelable de nourriture ayant assuré la subsistance des pêcheurs durant des siècles, que ces stocks sont maintenant menacés d'extinction, qu'il est absolument nécessaire que les bateaux de pêche se conforment, tant dans les eaux de pêche canadiennes que dans la zone de réglementation de l'OPAN, aux mesures variables de conservation et de gestion de ces stocks, notamment celles prises sous le régime de la Convention sur la future coopération multilatérale dans les pêches de l'Atlantique nord-ouest, faite à Ottawa le 24 octobre 1978 et figurant au numéro 11 du Recueil des traités du Canada (1979), et que certains bateaux de pêche étrangers continuent d'exploiter ces stocks dans la zone de réglementation de l'OPAN d'une manière qui compromet l'efficacité de ces mesures, déclare que l'article 5.2 a pour but de permettre au Canada de prendre les mesures d'urgence nécessaires pour mettre un terme à la destruction de ces stocks et les reconstruire tout en poursuivant ses efforts sur le plan international en vue de trouver une solution au problème de l'exploitation induite par les bateaux de pêche étrangers.

5.2 Il est interdit aux personnes se trouvant à bord d'un bateau de pêche étranger d'une classe réglementaire de pêcheur, ou de se préparer à pêcher, dans la zone de réglementation de l'OPAN, des stocks chevauchants en contravention avec les mesures de conservation et de gestion prévues par les règlements.

3. L'article 6 de la même loi est modifié par adjonction, après l'alinéa b), de ce qui suit:

b.1) déterminer comme stock chevauchant, pour l'application de l'article 5.2, les stocks de poissons qui se situent de part et d'autre de la limite des eaux de 45 pêche canadiennes;
Clause 3: New.

Article 3. — Nouveau.
Protection des pêches côtières

(b.3) prescrivant, pour les des fins de la section 5.2,

(i) toute mesure de conservation et de gestion, de toute embarcation à peche, qui est financée par des personnes se trouvant à bord d’un bateau de pêche étranger d’après les lois de conservation et de gestion des stocks de poissons, y compris celles ayant pour but d’éviter que ces bateaux ne se livrent à une activité qui compromet l’efficacité des mesures de conservation et de gestion des stocks de poissons prises sous le régime de la convention mentionnée à l’article 5.1;

(b.4) fixant les modalités et les limites prévues à l’article 8.1;

(b.5) déterminant les formes à utiliser, au lieu de celles de la partie XXVIII du Code criminel, dans les poursuites contre les bateaux de pêche prévues par la présente loi ou la Loi sur les pêches;

4. Section 7 du présent texte est remplacé par ce qui suit :

7. Un compteur de pêche peut

(a) en vertu de l’article 7.1, à la fouille du bateau et de sa cargaison.

(b) procéder, en vertu d’un mandat délivré sous le régime de l’article 7.1.

7.1 (1) Un juge de la paix qui, par ex parte, application est en mesure de déterminer si il y a des motifs raisonnables de croire à la présence dans un endroit — y compris un bateau ou un autre
Clause 4: Proposed section 7.1 is new. Section 7 reads as follows:

7. A protection officer may, with respect to any fishing vessel found within Canadian fisheries waters,

(a) go on board the fishing vessel and, while it remains within Canadian fisheries waters, stay on board so long as is reasonably necessary to determine compliance with this Act;
(b) bring the fishing vessel into port and search its cargo where the officer believes on reasonable grounds that an offence against this Act has been committed; and
(c) examine the master and any member of the crew on oath with respect to the cargo and voyage of the fishing vessel.

Article 4. — Le texte de l'article 7.1 est nouveau. Texte de l'article 7 :

7. Le garde-pêche peut, en ce qui a trait à tout bateau de pêche se trouvant dans les eaux de pêche canadiennes :

a) monter à bord du bateau et, aussi longtemps que celui-ci reste dans les eaux de pêche canadiennes, y demeurer le temps raisonnablement nécessaire pour déterminer si la présente loi est respectée;
b) faire conduire le bateau à un port et examiner sa cargaison s'il a des motifs raisonnables de croire qu'il y a eu infraction à la présente loi;
c) interroger sous serment le capitaine et tout membre de l'équipage du bateau au sujet de la cargaison et du voyage.
any premises, vessel or vehicle, any fish or other thing that was obtained by or used in, or that will afford evidence in respect of, a contravention of this Act or the regulations, may issue a warrant authorizing the protection officer named in the warrant to enter and search the place for the fish or other thing subject to any conditions that may be specified in the warrant.

(2) A protection officer may exercise the powers referred to in paragraph 7(b) without a warrant if the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practical to obtain a warrant.

5. The Act is amended by adding the following after section 8:

8.1 A protection officer may, in the manner and to the extent prescribed by the regulations, use force that is intended or is likely to disable a foreign fishing vessel, if the protection officer

(a) is proceeding lawfully to arrest the master or other person in command of the vessel; and

(b) believes on reasonable grounds that the force is necessary for the purpose of arresting that master or other person.

6. (1) The portion of subsection 18(1) of the Act before paragraph (a) is replaced by the following:

18. (1) Every person who contravenes paragraph 4(1)(a), subsection 4(2) or section 5.2 is guilty of an offence and liable

6. (1) Le passage du paragraphe 18(1) de 30 la même loi précédant l'alinéa a) est rem- placé par ce qui suit :

18. (1) Quiconque contrevient à l'alinéa 4(1)q), au paragraphe 4(2) ou à l'article 5.2 commet une infraction et encourt, sur décla- ration de culpabilité :

6. (1) Le passage du paragraphe 18(2) de la même loi précédant l'alinéa a) est remplacé par ce qui suit :

(2) Every person who contravenes any of paragraphs 4(1)(b) to (e), section 5 or the regulations is guilty of an offence and liable

7. The Act is amended by adding the following after section 18:

7. La même loi est modifiée par adjonc- tion, après l'article 18, de ce qui suit :

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7. La même loi est modifiée par adjonc- tion, après l'article 18, de ce qui suit :
Clause 6: (1) The relevant portion of subsection 18(1) reads as follows:

18. (1) Every person who contravenes paragraph 4(a) is guilty of an offence and liable

(2) The relevant portion of subsection 18(2) reads as follows:

(2) Every person who contravenes any of paragraphs 4(b) to (e), section 5 or the regulations is guilty of an offence and liable

Clause 7: New.
18.1 An act or omission that would be an offence under an Act of Parliament if it occurred in Canada is deemed to have been committed in Canada if it occurs, in the course of enforcing this Act,

(a) in the NAFO Regulatory Area on board or by means of a foreign fishing vessel on board or by means of which a contravention of section 5.2 has been committed; or

(b) in the course of continuing pursuit that 10 commenced while a foreign fishing vessel was in Canadian fisheries waters or the NAFO Regulatory Area.

18.2 (1) Every power of arrest, entry, search or seizure or other power that could be exercised in Canada in respect of an act or omission referred to in section 18.1 in the circumstances referred to in that section may be exercised

(a) on board the foreign fishing vessel; or

(b) where pursuit has been commenced, at any place on the seas, other than a place that is in the territorial sea or internal waters of a state other than Canada.

(2) A justice of the peace or judge in any 25 territorial division in Canada has jurisdiction to authorize an arrest, entry, search or seizure or an investigation or other ancillary matter related to an offence referred to in section 18.1 in the same manner as if the 30 offence had been committed in that territorial division.

(3) Where an act or omission that is an offence by virtue only of section 18.1 is alleged to have been committed on board or by means of a vessel that is registered or licensed under the laws of a state other than Canada, the powers referred to in subsection (1) may not be exercised outside Canada with respect to that act or omission without the consent of the Attorney General of Canada.

18.3 A proceeding in respect of

(a) an offence under this Act consisting of a contravention of section 5.2, or

(b) an act or omission that would be an offence under an Act of Parliament if it occurred in Canada is deemed to have been committed in Canada if it occurs, in the course of enforcing this Act,

(a) in the NAFO Regulatory Area on board or by means of a foreign fishing vessel on board or by means of which a contravention of section 5.2 has been committed; or

(b) in the course of continuing pursuit that 10 commenced while a foreign fishing vessel was in Canadian fisheries waters or the NAFO Regulatory Area.

18.2 (1) Les pouvoirs — arretation, visite, perquisition, saisie et autres — pouvant etre exercised au Canada a l’egard d’un fait visite a l’article 18.1 peuvent l’etre a cet egard et dans les circonstances mentionnees a cet article:

(a) a bord d’un bateau de pêche etranger;

(b) en cas de poursuite entamée, dans toute partie de la haute mer autre que la mer territoriale et les eaux intérieures d’un État autre que le Canada.

(2) Un juge de paix ou un juge a competence pour autoriser les mesures d’enquete et autres mesures accessoires a l’egard d’une infraction visite a l’article 18.1, notamment en matiere d’arrestation, de visite, de perquisistion, de fouille et de saisie, comme si l’infraction avait ete perpee dans son ressort.

(3) Dans le cas ou un fait qui ne constitue une infraction qu’aux termes de l’article 18.1 est presume survenu a bord d’un bateau immatricule ou titulaire d’un permis delivre sous le regime des lois d’un Etat autre que le Canada, les pouvoirs mentionnes au paragraphe (1) ne peuvent etre exerces a l’exterieur du Canada a l’egard de ce fait sans le 40 consentement du procureur general du Canada.

18.3 Une infraction visite a la presente loi consistant dans la contravention de l’article 5.2 ou une infraction visite a l’article 18.145
Coastal Fisheries Protection

18.4 No proceeding in respect of

(a) an offence under this Act consisting of 10
a contravention of section 5.2,
(b) an offence referred to in section 18.1, or
(c) an offence under paragraph 17(d) con-
sisting of resistance to or obstruction of a 15
protection officer in the execution of the of-
officer’s duty in relation to section 5.2

may be commenced without the personal
consent in writing of the Attorney General of
Canada or the Deputy Attorney General, and 20
such a proceeding may be conducted only by
the Attorney General of Canada or counsel
acting on his or her behalf.

18.5 All the provisions of this Act and the
Criminal Code or the Fisheries Act and the 25
Criminal Code relating to indictable off-
ences that are applicable to or in respect of
persons apply, in their application to indicta-
able offences created by this Act or the Fish-
eries Act, to or in respect of fishing vessels, 30
with such modifications as the circumstances
require, and all the provisions of this Act and
the Criminal Code or the Fisheries Act and
the Criminal Code relating to summary con-
viction offences that are applicable to or in 35
respect of persons apply, in their application
to all other offences created by this Act or
the Fisheries Act, to or in respect of fishing
vessels, with such modifications as the cir-
cumstances require.

8. If Bill C-8, introduced in the first ses-
sion of the thirty-fifth Parliament and enti-
tled An Act to amend the Criminal Code and 40
the Coastal Fisheries Protection Act (force),
is assented to, then

(a) if section 2 of that Act enacts section
8.1 of the Coastal Fisheries Protection Act

8. En cas de sanction du projet de loi 45
C-8, déposé au cours de la première session
de la trente-cinquième législature et intitulé
Loi modifiant le Code criminel et la Loi sur la
protection des pêches côtères (force néces-
saire) ;
but section 2 does not come into force before the day on which this Act is assented to, section 2 of that Act and the heading before it are repealed on the latter of the day on which that Act is assented to and the day on which this Act is assented to; or

(b) if section 2 of that Act enacts section 8.1 of the Coastal Fisheries Protection Act and section 2 comes into force before the 10 day on which this Act is assented to, section 8.1 of the Coastal Fisheries Protection Act, as enacted by section 2 of that Act, is repealed on the day on which this Act, other than subsection 6(2) and this section, comes into force.

9. This Act, other than subsection 6(2) and section 8, comes into force on a day to be fixed by order of the Governor in Council.

9. La présente loi, sauf son paragraphe 6(2) et son article 8, entre en vigueur à la date fixée par décret du gouverneur en conseil.
PART I

Purpose, Scope and Definitions

Purpose and Scope

Article 1: The purpose of the Regulations which shall apply to all ships navigating in the Straits and the Sea of Marmara is to regulate the maritime traffic scheme in order to ensure the safety of navigation, life and property and to protect the environment in the region.

Definitions:

Article 2: For the purposes of these regulations:

a) "Administration" means T.C. Başbakanlık Denizcilik Müstesarlığı (Undersecretariat for Maritime Affairs)

b) "The Straits and Marmara Region" means the maritime area comprising the Sea of Marmara, the Strait of Istanbul (the Bosphorus), the Strait of Canakkale (the Dardanelles) and the coastlines surrounding this area.

c) "The Straits" mean the area within the boundaries of the Strait of Istanbul and the Strait of Canakkale.

d) "Vessel" means any vehicle able to navigate at sea except craft under oars.

e) "Vessel in transit" means a vessel the passage of which shall be innocent, continuous, expeditious and without delay. The passage through the Straits and Marmara Region shall be planned so as not to stop at any port, berth or any other place, and a notification to that effect shall have been made by the master of the vessel to the Turkish authorities before entering into the Straits.

f) "A vessel interrupting her transit passage" means a vessel the master or commander of which has notified during passage that the vessel has given up her transit passage.
g) "Vessel whose transit passage has been interrupted" means a vessel, which due to the maritime accidents such as collision and grounding, or for other reasons, is subject to investigations, legal proceedings and inquiries carried out by the Turkish administrative or legal authorities.

h) Vessel carrying nuclear, noxious and dangerous goods and wastes means:

1- Any nuclear-powered vessel except for military vessels.

2- Vessels carrying cargo classified by the International Maritime Organization (IMO) as dangerous, including petroleum and its derivatives, and vessels constructed or used for the carriage of substances qualified in the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL 73/78) and in its annexes as pollutants.

3- Vessels carrying cargo or polluting substances referred to in paragraphs (1) and (2) and which have not effected the necessary operations to eradicate the dangers of such cargo.

4- Vessels carrying nuclear, dangerous and noxious wastes as defined in international conventions and domestic legislation.

i) "deep draught vessel" means vessels with a maximum draught of 10 metres or more.

j) "large vessel" means a vessel 150 metres or more in length.

k) "total towing length" means the distance between the fore of the towing vessel and the aft of towed vessel or the distance between the aft of the pushing vessel and the fore of the vessel being pushed when sailing at full ahead.

e) "Northern entrance to the Strait of Istanbul" means the line joining Anadolu Lighthouse to Turkali Lighthouse.

m) "Southern entrance to the Strait of Istanbul" means the line joining Ahirkapi Lighthouse to Kadiköy Inciburnu breakwater Lighthouse.

n) "Northern entrance to the the Strait of Çanakkale" means the longitude passing through Zincirlikuyu Lighthouse.
(a) "Southern entrance to the the Strait of Çanakkale" means the line joining the Lighthouse of Mahmetcik Cape to the Lighthouse of Çanakkale.

(b) "Day-time" means the period between sunrise and sunset.

(c) "Night-time" means the period between sunset and sunrise.

PART II
General Provisions

Boundaries

Article 3: The boundaries of the traffic separation scheme which shall apply in the Straits and Marmara Region are delimited,

- in the north, by the north border of the area joining the following points:

  41 16 N  028 55 E
  41 21 N  028 55 E
  41 21 N  029 16 E
  41 14 N  029 16 E

- in the south, by the south border of the area joining the following points:

  40 05 N  026 11 E
  40 02 N  025 55 E
  39 50 N  025 53 E
  39 44 N  025 55 E
  39 44 N  026 09 E

Traffic Separation Scheme

Article 4: A traffic separation scheme as described in the Annex 1/1-21 is established in the Straits and the Marmara Region.

Competence of the Administration

Article 5: All vessels proceeding in the Straits and the Marmara Region shall comply with the navigation rules laid down or to be laid down by the Administration to ensure the safety of life and property, provided such rules do not violate existing regulations, as well as with the warnings of the Administration.

394
Technical Specification of Vessels which transit through the Straits and the Notice to be given by these Vessels.

Article 8:
A) All vessels that shall pass through the Strait of Istanbul and the Strait of Çanakkale shall be seaworthy in accordance with international rules and the legislation of the State whose flag they fly.

B) Before giving the Sailing Plan II referred to in Article 8, masters of the vessels, except those of military vessels, shall establish the technical conformity of their vessel with the following conditions and make an entry to this effect in the log book.

a) Main and auxiliary machinery units shall be operational as usual and be ready to manoeuvre at any time.

b) Emergency generators shall be readily operational at all times.

c) Main and auxiliary steering gear, gyro-compass and radar shall be operational as usual.

d) Navigation bridge R.P.H., steering wheel and pitch indicators shall be operational and illuminated.

e) Navigation lights and vessel's whistle shall be operational and the equipment of the navigation bridge shall be complete.

f) All communication systems, particularly those between the navigating bridge and fore, aft, steering wheel and engine control room, and all alarm systems shall be operational.

g) VHF radiotelephone equipment shall be fully operational.

h) Projector and at least a pair of binoculars shall be kept ready for use day and night in the navigation bridge.

i) Windlass and its running riggings shall be ready for use and both anchors will be prepared for lowering with crew standing by.

j) there shall be an emergency fire wire at the fore and aft of vessels carrying dangerous cargo. A towing hawser and hauling lines shall be available at the fore and aft of vessels other than those carrying dangerous cargo.

395
k) A vessel shall not be with trim by the stern so as to affect the ability to manœuvre and steer, and no vessel shall enter into the Straits with trim by the head.

l) As far as possible vessels shall be trimmed so that the propeller will be totally below water-level and in cases of necessity the blade of the propeller which shall be above water-level shall not exceed 4/5 of the propeller's diameter.

m) The vessel will be trimmed and loaded such that the fore of the vessel and the sea beyond shall be easily visible from the navigation bridge.

n) Each vessel shall have these Regulations and an up-to-date version of the nautical charts of the Straits area.

o) All crew employed on vessels shall be in accordance with the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW-78).

Masters of the vessels which are not in conformity with the above mentioned conditions shall notify the Traffic Control Centre. The Administration shall take such measures prescribed in parag. 2 of rule 10 for vessels which do not report conformity with the conditions above.

Sailing Plan I

Article 7: Masters, Owners, or Agents of the vessels carrying dangerous cargo and which are 500 gross tons and more, 24 hours before entering the entrance of the Strait of Istanbul and the Strait of Canakkale, shall give Sailing Plan I (SP I) as determined by the Administration.

Sailing Plan I to be given to Traffic Control Centre shall contain the following information:

- name of the vessel
- flag of the vessel
- call sign
- tonnage
- port of departure
- port of arrival
- cargo
- whether a pilot is requested
- deficiencies of the vessel which affect navigation adversely
- other information

396
Vessels carrying dangerous cargo and those 500 gross ton and greater which depart from ports in the Marmara region shall give Sailing Plan I 6 hours before departure.

Sailing Plan II

Article 8: Masters who have given Sailing Plan I and established that their vessel is in conformity with the conditions prescribed in Article 6, shall give Sailing Plan II two hours before arriving at the entrance to the Strait, or at a distance of 20 NM from the entrance to the Strait, whichever comes first.

Sailing Plan II which shall be given by VHF to the Traffic Control Centre should contain the following information:

- name of the vessel,
- flag of the vessel,
- call sign,
- position of the vessel,
- estimated arrival time to the entrance of the Strait,
- whether a pilot is requested
- inabilities of the vessel affecting sailing adversely,
- other information

After giving Sailing Plan II vessels shall navigate taking into account information to be given by the Traffic Control Centre. The information regarding the traffic in the Straits as well as the fact that Sailing Plan II has been given should be recorded in the log book.

Position Report

Article 9: Vessels longer than 20 meters, when they are at a distance of 5 NM to the entrance of the Straits, shall give by VHF to the Traffic Control Centre situated on the approaching side, the position report as determined by the Administration and containing the necessary information for the identification of the vessel.

Notice to be given by a vessel which loses her technical ability before entering the Straits.

Article 10: Vessels which for whatever reason lose their technical sufficiency or whose navigation equipment becomes inoperational before entering the Straits shall provide the pertinent information by means of telex, telephone, fax or VHF.
The relevant Port Authority will indicate, through the Traffic Control Centre, the place where the vessel should wait while repairs are carried out. If the breakdown of navigation equipment continues after repairs and survey, the passage of the vessel through the Straits shall be effected in a way determined by the Administration considering the safety of navigation.

The Traffic Control Centre and Traffic Control Stations.

Article 11: For the execution and control of the traffic separation scheme and for the operation of the reporting system, the Administration can set up a Traffic Control Centre and traffic control stations.

Pilotage Sign.

Article 12: Vessels passing through the Straits and Marmara Region with a pilot shall hoist an (H) pennant during daytime.

Transit Sign

Article 13: Vessels transitting through the Straits and Marmara Region while underway or at anchor during daytime shall hoist a (T) pennant. They will display at night a green light visible over an arc of the horizon of 360 degrees.

A vessel interrupting its transit passage or whose transit passage has been interrupted shall not display the transit sign.

Conditions of Anchorage for Vessels in transit.

Article 14: Vessels transitting through the Straits and Marmara Region can stop for 48 hours to obtain necessary provisions in the locations indicated in Article 27. In such cases they shall get permission from the Port Authority and will stay under the surveillance of the concerned authorities without taking free pratique.
During this stay the following activities are allowed:

- if there is a breakdown in the vessel; to bring experts, mechanics and workers to the vessel in order to inspect and to repair the breakdown.

- visits by the vessel's Agent.

- disembarking of the master or a crew member to purchase necessary supplies for the vessel.

- to disembark any ill crew.

- to employ new crew to replace those any hospitalized crew.

Vessels in transit which shall stay more than 48 hours in port should anchor at the anchorage indicated, and take free pratique. Vessels interrupting a transit by anchoring shall be subject to all controls and procedures rendered necessary by reason of security, customs and other legislation.

Part III

Transit through the Straits

Procedures for Passage

Article 15: Masters will ensure that no unauthorized personnel shall enter the navigating bridge, chart room and wings while navigating in the Straits, and that nothing will hinder the ability of the crew to command the vessel and to keep watch around the vessel.

Authorized personnel will remain on duty by the main engine whether or not the controls of the engines are in the main engine room.

While navigating in the Straits steering will be controlled manually; automatic pilot systems will not be used. The emergency steering gear will also be kept ready for immediate use with personnel on duty to use it.
Steady Steering Light

Article 16: Vessels, the distance between whose bridge and fore is 150 metres or more, and vessels, whose bridge is very close to the fore of the vessel, at nighttime shall carry at the fore of the vessel a blue or green steady steering light visible only from the bridge.

Speed

Article 17: The normal speed in the Straits is 10 NM/hr relative to land. This speed may be exceeded if steering way cannot be reached, by informing the traffic control stations and taking care to avoid collisions and creating waves harmful to the environment.

Overtaking

Article 18: Vessels navigating in the Straits shall not overtake vessels proceeding before them except due to necessity.

a) Vessels passing through the Strait shall maintain a distance of at least 8 cable between each other.

b) If for any reason a vessel is going to reduce speed while navigating in the Straits, she shall first inform the vessels proceeding behind her.

c) A vessel navigating under her own power at low speed will stay to the most starboard side of her own traffic separation lane and will permit faster vessels to overtake her.

d) When a vessel needs to overtake another in front of her, she shall first obtain a traffic report from the traffic control station, and if the situation is clear, shall inform the vessel to be overtaken. The overtaking shall if possible take place without course alterations.

e) Overtaking will not take place between Vanikoy and Kanlica in the Strait of Istanbul, and between Cape Nara and Cape Kilitbahir in the Strait of Canakkale.

Accidents and Breakdowns while Underway.

Article 19: Vessels whose transit passage through the Strait has been interrupted due to accidents, breakdowns or compulsory anchoring shall immediately inform the traffic control station and request recommendations and instructions. After measures are taken by the relevant Port Authority in regard to the safety of the vessel and the area, the vessel shall take a pilot and carry out the action required for the completion of the passage.
Vessel Not Under Command

Article 20: The passage through the Straits of a "vessel not under command" or "a vessel restricted in her ability to manoeuvre", as defined in COLREG 72, depends on the special permission of the Administration.

If a vessel becomes "not under command" in the course of passage the master of the vessel shall immediately inform the Traffic Control Station and follow the instructions given.

Towing Operations

Article 21: A vessel or any other object may only pass through the Straits when being towed by a suitable tug boat of sufficient power. A vessel may not pass in the tow of another vessel.

a) The length of the tow will be appropriately shortened before entering the Straits.

b) The Administration may take the necessary measures to ensure that vessels and their tow, which together exceed 150 metres, keep their course.

c) On vessels or objects being towed, extra hailing lines of sufficient strength and the necessary crew will be kept on board to immediately replace the towing hawser should it brake.

d) If possible the propeller and steering gear of a vessel being towed will be kept in operation.

Vessels leaving a port in the Straits

Article 22: Before getting underway from ports, piers or anchorage positions in the Straits, vessels will inform the traffic control stations and receive any necessary information concerning the traffic flow.

Such vessels will wait for clear traffic before entering the traffic flow in the Straits.

Leaving the Traffic Separation Scheme

Article 23: Vessels which have to leave the traffic separation scheme to berth, moor to a buoy, drop anchor, turn back or due to break downs and other exceptional circumstances shall inform the traffic control station and any other vessels which may be in the vicinity.
Halting Traffic due to Compulsory Circumstances

Article 24: Maritime traffic in the Straits may be temporarily halted by the Administration due to construction work including underwater work, drilling, fire extinguishing, scientific and sports activities, salvage and rescue operations, prevention and eradication of maritime pollution; pursuing criminals, accidents and similar cases.

The halting and opening of traffic will be announced by the relevant port authority and traffic control stations to vessels and persons involved.

After the reopening of the Straits to traffic following a temporary closure, the order in which waiting vessels will enter the Straits will be determined by the traffic control stations and will be announced to the vessels.

Obligation to Navigate within the Lanes

Article 25: Vessels must proceed within the designated traffic lanes. Vessels which cross the lanes may be fined according to Article 11 of Law No 618 on the Ports, as well as be brought to the attention of IMO and the flag state.

Deep Draught Vessels

Article 26: Deep draught vessels navigating in the Straits shall exhibit at night three lights in a vertical line visible over an arc of the horizon of 360 degrees, and in daytime a cylinder-shaped sign visible from all directions.

Other vessels in the Straits shall not inhibit the manoeuvres of deep draught vessels and shall provide sufficient space for navigation. At crossing and turning points in the traffic separation scheme, other vessels in the Straits shall keep clear of the course of deep draught vessels.

Anchorage Locations

Article 27: Anchorage locations for the traffic separation scheme are given below:

a) The Strait of Istanbul northern entrance anchorage locations are shown in Annex-2.
b) The Strait of Istanbul southern entrance anchorage locations are shown in Annex 3. Vessels shall anchor in or leave these locations with a pilot.

c) Strait of Canakkale northern entrance anchorage locations are shown in Annex 4.

d) The anchorage location for Port Karanlık in the Strait of Canakkale is shown in Annex 5. Vessels shall anchor in or leave these locations with a pilot.

e) Strait of Canakkale southern entrance anchorage locations are shown in Annex 5. Anchoring vessels will ensure that they remain within the limits of the anchorage areas.

It is forbidden to anchor within 2.5 cables from the shore near all these anchorage locations.

Special Regulations

Article 28 - The articles in this part are valid for both Straits without prejudice to the special regulations concerning the Ports of Istanbul and Çanakkale.

PART IV

Common Articles for the Straits and Sea of Marmara

Large Vessels

Article 29: The owner or manager of large vessels which plan to pass through the Straits shall provide information to the Administration on the vessel and its cargo at the planning stage of the passage. The Administration, taking into consideration the morphological and physical structure of the Straits, the vessel's dimensions and manoeuvre capability, the safety of life, property and the environment, and maritime traffic conditions, shall inform the applicants of the outcome of its review.
Nuclear-powered vessels or vessels carrying Nuclear, Dangerous or Noxious Cargo or Waste.

Article 30: To navigate through the Straits and Marmara region, nuclear-powered vessels or vessels carrying nuclear cargo or waste which intend to pass through the Straits and Marmara Region must obtain permission in accordance with relevant regulations from the Undersecretariat for Maritime Affairs at the planning stage of the passage. Vessels carrying dangerous or noxious waste must obtain permission from the Ministry for Environment at the planning stage of the passage.

Vessels carrying dangerous cargo and, nuclear-powered or nuclear cargo carrying vessels as well as vessels carrying nuclear, dangerous or noxious waste, whose passage requires special permission, must comply with the pertinent International Maritime Organization (IMO) regulations and shall transport their cargo according to these regulations.

Such vessels will exhibit a (B) pennant in daytime and in nighttime, a red light visible over an arc of the horizon of 360 degrees.

Vessels which are required to take pilots.

Article 31: Turkish vessels 150 metres or more in length passing through the Straits shall take a pilot for the safety of navigation, life, property and the environment.

Foreign vessels are advised for safety purposes to take a pilot.

The Administration may establish compulsory pilotage requirements in certain areas in the Straits and Marmara region for vessels other than transiting vessels.

Irregular Anchorage

Article 32: Vessels, which while navigating in the traffic separation scheme anchor, berth at docks or quays or moor to buoys without providing notification and receiving permission shall be removed by pilots and tug boats provided by the relevant Port Authority. The expenses for such operations will be paid by the vessel’s owner, manager or agent.

Vessels are not to anchor in the traffic separation scheme except for emergency situations. In case a vessel has to anchor due to an emergency, the traffic control station will immediately notify. The Administration will then move vessel by using pilots and tug boats to a safer location, clear the traffic separation schema. The expenses for such operations will be paid by the owner, manager or agent of the vessel.
Ban on Environmental Pollution

Article 33: No refuse, landfill, bilge water, domestic and industrial waste, ecologically harmful or unsanitary material, oil and other pollutants can be dumped or discharged into the sea in the Straits and Marmara region.

Vessels in the Straits and Marmara region must take every measure not to create air pollution.

Ban on Sailing Vessels and Vessels under Oars

Article 34: Proceeding under sail or oars, swimming or fishing in the traffic separation scheme is forbidden. Sports activities such as sailing, rowing and swimming are required to have permission.

Notification Requirement and Reporting

Article 35: a) The masters of vessels in the Straits and Marmara region are required to notify any incidents such as illness, disease, injury or death to the traffic control stations for conveyance to the relevant authorities.

b) Pilots, traffic control station personnel, masters and public officials who observe vessels not complying with regulations or navigating improperly will immediately report the incident to the concerned Port Authority and will present a written report within 24 hours. The relevant port authority will take the necessary action at once and commence the legal procedure concerning the vessel and her master.

c) Pilots will inform the traffic control station of any maritime accidents which occur on the vessels they are piloting as well as of any situations detrimental to maritime safety which they may notice en route, and will submit a written report to the relevant Port Authority.

/...
Part V

Regulations concerning the Strait of Istanbul Traffic Separation Scheme Area Boundaries

Article 36: The area of the Strait of Istanbul traffic separation scheme is delimited,
in the north by the coordinates:

41°16'N, 029°55'E
41°21'N, 029°16'E

and in the south by the coordinates:

by the line from the location two miles to the southern bearing
of Cape Baba (Büyükçıkmece), to the Yelkenkaya Lighthouse.

Call Point Report

Article 37: Vessels longer than 20 metre in length entering the
Straits of Istanbul will present a call point report via VHF.
The contents and location of the report will be determined by
the Administration.

Air Draught

Article 38: Vessels navigating in the traffic separation scheme
in the Strait of Istanbul will pay all due attention to the
navigational warning lights of the bridges over the Strait.

Vessels 58 metres or greater in height cannot pass the
Strait of Istanbul.

Vessels with air draughts between 54 metres and 58 metres
will be escorted by as many tugboats as necessary to be
determined by the Administration to ensure that they keep on
course.

Local Maritime Traffic.

Article 39: In the area delimited by the lines drawn from the
Türkeli Lighthouse to the Anadolu Lighthouse in the north, and
from the Ahi Raki Lighthouse to the Incirburnu breakwater
Lighthouse, Karşıyaka, in the south, vessels travelling between
the shores of the Strait, intra-city ferries and other vessels
will cross the traffic separation lanes as rapidly as possible.
Such vessels will avoid the routes of vessels sailing from the
Black Sea to the Sea of Marmara, or vice versa, and will take
care not to cause evasive manoeuvres. In case of the danger of
collision vessels will take action according to COLREG 72/79.
Currents

Article 40: a) When the main surface current speed in the Strait of Istanbul exceeds 4 NM/hr or when northerly surface currents are caused by southerly winds, then, large vessels, deep draught vessels and hazardous cargo carrying vessels with a speed of 10 NM/hr or less will not enter the Straits and will wait until current speeds are 4 NM/hr or less.

b) When the main surface current in the Strait exceeds 6 NM/hr or when strong northerly flows are caused by southerly winds, then large vessels, deep draught vessels and hazardous cargo carrying vessels - whatever their speed - will not enter the Strait and will wait until current speeds are less than 6 NM/hr, or the strong northerly flows have stopped.

c) The Administration will provide information on the state of the currents to the vessels and others concerned.

d) When the current speed or direction has returned to normal, the arrangement and order of entering the Straits shall be determined and notified to the waiting vessels and persons concerned by the Traffic Control Centre.

Visibility

Article 41: Information on reduced visibility will be provided by the Administration to vessels and others concerned.

a) Whenever visibility is 2 NM or less in any part of the Strait, vessels passing through the Strait will keep their radar turned on constantly to provide radar readings. On vessels with two radars, one of them will be assigned to the pilot's usage.

b) When visibility is 1.5 NM or less in any part of the Strait, vessels whose radar does not provide a complete display ability shall not enter the Strait.

c) When visibility in the Strait is 1 NM or less, vessels carrying hazardous cargo and large vessels shall not enter into the Straits.

d) When visibility is any part of the Straits is 0.5 NM, maritime traffic shall be open in the appropriate direction and closed in the opposite. In such situations only vessels less than 100 meters in length and which do not carry hazardous cargo can navigate in the direction open to traffic.
SAFETY OF NAVIGATION

Rules for ships navigating in the Straits of Istanbul and Canakkale

Note by the Secretariat

1. At the thirty-ninth session of the Sub-Committee the delegation of Turkey undertook to submit to the Organization, in time for consideration by MSC 63, rules of navigation with details of traffic management for the Straits of Istanbul and Canakkale (NAV 39/31, paragraph 3.6) to enable the Committee to adopt the proposed traffic separation schemes.

2. Attached at annex are the rules for ships navigating in the above Straits submitted by the Government of Turkey, as requested by NAV 39, for inclusion in Ships' Routeing Part F, if adopted by the Committee.

Action requested of the Committee

3. The Committee is invited to consider the aforementioned rules of navigation and decide as appropriate.
2.10 In consideration of the limited manoeuvrability of vessels with deep
draught, during the passage of such vessels through the Straits, sufficient
space for manoeuvre and navigation will be provided (COLREG 72, rule 3(h)).
Such vessels will navigate the Straits in daytime.

2.11 The passage of large vessels whose length exceeds 200 metres or with a
draught greater than 15 metres is naturally restricted by the adverse
morphological, oceanographic and meteorological characteristics and physical
constraints of the Straits. In view of the high risks related to the natural
structure of the Straits, the passage of such vessels is neither desirable nor
advisable. However, if circumstances, as determined by the unique
physical/natural characteristics of the Straits, permit, in terms of their
length and draught, the passage of such vessels, then passage will be carried
out subject to the special rules specified under section 3.5.

Pilotage services

2.12 In consideration of the hydrographical and oceanographic characteristics
of the Straits and its morphological structure and the local maritime traffic,
it is strongly recommended that pilots be used during navigation through the
Straits so as to minimize the risk of accidents as much as possible.

Health inspection

2.13 Health inspections are mandatory at the entrance of the Straits of
Istanbul and Canakkale.

Currents

2.14 When the surface current speeds in the Straits of Istanbul and Canakkale
reach the limits determined by the Administration given below, the following
traffic management rules will be applied:

.1 When the surface current speed in the Strait of Istanbul exceeds
4 mm/hr., or when northerly surface currents are caused by northerly
winds, then large vessels with a manoeuvre speed of 10 mm/hr. or
less and deep draught vessels will not enter the Straits and will
wait until current speeds are 4 mm/hr. or less, or the northerly
flows have stopped.

.2 When the surface current speed in the Strait of Istanbul exceeds
6 mm/hr. or when strong northerly flows are caused by southerly
winds, large vessels and deep-draught vessels - whatever their
speed - will not enter the Straits and will wait until current
speeds are less than 6 mm/hr., or the strong northerly flows have
stopped.

.3 At the Strait of Canakkale, vessels the difference between whose
speed and the surface current is less than 4 mm/hr., will not enter
the Strait and will wait for the current's speed to diminish.
Vessels, the difference between whose speed and the slowest surface
current is less than 4 mm/hr. will pass through the Straits with
tugboats, the number of which will be determined by the
Administration according to the tonnage of the vessels.

.4 Information on the strength or direction of currents will be
provided by the Traffic Control Centre to the vessels.
Visibility

2.15 When visibility in the Straits of Istanbul and Canakkale drops to the levels determined by the Administration given below, the following traffic management rules will be applied:

.1 Whenever visibility is 2 mm or less in any part of the Straits, vessels passing through the Straits will keep their radar turned on constantly to provide radar readings. On vessels with two radars, one of them will be assigned to the pilot's usage.

.2 When visibility is 1.5 mm or less in any part of the Straits, vessels whose radar does not provide a complete display ability shall not enter the Straits.

.3 When visibility in the Straits is 1 mm or less, vessels carrying dangerous cargoes and large vessels shall not enter into the Straits.

.4 When visibility in any part of the Straits is 0.5 mm, maritime traffic shall be open in the appropriate direction and closed in the opposite. In such situations only vessels less than 100 metres in length and which do not carry dangerous cargoes can sail in the direction open to traffic.

.5 When visibility in the Straits is less than 0.5 mm, the traffic flow in the Straits shall be closed in both directions.

.6 When visibility in the Straits is suitable for navigation, the arrangement and order of entering the Straits shall be determined and notified to the waiting vessels and the persons concerned by the Traffic Control Centre.

3 Special rules

Maritime traffic between the two shores of the Straits

3.1 Intra-city ferries and other shuttle boats crossing between the two sides of the Straits of Istanbul (Bosphorous) and Canakkale (Dardanelles) shall keep out of the way of vessels proceeding from north to south and from south to north as much as possible by avoiding crossing situations (International Convention for the Prevention of Collisions at Sea – rule 10(c)).

3.2 Nevertheless, if there is a risk of collision, they shall take all necessary precautions provided by article 2 of the International Convention for the Prevention of Collisions at Sea (1972 Collision Regulations, rule 2).

Two-way maritime traffic in the Straits

3.3 To proceed within the traffic separation lanes established in the Turkish Straits is obligatory. Vessels shall proceed in the appropriate traffic lane in the general direction of traffic flow for that lane (International Convention for the Prevention of Collisions at Sea, rule 10b.I and 10b.II). If there is no possibility of proceeding within the lanes, or to sail out of the lanes is considered a necessity, then such situations shall be notified to the Traffic Control Station and to vessels sailing in the area.
3.4 Vessels with lengths of 150-200 metres, when entering the Straits will pass the areas between Pasabahce-Yeniköy and Vaniköy-Arnavutköy in the Strait of Istanbul; and the areas between Cape Nara-Akbas and Cape Kanlidere and Cape Karanfil in the Strait of Canakkale, without encountering one another. When oceanographic and meteorological conditions may adversely affect transits, the Administration will take additional measures. During passage, vessels of 150-200 metres in length carrying dangerous cargo will take escorts.

Closure of the Straits to one-way or two-way traffic

3.5 In the case that vessels greater than 200 metres in length, which are advised against passing through the Straits, should have to do so:

1. the request for passage will be transmitted to the Administration before scheduling the transit;

2. to the extent permitted and necessitated by the traffic, oceanographic and meteorological conditions, the Straits may be closed by the Administration to one-way or two-way traffic;

3. the passage will be effected in daytime, with tugboats of sufficient number and power, escorts and pilots which will be determined taking into account, inter alia, the strength of currents.

3.6 The Straits of Istanbul and Canakkale may be closed to maritime traffic during the passage of large vessels, deep draught vessels, nuclear-powered vessels or vessels carrying nuclear, dangerous and noxious wastes, and/or due to meteorological and oceanographic conditions.

3.7 When articles 3.5 and 3.6 are in effect, vessels will await the opening of the Strait of Istanbul to maritime traffic, in the Kilyos anchorage area on the Black Sea side, and off the Ahirkapi-Kumkapı area in the Sea of Marmara; and the opening of the Strait of Canakkale in the Gelibolu-Sarköy area in the Sea of Marmara, and the south-west of Bozcaada in the Aegean Sea, in the designated anchorage positions.
SAFETY OF NAVIGATION

Rules for ships navigating in the Straits of Istanbul and Canakkale

Submitted by the Russian Federation

1. Having examined "Rules for Ships Navigating in the Straits of Istanbul and Canakkale" (MSC 63/7/2), submitted by the Government of Turkey, the Russian Federation is of the opinion that, though some of the provisions on safety of navigation are technically well-grounded, the Rules contain provisions which restrict and, in some cases, prohibit transit of ships through the Straits. Both these provisions and requirements of the new Turkish Regulations for Traffic Order in the Area of the Straits and the Sea of Marmara (is to enter into force on 1 July 1994), grounding the Rules contradict universally recognized provisions of the Law of the Sea by which no regulations issued by a coastal State may deny, hamper or impair the rights of freedom of passage through international straits and transit through straits may not be suspended.

2. A number of provisions of the Rules contradicts the terms of the Montreux Convention, 1936, which guarantees freedom of transit and navigation in the Straits by day and by night under any flag and with any cargo, without any formalities, except medical inspection of merchant ships at an entrance to the Straits. According to the Convention, pilot and tow charges are to be levied only if the services are provided upon request of the Master or the ship's agent.

3. Having infringed the Convention's terms, a number of provisions of the Rules envisages significant limitations to the extent of a complete ban on transit dependent on ship's length, draught, cargo as well as nuclear-powered ships (paragraphs 2.5, 2.11, from 3.4 to 3.6) and in some cases a suspension of navigation in the Straits has been envisaged (paragraphs 2.11, 3.5(2) and 3.6). Mandatory towage has also been envisaged (paragraphs 2.8, 3.4 and 3.5(3)).

4. Restrictions imposed by the Rules on passage of large vessels and deep-draught vessels are not of a reasonable nature since there have been many transits of ships up to 295 metres in length and with a draught up to 17 metres. Closure of the Straits to one-way or two-way traffic for ships greater than 200 metres in length would lead to long delays of ships and would result in a concentration of ships drifting at the entrances to the Straits.
Such a concentration of ships, in its turn, would be the reason for groundings and collisions between the drifting ships themselves and ships entering or leaving the Straits.

5 Requirements for passage of ships greater than 200 metres in length in daytime only with tugs, number and power of which to be determined by the coastal Administration (see paragraph 3.5.3), is considered to be unreasonable and is in conflict with the Montreux Convention.

6 Starting from 1982, a traffic order has been introduced for the Strait of Istanbul governed by rule 9 of the Convention on the International Regulations for Preventing Collisions at Sea, 1972, (Collision Regulations, 1972) which justified itself from the point of view of safety of navigation. This well-established method of routing in the Strait of Istanbul should be adopted also for the Strait of Canakkale. At the same time, the methods of routing in the Straits under rule 10 of the Collision Regulations, 1972, as proposed by the Government of Turkey, cannot be adopted since that rule can be fulfilled by small ships only. The new order will lead to compulsory towage of all large ships by local tugs in some narrowest points of the Straits since the Turkish national law (Regulations of 1994) has envisaged to impose a fine on ships crossing the separation line. It should be taken into account that there are some areas in the Straits where keeping to the centre of the fairway is the only safe navigation option due to the width of the Straits.

7 At the thirty-ninth session of the NAV Sub-Committee, the Russian Federation reserved its position on the proposal by the Government of Turkey to change the existing system of ships' routing in the Straits.

8 We consider that the introduction of the new traffic order in the Straits under rule 10 of the Collision Regulations, 1972 may only be observed by small ships (less than 150 metres in length) and does not correspond to the IMO General Provisions on Ships' Routeing which require that "The routeing system selected for a particular area should aim at providing safe passage for ships through the area without unduly restricting legitimate rights and practices, and ...".

9 As an alternative to the traffic separation scheme in the Straits under rule 9 of the Collision Regulations, 1972, if it is considered to be necessary, the Committee may wish to consider establishing a traffic separation scheme under rule 10, with certain precautionary areas in the narrowest points of the Straits. In these areas there should be sub-centres for traffic control equipped with radar. Although the reporting by ships is considered essential for safety of navigation, the advantages of radar use cannot be over-emphasised. Additionally, in these areas pilotage and towage may be recommended. However, it is impossible to agree that obligatory payable pilotage and towage be introduced in contradiction with the Montreux Convention.

10 Envisaged in paragraph 2.4 of the Rules, the responsibility of shipowners or Masters of large ships to report to the coastal Administration on the vessel and its cargo at the planning stage of the passage and the right of the coastal Administration according to paragraph 2.5 to give permission for transit of such ships (actually it means introduction of an authorization procedure for the passage) is against the terms of the Montreux Convention and is considered to be unacceptable. It is also considered unacceptable the introduction by the new Turkish law (Regulations of 1994) of an authorization procedure for the passage for nuclear-powered ships and for ships carrying certain cargoes.
11 Requirements on reporting by ships in accordance with the TUBRAP reporting system established by the Turkish Administration (see paragraph of the Rules) and some other provisions on ships reporting should be clarified in order not to lend themselves to subjective interpretations since, in no circumstances, the information reported by ships shall be restricted to the minimum necessary to make safe transit.

12 Provisions of the Rules with respect to traffic control body including rights, obligations and responsibilities should be established precisely.

13 Restrictions imposed by the Rules, as far as surface current speeds are concerned, may not be considered reasonable as currents in the Straits do not cause any problem to modern ships.

14 We are of the opinion that the Rules for Ships Navigating in the Straits of Istanbul and Canakkale proposed for adoption by the Organization shall conform completely to the Montreux Convention, the United Nations Convention on the Law of the Sea, 1982, provisions of customary law on international straits and the IMO General Provisions on Ships' Routeing. The Rules should be applied to the extent which is to prevent any infringement of the above documents.

15 We believe that to ensure safe navigation and pollution prevention in the Straits a safety management system should be developed by the Committee including response procedures to deal both with known and foreseeable risks.

16 We recognize that it will be a difficult and a time-consuming task to organize such a system but it is the only way to develop a realistic safety and pollution prevention management system in the Straits.

17 Temporary suspension of navigation in the Straits may only be made in cases of force majeure and any requirements for transiting ships should be of a recommendatory nature.

Action requested of the Committee

18 The Committee is invited to consider the above views and proposals and decide as appropriate.