

Department of Defense
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Before the Senate Committee on Foreign Relations
On the U.N. Convention on the Law of the Sea
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Chairman Lugar, Senator Biden, Members of the Committee, good morning, and thank you for the opportunity to testify today in support of the United Nations Convention on the Law of the Sea.

Let me begin by stating that the Administration strongly supports accession to the Law of the Sea Convention. The Convention codifies customary international law and practices that are critical to the United States Armed Forces, and provides additional benefits to the United States.

The Administration has, however, identified serious issues raised by U.S. accession to the Convention that we believe can be resolved with the Senate's assistance.

I would like to address first the benefits to the United States that will be derived from accession to the Convention, and then follow with a discussion of the Administration's concerns and proposed remedies.

The Administration supports accession to the Convention because the Convention supports navigational rights critical to military operations. These rights are essential to the formulation and implementation of our national security strategy. Although much of what is contained in the Convention is customary international law, accession to the Convention ensures that the United States has the benefit of the stability that comes with the codification of customary international law. Indeed, an essential element of executing our national security strategy is the assumption that key sea and air lines of communication will remain open as a matter of international legal right—not contingent upon approval by coastal and island nations along the route or in the area of operations.

Examples of rights that exist under the Convention that are critical to military operations include:

- Freedom of navigation and overflight on the high seas and within the 200 NM Exclusive Economic Zone (EEZ);

- Freedom of navigation and overflight through key international straits (such as Gibraltar, Hormuz, Malacca) and archipelagoes (such as Indonesia and the Philippines);
- Limitation of territorial seas to 12 NM and limitations on the jurisdiction of coastal states within their EEZs and beyond;
- Innocent passage through foreign territorial seas without notice or permission, regardless of armament or means of propulsion; and
- Freedom to conduct military surveys seaward of foreign territorial seas without the permission of coastal states.

In short, the Law of the Sea Convention codifies the rights of the U.S. Armed Forces to navigate freely on, under, and over the seas.

While the United States currently enjoys the benefits of the Convention as reflected in customary international law, accession provides the United States with additional benefits.

First, U.S. accession to the Convention will enhance our ability to influence the future direction of the law in international maritime forums, such as the International Maritime Organization, and the various entities established under the Convention.

Second, accession will provide the United States with another venue to try to prevent the erosion of navigational rights and freedoms critical to the U.S. Armed Forces. We can do this by seeking to prevent adverse amendments to the Convention, and by using the annual meeting of States Parties to address misunderstandings or misinterpretations of the Convention. These treaty-based tools complement longstanding U.S. efforts to challenge, among other things, excessive maritime claims and illegal constraints on our navigational freedoms, through our diplomatic initiatives and the freedom of navigation program.

Third, accession will not only provide the United States with additional mechanisms through which it can strive to stop the erosion of freedoms critical to the U.S. Armed Forces, but it will also provide the United States another forum to advance U.S. interests. For example, we believe that as a party to the Law of the Sea Convention, the United States will have another avenue through which to achieve international consensus proscribing the maritime trafficking of weapons of mass destruction, their delivery systems, and related materials to and from states of concern and terrorists. To be sure, we will avail ourselves of every available option to halt the proliferation of weapons of mass destruction on the high seas.

Finally, accession will allow the United States to participate in the bodies established by the Convention. Specifically, it will permit the United States to participate in the Commission on the Limits of the Continental Shelf, the International Seabed Authority,

and the International Tribunal for the Law of the Sea. These bodies could play an important role in influencing future law of the sea developments.

September 11 demonstrated how rapidly the world can change. As a result, the Administration believes it is important to ensure that, as time passes, the Convention continues to provide the United States with the flexibility needed to meet national security challenges that may arise. To achieve that objective, the Administration considered a number of options.

To begin, once in force, the Administration will conduct biennial reviews of the treaty's implementation, including the identification of any needed changes in the Convention's implementation or in the Convention itself. Such reviews will help the United States assess whether the Convention continues to serve U.S. interests. As part of these reviews, the Administration will seek to identify any changes in the treaty or its implementation that may be required to adapt the treaty to changes in the global security situation. In addition, these biennial reviews will be coupled with a more comprehensive review after ten years. The results of these reviews will be shared with the Senate.

Reviews of this kind are not the only option for ensuring the Convention continues to serve U.S. interests. Another option that we considered is that of a sunset provision, that is, limiting the length of time that the United States is a party to the Convention, which has disadvantages as well as advantages. And, needless to say, the United States could, of course, withdraw from the Convention if U.S. interests are ever seriously threatened.

In any case, the goal is to make certain that the Convention continues to meet our national security requirements, protects our strategic flexibility, and advances broader U.S. interests in a world that is constantly changing.

To this end, in the past year the Administration undertook a review of the Law of the Sea Convention to ensure that it continues to meet U.S. needs in the current national security environment. This dynamic environment also requires that the Convention allow for the flexibility we need to meet U.S. national security objectives and interests over the long term.

Specifically, the Administration sought to ensure that, given this new strategic environment, the Law of the Sea Convention provides the United States with sufficient operational freedom and flexibility to pursue effectively U.S. goals in the global war on terrorism and our efforts in concert with other nations to halt the proliferation of weapons of mass destruction. That review did not reveal particular problems affecting current U.S. operations.

Our review also focused on the Convention's dispute settlement provisions, which permit a Party to exclude from dispute settlement the category of "disputes concerning

military activities." This exception is of vital importance to the United States. That said, our review, did identify one area of serious concern for U.S. military activities.

As you know, the Convention establishes a mandatory dispute resolution scheme. Pursuant to Part XV of the Convention, an arbitral tribunal may be constituted to settle disputes that arise with respect to the interpretation and application of the Convention. The Convention authorizes State Parties to the Convention, through a declaration, to opt out of dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring states, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the U.N. Security Council is exercising the functions assigned to it under the U.N. Charter. Through the military activities exception, the Convention recognizes that such activities involve vital national security interests that are not an appropriate matter for mandatory dispute resolution.

The military activities exception is of obvious importance to the activities of the U.S. Armed Forces. As a result, we have examined this issue thoroughly to make certain that a tribunal cannot question whether U.S. activities are indeed "military" for purposes of that exception. Allow me to offer an example to illustrate the Administration's concern. It is possible to imagine a scenario wherein another State Party calls upon a tribunal to decide whether or not our military surveys in that country's EEZ or reconnaissance aircraft flying in the airspace above that country's EEZ—both of which are military activities of paramount importance—are consistent with the Convention.

In this scenario, if a tribunal were permitted to interfere with such military activities, this would have a major impact on our military operations and U.S. national security.

In this light, the Administration closely examined the Convention, its negotiating history, and the practices of the tribunals constituted under the Convention. Based on this examination, the Administration believes that it is clear that whether an activity is "military" is for each State Party to determine for itself. Indeed, having the ability to determine what is a "military activity" involves vital national security interests that are critical to our ability to defend the Nation, protect our forces overseas, safeguard our interests abroad, and assist our friends and allies in times of need.

The Administration thus recommends that the United States submit a declaration electing to exclude all three of these categories of disputes from binding dispute settlement. With respect to the particular category of disputes concerning military activities, the Administration further recommends that the U.S. declaration make clear that its consent to accession to the Convention is conditioned upon the understanding that each Party has the exclusive right to determine which of its activities are "military activities" and that such determinations are not subject to review. We will provide the Committee with language on this point.

Additionally, I would like to note that the Convention includes certain simplified procedures for the adoption and the entry into force of amendments and implementation and enforcement measures that raise potential constitutional issues. We intend to sort these and other legal and policy issues out with the Senate, confident that they can be satisfactorily resolved.

Mr. Chairman, let me conclude where I began by stating the Administration's strong support for U.S. accession to the Law of the Sea Convention. The Convention codifies customary international law that is critical to the United States Armed Forces; accession will provide the United States with additional benefits and ways to safeguard the rights the Convention codifies.

I would note that, in addition to the declarations and provisions cited above, there are other declarations and issues that the Administration is considering for inclusion in the Resolution of Ratification. That said, while the Administration has identified problems with the Convention, we believe those issues can be resolved by working in close partnership with the Senate.

In closing, the Administration is confident that U.S. accession to the Law of the Sea Convention will benefit the United States, and that accession with the right declarations supports the ability of the U.S. Armed Forces to protect and advance our national security interests.

Mr. Chairman, I would like to thank you again for the opportunity to appear before the Committee this morning. The Administration looks forward to working with the Committee to secure the Senate's advice and consent. I am happy to respond to any questions you or other members of the committee may have, Mr. Chairman.

Thank you.
