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CONGRESSIONAL TESTIMONY

Hearing before the
United States Senate
Committee on Foreign Relations
on

The Law of the Sea Convention (Treaty Doc. 103-39)

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2:30 P.M.

Mr. Chairman and members of the Committee:

Thank you for inviting me to testify before you today regarding the United Nations Convention on the Law of the Sea (UNCLOS).

UNCLOS, like any complex treaty or piece of legislation, should be thoroughly examined by the Committee to determine its costs as well as its benefits. At bottom, the disagreement between those who favor U.S. accession to the convention and those who oppose boils down to a disagreement regarding whether the benefits of membership are outweighed by the costs.

By its nature, no treaty comes without costs. As with comprehensive legislation, there are often provisions of a treaty that are uncontroversial and attractive in themselves. Likewise, there are other provisions that are controversial and divisive. This rule generally holds true for all treaties, including those involving arms control, human rights, the environment, international courts, and others. UNCLOS is no exception.

However, unlike most other treaties, the terms of UNCLOS prevent the United States from exempting itself from its more controversial provisions. Specifically, pursuant to Article 309, UNCLOS forbids states parties from submitting reservations or exceptions that would otherwise allow the United States to disregard provisions that do not comport with the U.S. Constitution or long-standing U.S. law and policy.

My testimony today focuses on the costs associated with U.S. accession to UNCLOS and whether the benefits of accession are such that the costs are outweighed. The costs of accession are not imaginary. Nor is opposition to U.S. accession based on purist ideology, but rather on the available evidence, current U.S. law and policy, customary international law, U.S. experience in other international organizations, the U.S. record in international tribunals, and of course the provisions of the convention itself.

In summary:

- If the U.S. accedes to UNCLOS, it will be required by Article 82 to transfer royalties generated from hydrocarbon production of the U.S. "extended continental shelf" (ECS) to the International Seabed Authority for redistribution to developing and landlocked countries. Since the value of the hydrocarbon resources lying beneath the U.S. ECS may be worth trillions of dollars, the amount of royalties that the U.S. Treasury would be required to transfer to the Authority would be substantial. In any event, U.S. accession would amount to an open-ended commitment to forgo an incalculable amount of royalty revenue for no appreciable benefit.

- U.S. accession to UNCLOS is not necessary to develop or secure title to the hydrocarbon resources of the ECS. Under international law and long-standing U.S. policy and practice, the U.S. has established full jurisdiction and control over its ECS and is in the process of delimiting its ECS boundaries on a worldwide basis. The successful delimitation of areas of U.S. ECS and subsequent leasing of those areas in the Gulf of Mexico to U.S. and foreign oil

exploration companies demonstrate that the United States does not need to achieve universal international recognition of its ECS to provide "certainty" to oil exploration companies.

- Proponents of U.S. accession to UNCLOS contend that by failing to join the convention the United States is forbidden from mining the deep seabed—the ocean floor lying beyond the ECS and designated as "the Area." However, no legal barriers prevent U.S. access, exploration, and exploitation of the resources of the deep seabed. The United States has long held that U.S. corporations and citizens have the right to develop the resources of the deep seabed and may do so whether or not the United States accedes to UNCLOS.

- U.S. accession to UNCLOS would expose the U.S. to lawsuits regarding virtually any maritime activity, such as alleged pollution of the marine environment from a land-based source or through the atmosphere. Regardless of the lack of merits of such a case, the U.S. would be forced to defend itself against every such lawsuit at great expense to U.S. taxpayers. Any adverse judgment rendered by an UNCLOS tribunal would be final, could not be appealed, and would be enforceable in U.S. territory.

- Finally, it is not essential or even necessary for the United States to accede to UNCLOS to protect and preserve its navigational rights and freedoms. The navigational and maritime boundary provisions of the convention either codify customary international law that existed well before the convention was adopted in 1982 or "refine and elaborate" navigational rights and regimes that are now widely-accepted as binding international law.

* * *

Article 82 and the Costs of Compliance

Proponents of U.S. accession to UNCLOS extol the supposed benefits of joining the convention but are reluctant to discuss its very real costs.

One area where the U.S. can expect to experience significant costs—with no appreciable benefit—is in its compliance with Article 82 of the Convention: "Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles."

If the U.S. accedes to UNCLOS, it will be required pursuant to Article 82 to transfer royalties generated on the U.S. continental shelf beyond 200 nautical miles (nm)—an area known as the "extended continental shelf" (ECS)—to the International Seabed Authority. These royalties will likely total tens or even hundreds of billions of dollars over time. Instead of benefiting the American people, the royalties will be distributed by the Authority to developing and landlocked nations, including some that are corrupt, undemocratic, or even state sponsors of terrorism such as Cuba and Sudan.

Article 82 of UNCLOS requires member states to "share" a portion of their royalty revenue for all oil, gas, or other mineral resources extracted from the ECS:

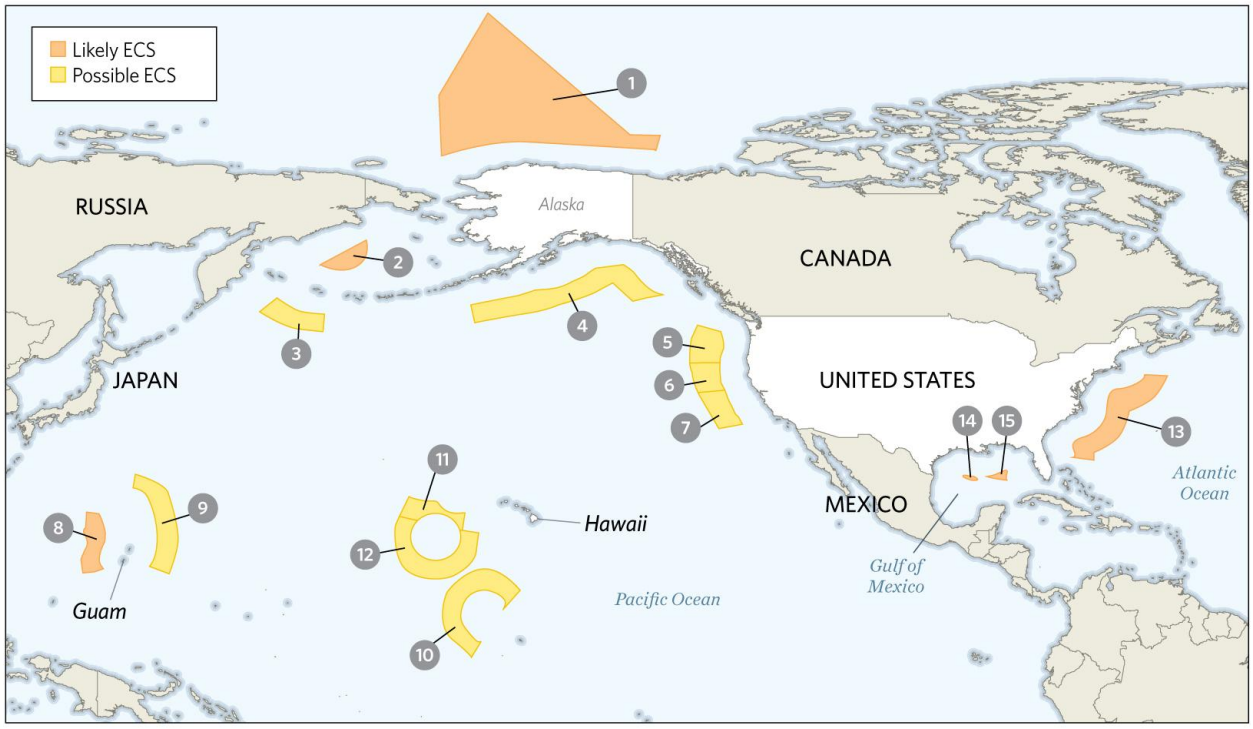
> The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

These payments are to be made to the Authority on an annual basis by the states parties, and are based on the value of production at the particular site—in most cases, an offshore drilling platform extracting oil or natural gas from the ECS. According to a recent study conducted for the Authority, such payments are considered "international royalties."

The potential size of the U.S. ECS worldwide is significant. The value of the hydrocarbon deposits lying beneath the U.S. ECS is difficult to estimate, but it is likely substantial. According to the U.S. Extended Continental Shelf Task Force, "Given the size of the U.S. continental shelf, the resources we might find there may be worth many billions if not trillions of dollars."

MAP 1

U.S. Extended Continental Shelf (ECS)



1 Arctic Ocean
2 Bering Sea
3 Aleutian Islands
4 Gulf of Alaska
5 Northwest Coast
6 Mendocino Ridge
7 California Coast
8 Northern Marianas and Guam (West)
9 Northern Marianas and Guam (East)
10 Kingman Reef and Palmyra Atoll
11 Necker Ridge
12 Johnson Atoll
13 Atlantic East Coast
14 Gulf of Mexico (Western Gap)
15 Gulf of Mexico (Eastern Gap)

Source: U.S. Extended Continental Shelf Project, "Establishing the Full Extent of the Continental Shelf of the United States," http://continentalshelf.gov/media/ECSposterDec2010.pdf (accessed May 8, 2012).

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Member states begin to pay these "international royalties" during the sixth year of production at the drilling site. Starting with the sixth year of production, UNCLOS members must pay 1 percent of the value of the total production at that site to the Authority. Thereafter, the royalty rate increases in increments of 1 percentage point per year until the twelfth year of production, when it reaches 7 percent. The rate remains at 7 percent until production ceases at the site.

As such, if the United States accedes to UNCLOS it would be obligated to transfer to the Authority a considerable portion of the royalties generated on the U.S. ECS that would otherwise be deposited in the U.S. Treasury for the benefit of the American people. For example, the royalty rate of the majority of blocks currently under an active lease on the U.S. ECS is 12.5 percent. Beginning in the twelfth year of production on such an ECS block the U.S. would be required to transfer 7 percent—more than half—of its royalty revenue to the Authority and do so each year until production ends on that lease. The remaining 5.5 percent of the royalty would be retained by the Treasury.

Given that resources of the U.S. ECS "may be worth many billions if not trillions of dollars," this would amount to a substantial sum over time.

But there is the rub. There has been no comprehensive study to determine the value of the oil and natural gas that lies beneath the U.S. ECS. The total area of the U.S. ECS is reportedly twice the size of California and stretches from the U.S. East Coast to the South Pacific and up to the Arctic Ocean. How can this Committee be expected to conduct a proper assessment of the financial impact of U.S. accession to UNCLOS if the value of the natural resources on the U.S. ECS is unknown? If the value of U.S. hydrocarbons on the ECS is unknown then so too is the amount of royalty revenue that the United States will ultimately forgo if it accedes to the convention.

As such, by acceding to UNCLOS the United States will be making an open-ended international commitment to transfer an indefinite sum of royalty revenue (indefinite, but likely in the tens if not hundreds of billions of dollars) to the Authority for redistribution to developing and landlocked nations.

Determining the Extent of the U.S. Extended Continental Shelf

Some proponents of U.S. accession to UNCLOS claim that U.S. oil companies cannot achieve the "certainty" they require to develop the hydrocarbon resources on the ECS unless the United States accedes to the convention and receives the approval of the Commission on the Limits of the Continental Shelf—an international committee of geologists and hydrographers located at U.N. headquarters in New York City. For example, in 2007, former Deputy Secretary of State John Negroponte stated, "In the absence of such international recognition and legal certainty, U.S. companies are unlikely to secure the necessary financing and insurance to exploit energy resources on the extended shelf."

However, pursuant to long-standing law and policy the United States already enjoys and exercises full jurisdiction and control over its ECS. In addition to the 1945 Truman Proclamation, in which President Harry S. Truman declared that the United States "regards the

natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control," in 1953 Congress passed the Outer Continental Shelf Lands Act, which defined the outer continental shelf as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters…and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."

After the adoption of UNCLOS in 1982, the U.S. affirmed its jurisdiction over its entire continental shelf, including the ECS. Specifically, in November 1987 a U.S. government interagency group issued a policy statement declaring its intent to delimit the U.S. ECS in conformity with Article 76 of UNCLOS (which provides a formula for measuring the extent of a coastal state's ECS). That statement read, in pertinent part, "The United States has exercised and shall continue to exercise jurisdiction over its continental shelf in accordance with and to the full extent permitted by international law as reflected in Article 76, paragraphs (1), (2) and (3)."

Indeed, the United States has already demarcated areas of its ECS in the Gulf of Mexico, the Bering Sea and the Arctic Ocean via bilateral treaties with Mexico and Russia. In the Gulf, for example, the U.S. and Mexico have negotiated a series of treaties to delimit their maritime and continental shelf boundaries, including areas of abutting ECS:

- In November 1970, the U.S. and Mexico signed a treaty to maintain the Rio Grande and Colorado River as the agreed international boundary between the two nations. As part of the treaty, the two nations demarcated their maritime boundaries in the Gulf of Mexico and the Pacific Ocean out to 12 nm.

- In May 1978, building on the 1970 treaty, the two nations signed a treaty delimiting their maritime boundaries in the Gulf and in the Pacific out to 200 nm. The treaty demarcated boundary lines in the Gulf where their respective 200 nm exclusive economic zones (EEZ) abutted, leaving a "doughnut hole" of approximately 5,092 square nm (now known as the "western gap") where their 200 nm boundary lines did not meet. A second doughnut hole was created in the eastern Gulf where the EEZ of the U.S., Mexico, and Cuba fail to intersect (the "eastern gap").

- In June 2000, the U.S. and Mexico signed a treaty dividing the area of ECS within the western gap. Of the 5,092 square nm of ECS in the western gap, 1,913 (38 percent) went to the United States and 3,179 (62 percent) went to Mexico. The treaty established a drilling moratorium over a narrow strip along the boundary within the western gap due to the possibility that transboundary hydrocarbon reservoirs are located along the boundary.

- In February 2012, the U.S. and Mexico signed a treaty regarding the exploitation of transboundary reservoirs located along the continental shelf boundary shared by the two nations in the Gulf, including along the ECS boundary within the western gap. The treaty has not yet been transmitted to the U.S. Senate for its advice and consent.

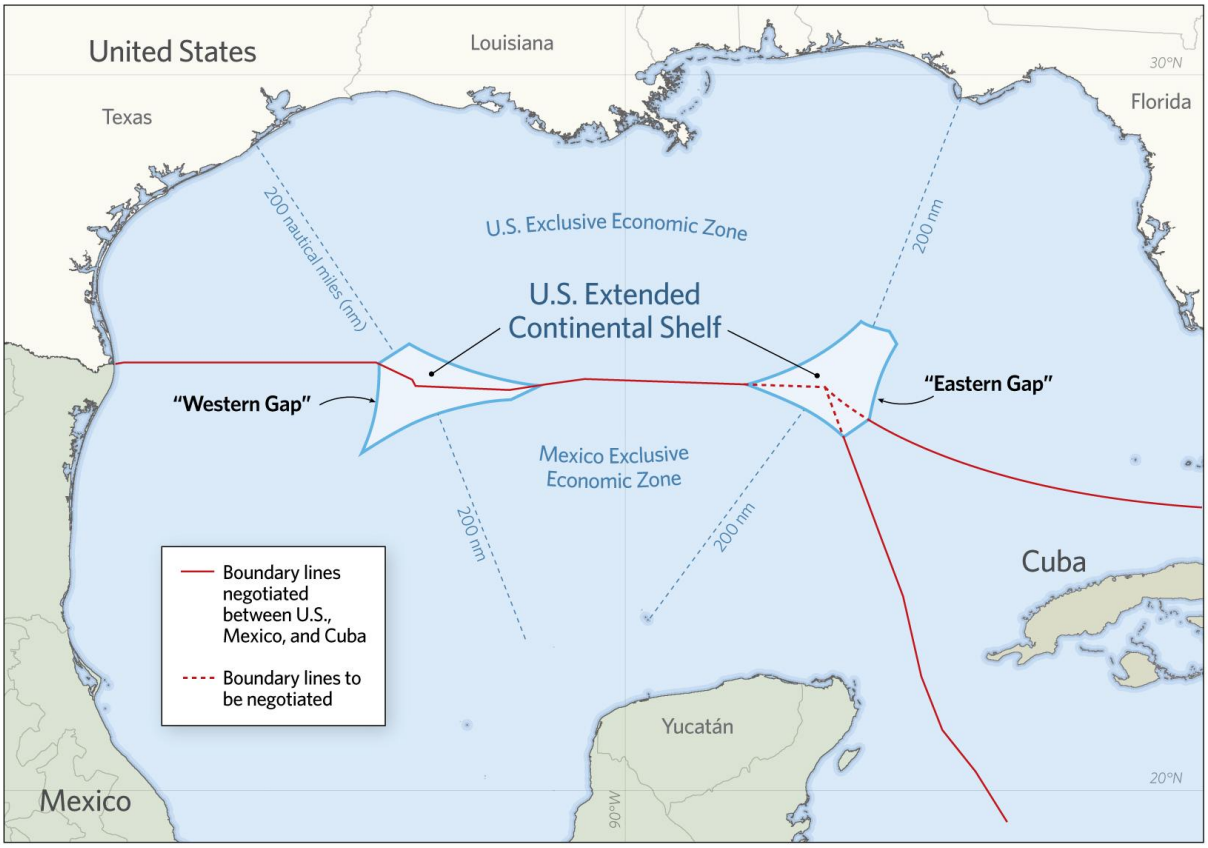
Collectively, these treaties between the United States and Mexico, particularly the June 2000 ECS delimitation treaty, demarcated an area of U.S. ECS—the 1,913 square nm of submerged

continental shelf in the northern portion of the western gap. There is no evidence that the "international community" does not or will not recognize the ECS in the northern portion of the western gap and its resources as being subject to the jurisdiction and control of the United States.

MAP 2

U.S. Extended Continental Shelf in Gulf of Mexico

The Gulf of Mexico contains two areas of submerged continental shelf that extend beyond the 200-nautical-mile exclusive economic zones (EEZ) of Mexico and the United States—the "western gap" and the "eastern gap." The U.S. and Mexico signed a treaty in June 2000 that divides the area of extended continental shelf within the "western gap" between the two nations.



Sources: U.S. Department of the Interior, Bureau of Ocean Energy Management, "Treaty on Maritime Boundaries Between the United Mexican States and the United States of America," May 4, 1978, http://www.boem.gov/uploadedFiles/BOEM/Regulations/Treaties/1978_0504-Treaty-MaritimeBoundariesMexicoandUS.pdf (accessed April 17, 2012); U.S. State Department, "Maritime Boundary Agreement Between the United States of America and the Republic of Cuba," December 16, 1977, http://www.state.gov/documents/organization/125389.pdf (accessed May 8, 2012); and United Nations, "Executive Summary: A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the United Mexican States Pursuant to Part VI of and Annex II to the United Nations Convention on the Law of the Sea," December 2007, http://www.un.org/depts/los/clcs_new/submissions_files/mex07/part_i_executive_summary.pdf (accessed May 8, 2012).

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The United States exercises jurisdiction and control over its ECS as evidenced by the fact that the Department of the Interior has made the western gap in the Gulf of Mexico available for hydrocarbon development since August 2001. Specifically, the Bureau of Ocean Energy Management (BOEM) offered the northern portion of the western gap for lease almost immediately after the 2000 U.S.–Mexico ECS delimitation treaty was ratified. That treaty entered into force on January 17, 2001. Seven months later, on August 22, BOEM offered the

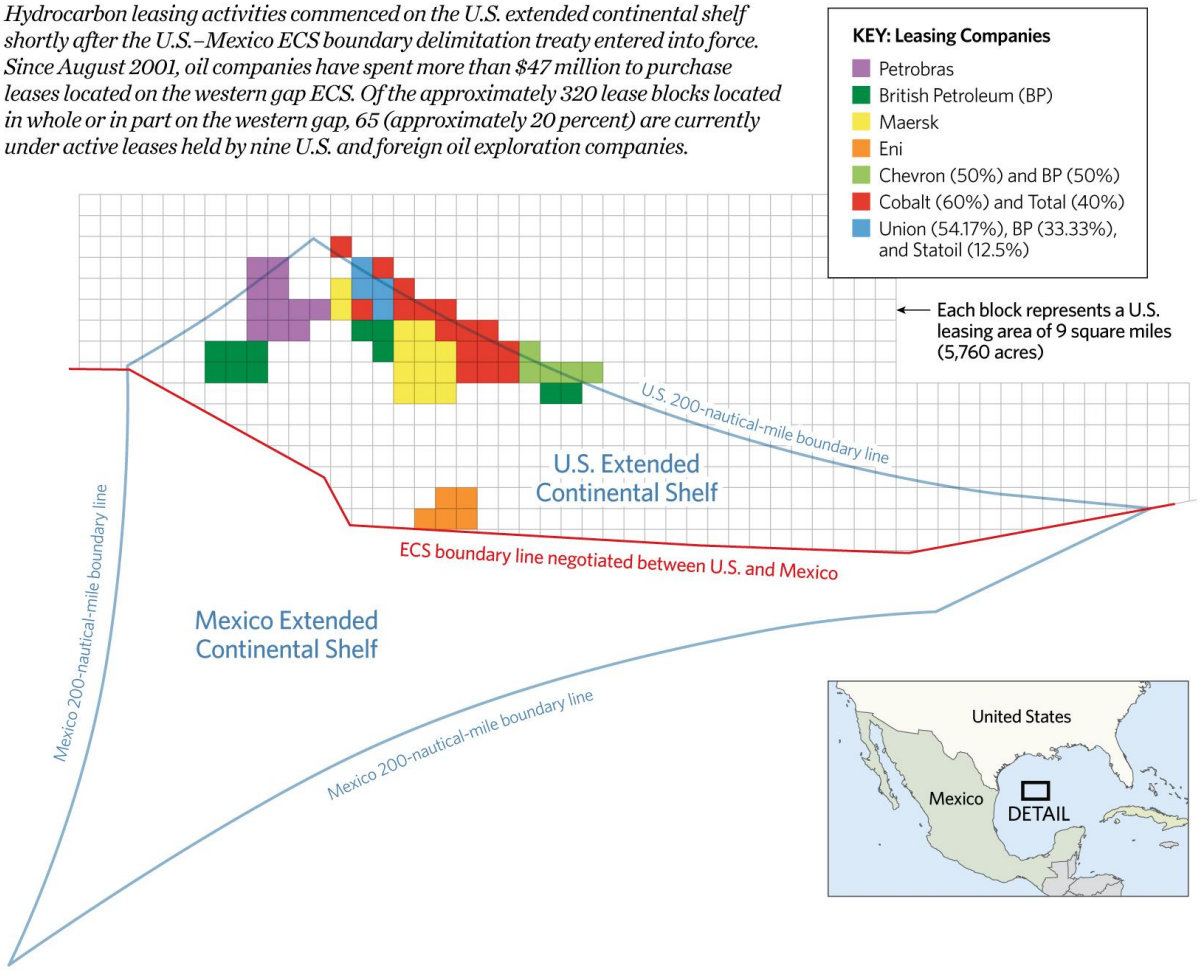
area of U.S. ECS in the western gap in Lease Sale 180. In that lease sale, three U.S. companies (Texaco, Hess, and Burlington Resources Offshore) and one foreign company (Petrobras) submitted bids totaling more than $2 million for seven lease blocks in the western gap.

BOEM has offered western gap ECS blocks in 19 lease sales between 2001 and 2010. Seven U.S. companies (Burlington, Chevron, Devon Energy, Hess, Mariner Energy, NARCA Corporation, and Texaco) submitted bids to lease ECS blocks in the western gap. Five foreign companies—BP, Eni Petroleum (Italy), Maersk Oil (Denmark), Petrobras, and Total (France)—also bid on western gap ECS blocks during those sales. BOEM collected more than $47 million in bonus bids in connection with lease sales on those ECS blocks. Of the approximate 320 blocks located in whole or in part on the western gap ECS, 65 (approximately 20 percent) are currently held under active leases by nine U.S. and foreign oil exploration companies.

MAP 3

Active Hydrocarbon Leases on U.S. Extended Continental Shelf in the "Western Gap"

Hydrocarbon leasing activities commenced on the U.S. extended continental shelf shortly after the U.S.–Mexico ECS boundary delimitation treaty entered into force. Since August 2001, oil companies have spent more than $47 million to purchase leases located on the western gap ECS. Of the approximately 320 lease blocks located in whole or in part on the western gap, 65 (approximately 20 percent) are currently under active leases held by nine U.S. and foreign oil exploration companies.



Sources: U.S. Department of the Interior, Bureau of Ocean Energy Management, "Lease Sale Information," http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Regional-Leasing/Gulf-of-Mexico-Region/GOMR-Historical-Lease-Sale-Information.aspx (accessed April 17, 2012), and "Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles," June 9, 2000, http://www.boem.gov/uploadedFiles/BOEM/Regulations/Treaties/2000_0609-Treaty-OCSinWGOMbeyond200nm.pdf (accessed April 17, 2012).

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The successful delimitation and subsequent leasing of ECS areas in the Gulf of Mexico demonstrate that the United States does not need to achieve universal international recognition of its ECS. The United States identified and demarcated areas of ECS in the western gap in cooperation with the only other relevant nation, Mexico, and that area was subsequently offered for development to U.S. and foreign oil and gas companies. All of this was achieved without U.S. accession to UNCLOS or the approval of the Commission on the Limits of the Continental Shelf.

Even though approximately 20 percent of the only area of U.S. ECS that has been made available for lease by BOEM is currently under an active lease, the U.S. oil and gas industry has supported and will likely continue to support U.S. accession to UNCLOS in order to achieve even greater "certainty." That is their prerogative, of course, and achieving a maximum amount of certainty is a legitimate and desirable goal for a capital-intensive commercial enterprise. However, the successful delimitation of the ECS in the western gap and the U.S. government's continuing lease sales of ECS blocks would appear to have provided the certainty necessary for several major U.S. and foreign oil exploration companies to secure leases for the development of the U.S. ECS.

U.S. Rights to Deep Seabed Minerals

Proponents of U.S. accession to UNCLOS contend that by failing to join the convention the United States is forbidden from mining the deep seabed—the ocean floor lying beyond the ECS and designated as "the Area." However, no legal barriers block U.S. access, exploration, and exploitation of the resources of the deep seabed. The United States has long held that U.S. corporations and citizens have the right to explore and exploit the resources of the deep seabed and may do so whether or not the United States accedes to UNCLOS.

The United States made its position on its right to engage in deep seabed mining very clear in March 1983 during the final days of the Third U.N. Conference on the Law of the Sea. Specifically, in response to statements from other U.N. member states that UNCLOS non-parties would not have the right to engage in deep seabed mining, the U.S. stated the following:

> Some speakers asserted that existing principles of international law, or the Convention, prohibit any State, including a non-party, from exploring for and exploiting the mineral resources of the deep sea-bed except in accordance with the Convention. The United States does not believe that such assertions have any merit. The deep sea-bed mining regime of the Convention adopted by the Conference is purely contractual in character. The United States and other non-parties do not incur the obligations provided for therein to which they object.
>
> Article 137 of the Convention [forbidding claims of sovereignty over the deep seabed or its resources] may not as a matter of law prohibit sea-bed mining activities by non-parties to the Convention; nor may it relieve a party from the duty to respect the exercise of high seas freedoms, including the exploration for and exploitation of deep sea-bed minerals,

> by non-parties. Mining of the sea-bed is a lawful use of the high seas open to all States…. The practice of the United States and the other States principally interested in sea-bed mining makes it clear that sea-bed mining continues to be a lawful use of the high seas within the traditional meaning of the freedom of the high seas.

The U.S. legal position set forth in 1983 on deep seabed mining remains the same today. According to the *Restatement of the Law, Third, of the Foreign Relations Law of the United States*, the United States may engage in deep seabed mining activities even if it does not accede to UNCLOS, provided that such activities are conducted without claiming sovereignty over any part of the deep seabed and as long as the mining activities are conducted with due regard to the rights of other nations to engage in mining. As related by the Restatement, "like the fish of the high seas the minerals of the deep sea-bed are open to anyone to take."

The U.S. position is also reflected in the Deep Seabed Hard Mineral Resources Act of 1980, which Congress enacted two years before the adoption of UNCLOS to provide a framework for U.S. corporations to conduct deep seabed mining until such time as the United States joins an acceptable convention on the law of the sea. The DSHMRA states the U.S. position on the legality of deep seabed mining as follows:

> [I]t is the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other freedoms recognized by general principles of international law.

In sum, the long-held position of the United States, both domestically and internationally, is that U.S. citizens and corporations have the right to explore and exploit the deep seabed regardless of whether or not the United States is a party to UNCLOS.

Exposure to Baseless International Lawsuits

> "The possibility that a small island state, or another injured party, would bring a liability claim against states responsible for climate change no longer is a topic for fiction or a theoretical prospect. There is a rise in plans for litigation worldwide for consequences of global warming."
>
> —International law professors Michael Faure and Andre Nollkaemper

Part XV of UNCLOS addresses the settlement of maritime disputes between parties to the convention. Part XV contemplates that UNCLOS states parties, in accordance with the U.N. Charter, will attempt to resolve maritime disputes peacefully without resort to the convention's compulsory procedures. When a dispute arises between two UNCLOS members, they are obligated to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means." States parties may also resort to a nonbinding "conciliation procedure" under Annex V of the convention.

But if a maritime dispute cannot be settled in a voluntary manner, any UNCLOS state party may compel another state party to defend itself in one of four forums: the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), an arbitral tribunal organized under Annex VII, or a "special" arbitral tribunal organized under Annex VIII. Within ITLOS, a special tribunal, the Seabed Disputes Chamber (SDC), was established to resolve disputes about activities on the seabed floor beyond the limits of national jurisdiction, known as "the Area."

Acceding to UNCLOS would expose the U.S. to lawsuits on virtually any maritime activity, such as alleged pollution of the marine environment from a land-based source or through the atmosphere. Regardless of the merits, the U.S. would be forced to defend itself against every such lawsuit at great expense to U.S. taxpayers. Any judgment rendered by an UNCLOS tribunal would be final, could not be appealed, and would be enforceable in U.S. territory.

Unlike a resolution passed by the U.N. General Assembly or a recommendation made by a human rights treaty committee, judgments issued by UNCLOS tribunals are legally enforceable upon members of the convention. Article 296 of the convention, titled "Finality and binding force of decisions," states, "Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute."

Judgments made by UNCLOS tribunals are enforceable in the same manner that a judgment from a U.S. domestic court would be. For example, Article 39 of Annex VI states that "The decisions of the [Seabed Disputes] Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought." In other words, if the United States accedes to the convention, the U.S. government will be required to enforce and comply with SDC judgments in the same manner as it would enforce and comply with a judgment of the U.S. Supreme Court. In other words, the U.S. court system will serve not as an avenue for appeal from UNCLOS tribunals, but rather as an enforcement mechanism for their judgments.

The domestic enforceability of UNCLOS tribunal judgments was confirmed by U.S. Supreme Court Justice John Paul Stevens in the landmark 2008 case, *Medellin v. Texas*. In *Medellin*, Justice Stevens, writing a concurring opinion, cited Article 39 of Annex VI for the proposition that UNCLOS members—presumably including the United States if it accedes to the convention—are obligated to comply with the judgments of the convention's tribunals.

U.S. accession to the convention would provide an opportunity and legal forum for other UNCLOS members to initiate lawsuits against the U.S. challenging the adequacy of its efforts to protect the marine environment. Although current U.S. law may satisfy many of the general environmental obligations set forth in the convention, the U.S. might nevertheless be forced to defend itself in a costly and politically embarrassing lawsuit challenging the sufficiency and enforcement of U.S. domestic environmental laws and regulations. One such lawsuit—the *MOX Plant Case (Ireland v. United Kingdom)*—has already been litigated in UNCLOS tribunals.

Acceding to UNCLOS would commit the U.S. to controlling its pollutants, including alleged "harmful substances" such as carbon emissions and other greenhouse gases (GHG), in such a

way that they do not negatively impact the marine environment. The U.S. would also be obligated to adopt laws and regulations to prevent the pollution of the marine environment from the atmosphere and could be liable under international law for failing to enact legislation necessary to prevent atmospheric pollution. Moreover, such domestic laws and regulations "shall" take into account "internationally agreed rules, standards and recommended practices and procedures." The "internationally agreed rules, standards and recommended practices" that could be invoked by UNCLOS litigants may include instruments such as the U.N. Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol.

A consensus has emerged within the international environmental and legal community that the United States is the best target for an international climate change lawsuit. One law professor has characterized the United States as a likely target because it is a developed nation with high per capita and total GHG emissions, adding that the "higher the overall historic and present contribution to global emissions by the defending party, arguably the better the chance of a successful outcome."

Over the past decade, there has been a steady drumbeat to initiate an international climate change lawsuit against the United States, and UNCLOS tribunals have featured prominently among the potential forums identified as a venue for such a case.

- In 2002, the prime minister of Tuvalu, a Pacific island nation consisting of a chain of nine coral atolls, stated his intention to initiate a climate change lawsuit against the United States because of its failure to adopt the Kyoto Protocol. That year, at the World Summit for Sustainable Development held in Johannesburg, Tuvalu's government lobbied other small island nations to join them in such a suit at the International Court of Justice.

- In 2003, the Washington, D.C.-based Environmental Law Institute published "The Legal Option: Suing the United States in International Forums for Global Warming Emissions" by law professor Andrew L. Strauss. According to Strauss, the U.S. rejection of the Kyoto Protocol "makes the United States the most logical first country target of a global warming lawsuit in an international forum." The article proposed various forums for initiating a lawsuit against the United States, including UNCLOS tribunals, but Strauss lamented, "As the United States has not adhered to the Convention, however, a suit could not be brought directly against it under the Convention."

- In her 2005 book *Climate Change Damage and International Law*, law professor Roda Verheyen posed a hypothetical case that could be brought against the United States for its alleged responsibility in melting glaciers and causing glacial outburst floods in the Himalayas. The claim would include compensation for flood damages as well as additional funds to monitor glacial lakes and prevent future floods. Verheyen based liability for such damages on the U.S.'s alleged violation of its commitments under the UNFCCC and failure to ratify the Kyoto Protocol.

- In December 2005, the Inuit Circumpolar Council, an international nongovernmental organization representing Inuit peoples in Alaska, Canada, Greenland, and Russia, filed a petition against the United States at the Inter-American Commission on Human Rights

(IACHR), a human rights body operating within the Organization of American States. The petition requested that the IACHR direct the United States to adopt mandatory measures to limit its emissions and to provide assistance to help the Inuit adapt to the impacts of climate change.

- In 2006, the *International Journal of Sustainable Development Law & Policy* published "Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention," in which law professor William C. G. Burns cited UNCLOS's marine pollution provisions as a basis for a cause of action for rising sea levels and changes in ocean acidity. Burns named the United States as "the most logical State to bring an action against given its status as the leading producer of anthropogenic greenhouse gas emissions, as well as its failure to ratify Kyoto," but noted that the U.S. "is not currently a Party to the Convention."

- In a September 2011 speech to the U.N. General Assembly, Johnson Toribiong, president of the Pacific island nation of Palau, called upon the General Assembly to seek an advisory opinion from the International Court of Justice "on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States."

In sum, the United States would be at the top of the list of potential defendants in an UNCLOS climate change lawsuit, if the U.S. accedes to the convention. Thus far, the United States has denied potential climate change claimants their day in international court by refusing to accede to UNCLOS. Clearly, accession to the convention would open the door to these litigants as well as to their advocates in the international academic, environmental, and nongovernmental organization communities.

Navigational Rights and Freedoms

In 1993, the Department of Defense issued an Ocean Policy Review Paper on "the currency and adequacy of U.S. oceans policy, from the strategic standpoint, to support the national defense strategy." The paper concluded that U.S. national security interests in the oceans have been protected even though the U.S. is not party to UNCLOS:

> U.S. security interests in the oceans have been adequately protected to date by current U.S. ocean policy and implementing strategy. U.S. reliance on arguments that customary international law, as articulated in the non-deep seabed mining provisions of the 1982 Law of the Sea Convention, and as supplemented by diplomatic protests and assertion of rights under the Freedom of Navigation Program, have served so far to preserve fundamental freedoms of navigation and overflight with acceptable risk, cost and effort.

Almost 20 years later, there is no evidence that suggests a change in circumstances such that U.S. accession to UNCLOS has become essential to the successful execution of the U.S. Navy's global mission.

Throughout its history, the United States has successfully protected its maritime interests despite not being an UNCLOS member. The reason is simple; Enjoyment of the convention's navigational provisions is not restricted to UNCLOS members. Those provisions represent widely accepted customary international law, some of which has been recognized as such for centuries. UNCLOS members and nonmembers alike are bound by the convention's navigational provisions.

The body of international law known as the "law of the sea" was not invented in 1982 when UNCLOS was adopted, but rather "has its origins in the customary practice of nations spanning several centuries." It developed as customary international law, which is "that body of rules that nations consider binding in their relations with one another. It derives from the practice of nations in the international arena and from their international agreements." Although not a party to UNCLOS, the United States is bound by and acts in accordance with the customary international law of the sea and considers the UNCLOS navigational provisions as reflecting international law.

Most of the UNCLOS navigational provisions have long been recognized as customary international law. The convention's articles on navigation on the high seas (Articles 86–115, generally) and passage through territorial waters (Articles 2–32, generally) were copied almost verbatim from the Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone, both of which were adopted in 1958. The United States is party to both conventions, which are considered to be codifications of widely accepted customary international law.

Similar to other multilateral conventions, such as the Vienna Convention on Diplomatic Relations, UNCLOS is said to "have codified settled customary international law or to have 'crystallized' emerging customary international law." UNCLOS codified customary law relating to navigation on the high seas and through territorial waters and "crystallized" emerging customary law, such as the concepts of "transit passage" through international straits and "archipelagic sea-lanes passage." As summarized by Defense Department official John McNeill in 1994, UNCLOS "contains a comprehensive codification of long-recognized tenets of customary international law which reflect a fair balance of traditional ocean uses." In short, the convention's navigational provisions have attained such a status that all nations—UNCLOS members and nonmembers alike—are expected to adhere to them.

One way to determine the extent to which UNCLOS's navigational provisions have achieved the status of binding international law is to study the behavior of nations. Behavior in conformity with the convention—known as "state practice"—is additional evidence that its navigational provisions reflect international law. Indications that a state is acting in conformity with international law may be found in states' "legislation, the decisions of their courts, and the statements of their official government and diplomatic representatives." A nation's inaction regarding a particular navigational provision may also be viewed as state practice because it can be deemed to be acquiescence.

The consistent practice of states—maritime states, coastal states, UNCLOS members, and nonmembers—indicates that the UNCLOS navigational provisions are almost universally

accepted law. The *Restatement of the Law, Third, of the Foreign Relations Law of the United States* notes:

> [B]y express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention.

This has long been the U.S. position. Since the Reagan Administration, the official U.S. policy has been that the UNCLOS provisions on the traditional uses of the oceans, including the provisions on navigation and overflight, confirm international law and practice. Specifically, in March 1983, President Ronald Reagan announced the U.S. oceans policy in light of his decision not to sign UNCLOS. Reagan announced that "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight" and "will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states."

Reagan's 1983 oceans policy statement confirmed what was already widely recognized: that the navigational provisions of UNCLOS generally reflect customary international law and as such must be respected by all nations.

Yet proponents of U.S. accession to UNCLOS maintain that the United States cannot fully benefit from these navigational rights unless it is a party to the convention, which "provides" and "preserves" these rights. This is simply incorrect. The United States enjoys the same navigational rights as UNCLOS parties enjoy.

At the December 1982 final plenary meeting of the Third United Nations Conference on the Law of the Sea, some nations took the opposite position, contending that any nation that chose not to join the convention would forgo all of these rights. On March 8, 1983, the United States, exercising its right to reply, expressly rejected that position:

> Some speakers discussed the legal question of the rights and duties of States which do not become party to the Convention adopted by the Conference. Some of these speakers alleged that such States must either accept the provisions of the Convention as a "package deal" or forgo all of the rights referred to in the Convention. This supposed election is without foundation or precedent in international law. It is a basic principle of law that parties may not, by agreement among themselves, impair the rights of third parties or their obligations to third parties. Neither the Conference nor the States indicating an intention to become parties to the Convention have been granted global legislative power….
>
> The United States will continue to exercise its rights and fulfil its duties in a manner consistent with international law, including those aspects of the Convention which either codify customary international law or refine and elaborate concepts which represent an accommodation of the interests of all States and form part of international law.

In sum, it is not essential or even necessary for the United States to accede to UNCLOS to benefit from the certainty and stability provided by its navigational provisions. Those provisions either codify customary international law that existed well before the convention was adopted in 1982 or "refine and elaborate" navigational rights that are now almost universally accepted as binding international law.

* * *

One prominent proponent of U.S. accession to UNCLOS recently stated that opposition to the convention was not based on "facts" or "evidence" but rather on "ideology and mythology." The facts and evidence, however, are as follows:

- The U.S. already has full jurisdiction and control over its entire continental shelf—including its "extended" continental shelf. Through presidential proclamations, acts of Congress, and bilateral treaties with neighboring countries, the United States has successfully demarcated the limits of its maritime boundaries and key areas of its ECS;
- The U.S. has clear title to all hydrocarbon resources lying under the ECS and currently enjoys the rights to any and all royalty revenue generated from the exploitation of such resources;
- The U.S. has demonstrably exercised jurisdiction and control over its ECS, as evidenced by the fact that it has been leasing blocks for development to U.S. and foreign oil exploration companies since August 2001;
- The "western gap" in the Gulf of Mexico is the only area of ECS that has been offered for development by the United States, and 20 percent of that area is currently under lease. U.S. companies such as Chevron and companies from Brazil, Denmark, France, Italy, Norway, and the United Kingdom hold active leases on the western gap ECS;
- No comprehensive study has been conducted to determine the value of the hydrocarbon resources that lie beneath the vast U.S. ECS that is likely twice the size of California;
- The U.S. Extended Continental Shelf Task Force estimates that the U.S. ECS resources "may be worth many billions if not trillions of dollars";
- If the U.S. accedes to UNCLOS it will be making an open-ended commitment to transfer an incalculable sum of royalty revenue from the U.S. Treasury to the International Seabed Authority for redistribution to developing and landlocked nations;
- The policy and law of the United States, both domestically (i.e. the Deep Seabed Hard Mineral Resources Act) and internationally, is that U.S. citizens and corporations have the right to explore and exploit the deep seabed regardless of whether or not the United States is a party to UNCLOS;
- Acceding to UNCLOS would expose the United States to international lawsuits, including baseless environmental cases and suits based on alleged U.S. contributions to global climate change;
- Certain UNCLOS states parties, environmental activists, and international legal academics are actively exploring the potential of using international litigation against the United States in an UNCLOS tribunal to advance their climate change agenda;
- An adverse judgment in a climate change lawsuit initiated under UNCLOS would be final, not subject to appeal, and enforceable in the United States. Such a judgment would impose

massive regulatory burdens on U.S. companies, which would pass the costs on to American consumers;

- For more than 200 years before UNCLOS was adopted in 1982 and for 30 years since then, the U.S. Navy has successfully protected U.S. maritime interests regardless of the fact that the U.S. has not joined the convention;
- The U.S. Navy has never been successfully denied access to any international strait or archipelagic water and regularly exercises its freedom of navigation and overflight rights on the high seas and "innocent passage" through territorial waters;
- The U.S. Navy's *Commander's Handbook on the Law of Naval Operations* is the preeminent operational manual regarding navigational rights and is considered the gold standard by maritime nations worldwide, many of which have adopted it for use by their own navies; and,
- The United States is a member of the International Maritime Organization and a founding member of the Arctic Council—organizations in which it actually means something to have a "seat at the table."

All of these facts collectively represent compelling evidence that the United States need not accede to UNCLOS in order to advance its maritime and national security interests. Indeed, the evidence suggests that there are real costs involved in accession that outweigh the supposed benefits, which are dubious and insubstantial.

UNCLOS is a controversial and fatally flawed treaty. Accession to the convention would result in a dangerous loss of American sovereignty. It would require the U.S. Treasury to transfer billions of dollars to an unaccountable international organization in Jamaica, which in turn is empowered to redistribute those American dollars to countries with interests that are inimical to the United States. The convention's mandatory dispute mechanisms will result ultimately in troublesome and costly lawsuits and adverse judgments if the United States is deemed to have "violated" the convention—most likely when the United States has acted in its own best interests.

The U.S. Navy's support for the navigational rights enshrined in UNCLOS is far outweighed by the convention's non-navigational provisions. The practices of the Navy and the navies of other major maritime powers created the very customary international law upon which the navigational provisions of UNCLOS are based. The Navy enjoys those same navigational rights and freedoms despite non-accession to the treaty. The Navy's insistence that a failure to join UNCLOS will hinder its ability to conduct its global mission successfully is belied by the facts and demonstrably disproved by history.

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