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Before the
Senate Committee on Foreign Relations
October 21, 2003

I. INTRODUCTION AND BACKGROUND

Mr. Chairman and Members of the Committee, thank you for the opportunity to present our views on the United Nations Convention on the Law of the Sea (UNCLOS or Convention). My name is Roger Rufe; I am the President of The Ocean Conservancy.

A. The Ocean Conservancy

The Ocean Conservancy (TOC) strives to be the world's foremost advocate for the oceans. Through science-based advocacy, research, and public education, we inform, inspire, and empower people to speak and act for the oceans. TOC is the largest and oldest nonprofit conservation organization dedicated solely to protecting the marine environment. Headquartered in Washington, D.C., TOC has offices throughout the United States, including offices in Alaska, Maine, California, and the Virgin Islands.

TOC has a long history as a leading proponent of numerous international initiatives to conserve the world's most biologically vulnerable marine animals – specifically marine mammals, sea turtles, sharks and their close relatives, skates and rays. TOC serves on the Species Survival Commission of the IUCN and has led efforts to extend protections for threatened marine species. We also helped secure listing of basking and whale sharks under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and passage of the International Dolphin Conservation Act and its sister treaty, The Antiqua Convention to the Inter-American Tropical Tuna Convention. To reduce litter on beaches, each year TOC sponsors an International Coastal Cleanup, assisted by hundreds of thousands of volunteers from over 100 participating countries.

We have also been a major proponent of marine protected areas, both in the United States and abroad. Since the 1980s, The Ocean Conservancy has been one of the few U.S. organizations to work collaboratively with Cuban universities and researchers to inventory and conserve marine biodiversity in Cuba. More recently, this work has expanded to include an exciting and promising new marine protected area project in Colombia. As all waters are connected, our work on marine pollution ranges from urging the strongest Clean Water Act protections for all waters in the United States to efforts to restore and protect

sensitive coral reef habitats from marine pollution produced by ocean-going ships.

TOC collaborated closely with our colleagues at the Center for International Law and Oceana in developing this testimony, and we have prepared a joint statement in support of accession that is appended to this testimony. My testimony on behalf of TOC is organized as follows: first, I will explain why we support U.S. accession to the United Nations Convention on the Law of the Sea. Second, I will highlight several issues that require the Senate's attention and development of interpretive language so that potentially ambiguous terms of the Convention are not misconstrued as limiting the United States' authority to protect its marine environment. In the third part of my testimony, I will highlight a few environmental issues that warrant further attention by the United States after our accession to ensure that implementation of, and future changes to, the Convention fully advance environmental goals and protect our interests in healthy, vibrant oceans.

B. UNCLOS

In his opening statement for the October 14th hearing, Chairman Lugar appropriately recognized the Law of the Sea as the international law for the world's oceans. The Chairman also took the opportunity to recognize the contributions of a former Chair of the Committee, Senator Pell, to this important issue. Senator Pell characterized the Law of the Sea as a "constitution" for the oceans,[1] a characterization that has been widely echoed by others. As the committee has heard from many witnesses, UNCLOS is an important and progressive international agreement that largely reflects values that our nation has worked to implement over the years. The Convention imposes basic obligations for all states to protect and preserve the marine environment and to conserve marine living species. These commitments are testaments to enlightened diplomacy to manage shared resources. Perhaps even more importantly, the Convention calls for the further development of global and regional rules on these subjects, and provides a framework of principles and objectives for that development. Both Chairman Lugar and Senator Pell's descriptions are entirely right: the Convention is both international law and a constitution for the world's oceans, to be used to guide and promote positive international and national decision-making over time.

The Third United Nations Conference on the Law of the Sea was convened in late 1973. The Conference continued until its final meeting in late 1982, at which time the final act was signed and the Convention was opened for signature. As time went on, it became clear that developed states were not willing to agree to Part XI of the Convention concerning deep seabed portions and mining of potentially valuable metals. Thus, modifications to that provision were negotiated, and an amending agreement was finalized in July of 1994. The U.S.

1 141 Cong. Rec. S2, 266-67 (daily ed. Feb 7, 1995)(statement of Senator Pell).

signed the Agreement in 1994 and recognizes the Convention as general international law, but has not ratified it at this time. UNCLOS entered into force in November of 1994 with the requisite sixty ratifications.

The Convention establishes law over a vast array of issues affecting the world's oceans, ranging from maritime boundary delimitation, to fisheries management, to the rights and duties of ships with regard to navigation, to ownership of marine resources. The United States' interests in becoming a signatory to the Convention are similarly broad and diverse, and the Committee has heard from many witnesses representing these interests, all in support of accession. Our testimony will be limited to a brief commentary on the environmental benefits and implications of U.S. accession at this time.

II. TOC Statement in Support of U.S. Accession to UNCLOS

There is general agreement in the environmental community that the Convention serves the environmental interests of the United States in providing a stable legal framework,[2] and as the foundation of public order in the oceans.[3] The primary environmental reason for encouraging U.S. accession to UNCLOS at this time is to give the United States the credibility and full rights accorded to a signatory, ensuring that the United States is in the best position to negotiate and lead future applications of this constitution for the oceans.

The Committee has heard from many witnesses that our failure to ratify this global treaty has hurt us to some extent economically, diplomatically and environmentally. These witnesses have rightly noted that our failure to ratify the Convention has hurt not only our international credibility, but also our ability to effect future changes in the terms and agreements upon which international law is based. The United States is a world leader in marine conservation, and our accession to UNCLOS will greatly help us advance international standards and practices.

While the United States is a world superpower, we must fully engage our fellow nations and secure the cooperation of the international community if we are to be successful in protecting our oceans and their resources. For example, currently the United States adheres to the fisheries conservation measures in the Law of the Sea and subsequent Straddling Stocks Agreement, and we treat them as customary international law. However, unless we become a signatory to the

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2 In 1998 Clifton Curtis prepared a statement of accession endorsed by many environmental organizations, including The Ocean Conservancy (then the Center for Marine Conservation). This testimony draws from that statement in its discussion of dispute settlement procedures, the precautionary principle and fisheries conservation measures. *See also, The United Nations Convention on the Law of the Sea and the Marine Environment: A Non Governmental Perspective*, Clifton E. Curtis, GEO. INT'L ENVTL. L. REV., 7: 739-743 (1995).

3 *See* Statement by Robert Hirshon, President, the American Bar Association, to the Commission on Ocean Policy, (November 13, 2001), available at http://oceancommission.gov/meetings/nov13_14_01/hirshon_testimony.pdf.

treaty, we are without recourse to enforce this Agreement's terms with regard to other states which do not. We are also unable to fully represent U.S. interests in negotiating future changes or terms to both of these agreements. Both the Pew and the Federal Oceans Commission have recently recommended accession for this purpose: to secure a positive environmental framework for U.S. ocean management. In sum, it is impossible to be a world leader relative to the health of the oceans without full participation in the international rule of law that applies to them.

Therefore, TOC urges accession at this time primarily to enable the United States to be a full participant and negotiator in the future development of the terms of the Convention. However, recognizing some of the environmental implications of our accession upon U.S. regulatory authority, we urge the Senate to include several interpretive statements as part of the record in giving its advice and consent to the President, and to be included in our accession instrument. These interpretive statements must clarify how some UNCLOS provisions will be implemented by the United States, so that our full authority to protect our marine environment and resources will be preserved and exercised effectively in the future. Part III of this testimony will address several areas requiring interpretive language to be developed by the Senate with its advice and consent.

III. Issues Requiring Interpretive Statements

UNCLOS is a self-executing treaty, meaning the United States does not need to pass additional national legislation to implement its terms. By acceding to the treaty, the United States indicates its intent to be bound by the Convention. The broad scope and general nature of UNCLOS presents significant interpretational challenges that must be fully addressed by the United States in its accession. We are concerned that because of some potential ambiguities between the Convention's terms and the United States' own statutory framework, an argument could be made that the United States is precluded from taking unilateral action where necessary to protect its marine ecosystems through the adoption of protective national legislation.

Before I summarize those provisions, let me provide a specific example. In the Department of Justice's 1998 prosecution of Royal Caribbean Cruise Lines (RCCL), the company attempted to use the Convention as a shield to prosecution.[4] The Coast Guard had observed a cruise ship dumping oil in the waters off the Bahamas on its way to Miami. RCCL claimed it was immune from criminal prosecution in the United States under UNCLOS. Although the court denied RCCL's motion to dismiss on those grounds, this case illustrates the potential conflict with the Convention, even before ratification, and the willingness of industry to employ its terms to attempt to avoid U.S. health, safety and

4 *U.S. v. Royal Caribbean Cruises,* LTD, 11 F. Supp.2d 1358 (S.D. Florida, 1998).

environmental laws. [5] The case also demonstrates the potential for further confusion absent interpretation by the United States.

Therefore, it is crucial that the United States indicate its intent to implement UNCLOS's provisions in a manner that is consistent with existing U.S. statutory law and preserves our ability to act to protect and conserve the marine environment. I will now turn to the main areas of potential conflict or confusion between UNCLOS and U.S. provisions on environmental matters. In each case, we recommend that the Senate reconcile these conflicts through the inclusion of interpretive language, to be delivered with the United States' instrument of accession. We recognize that there may be other areas of potential ambiguity that warrant Senate interpretation in its advice and consent. We would welcome the opportunity to work with the Committee to address these issues through interpretive language.

A. Pollution From Vessels

The Law of the Sea is particularly vague with respect to the rights of a coastal state to protect itself against pollution from ships.

On one hand, the Convention grants coastal states the authority to broadly regulate for the purposes of environmental protection. Within the Exclusive Economic Zone (EEZ), Article 56 grants coastal states "sovereign rights" for the purpose of (among other things) "conserving and managing the natural resources," as well as jurisdiction over "the protection and preservation of the marine environment." On the other hand, Article 211, which generally discusses the regulation of pollution from vessels, potentially limits this broad authority. Article 211 permits a coastal state to establish particular requirements for the prevention, reduction and control of pollution of the marine environment "as a condition for the entry of foreign vessels into their ports," and where "conforming to and giving effect to generally accepted international rules and standards established through the competent international organizations…" Thus, potentially a state may not regulate pollution discharges from vessels in the EEZ unless it is doing so either as a condition of port entry or to give effect to international standards.

Relative to the territorial sea, there is additional ambiguity between the balance of the authority vested in the coastal state, and the rights of ships passing in innocent passage. Article 21 grants coastal states the authority to adopt laws and regulations for several purposes, including the conservation of the living

5 *See* William A. Goldberg, *Cruise Ships, Pollution and International Law: The United States Takes on Royal Caribbean Cruise Lines,* 19 WIS. INT'L L.J. 71 (2000), calling into question the continuing ability of international law to control pollution in the world's waterways. *See also* Shaun Gehan, *United States v. Royal Caribbean Cruises, Ltd: Use of Federal "False Statements Act" to Extend Jurisdiction over Polluting Incidents into Territorial Seas of Foreign States*, 7 OCEAN & COASTAL L.J. 167 (2001), concluding that similar applications of domestic law are entirely consistent with the goals of the applicable international treaties. *Id*., at 168.

resources of the sea, the prevention of infringement of the fisheries laws and regulations of the coastal state, the preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof, and the prevention of infringement of the customs, fiscal immigration or sanitary laws and regulations of the coastal state. However, all of these are subject to limitations in Article 21.2, preventing a state from imposing restrictions on design, construction, manning, or equipment upon a foreign ship in innocent passage unless the state is doing so to give effect to "generally accepted international rules or standards." Unfortunately, no clear view has been articulated either at the international level or within the United States as to what does or should constitute a "generally accepted international standard" under these articles.

Without clarification by the United States, these provisions could be interpreted to preclude the U.S. from adopting legislation – even in the absence of any international dialogue on a particular subject – as may be necessary to protect its marine ecosystems. It could potentially limit the U.S. from taking necessary steps to protect the territorial sea except to give effect to those general rules or standards.

Although generally the United States exercises jurisdiction in accordance with UNCLOS provisions, the Oil Pollution Act of 1990 (OPA) is one example of the U.S. exercising extraterritorial jurisdiction and exceeding the standards in UNCLOS.[6] OPA requires all ships operating in U.S. waters to be constructed with a double-hulled design.[7] Additionally foreign vessels lightering in the U.S. EEZ, including "those not intending to enter United States waters," must maintain certificates of financial responsibility if some of the oil is destined for the United States. OPA also imposes a series of additional requirements for vessels transferring oil or hazardous materials in the marine environment. Passed in response to the devastating Exxon Valdez oil spill off the coast of Prince William Sound in Alaska, OPA is a clear example of the need to protect the United States' ability to act in the absence of adequately protective international standards.

The Senate must therefore ensure in its advice and consent that the provisions in UNCLOS do not overly limit the current authority of the United States to regulate pollution from vessels by clarifying the phrase "generally accepted international standards." The Senate should also specify that the U.S. believes it is free to act where necessary to protect its waters where the regulated activity is not addressed by a specific international rule or standard to prevent, reduce or control its pollution.

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6 See Christopher P. Mooradian, Protecting Sovereign Rights: The Case for Increased Coastal State Jurisdiction over Vessel Pollution in the Exclusive Economic Zone, 82 BOSTON U. L. REV. 767, 801, 802 (2002).
7 46 U.S.C. 3703(a)(c)(3).

B. Treatment of Invasive Species

The introduction of invasive species via ballast water is a continuing and growing challenge for the protection of U.S. resources, both inland and throughout the EEZ. The potential ecological damage from invasive species is enormous. According to the International Maritime Organization, invasive species are one of the four greatest threats to the health of the world's oceans, along with other pollution, overexploitation of marine resources, and destruction of marine habitat. The discharge of ballast water from ships is the number one source of marine invasive species in the United States.[8]

UNCLOS, however, fails to clearly address the problem of invasive species. If the treaty were interpreted such that invasive species were intended to be covered by the broad definition of "pollution" as defined in Article 1.1.3, then coastal states would be potentially constrained in their ability to prevent the spread of these invasive species from ships operating outside of the territorial sea. As the IMO has failed to prescribe international standards for the treatment of ballast water, more stringent measures by the U.S. could be interpreted as being "beyond generally accepted international rules or standards."[9] This would leave the United States reliant upon the remaining authority granted in 211 to require treatment and practices as a condition of entry into port.

We urge instead the better interpretation that alien species are not intended to be addressed by the definition of "pollution" by UNCLOS. This interpretation is supported by the fact that invasive species are addressed by Article 196, and not in Article 194, which addresses the regulation of various types of marine pollution generally. Moreover Article 196 distinguishes invasive species from pollution within the provision. We recommend that the Senate include an interpretive statement on this issue as part of its advice and consent to be included with the instrument of accession specifying that the United States does not view invasive species as "pollution" for purposes of UNCLOS.

C. Conditions of Port State Entry

UNCLOS allows coastal states fairly wide authority to prescribe conditions of entry upon foreign vessels. This constitutes perhaps the most obvious mechanism for addressing illegal or problematic shipping discharges of pollution. Yet the U.S. should ensure its right to establish more stringent or targeted measures as necessary to protect and conserve the marine environment. For example, since 1996 the U.S. has required ships entering the Great Lakes to exchange ballast water from beyond the Exclusive Economic Zone as a condition

8 See, e.g., Carlton and Geller, "*Ecological Roulette: The Global Transport and Invasion of Nonindigenous Marine Organisms,*" SCIENCE (1993); Marine Board of the National Research Council, *Stemming the Tide*, National Academy Press, Washington D.C. (1996).
9 UNCLOS Art. 211.5

of entering into the Great Lakes system to minimize the spread of invasive species.[10]

We urge the Senate to include an interpretive statement on this issue as part of its advice and consent, to be included with the instrument of accession. This statement should clarify that the U.S. interprets Articles 25.2 and 211.3 to recognize longstanding rights of states to impose conditions on the entry of vessels into ports or internal waters. Conditions on port of entry include conditions on operation and design of a vessel as it proceeds to a given U.S. port of call, extending seaward as necessary.

D. Enforcement of Non-Monetary Penalties in the Territorial Sea

Article 230.2 of UNCLOS authorizes only monetary penalties for violations committed in the territorial sea, except in the case of "a wilful and serious act of pollution." U.S. law (e.g. the Clean Water Act), currently authorizes criminal penalties as well as broad civil penalties for illegal discharges in the territorial sea.

Two potential ambiguities are created by reconciling the UNCLOS provisions with U.S. law. The first is whether the monetary penalties authorized by UNCLOS are consistent with the U.S. concept of "civil penalties" so as to potentially allow for injunctive relief, administrative orders or restitution. And second, in determining where criminal penalties may be available in the territorial sea, to what extent is "wilful and serious" consistent with the U.S. concept of mens rea; does it mean knowing, negligent or grossly negligent?

So that this provision is not construed in a manner inconsistent with U.S. interests, the Senate should make clear in its advice and consent that the determination of "wilful and serious" will be made by the responsible U.S. agency in accordance with U.S. law; that the "wilful" element is satisfied if the defendant was aware of the conduct leading to the "act of pollution," regardless of whether the defendant intended the illegal discharge or the act of pollution, and that the concept of monetary penalties means the full array of civil remedies.

E. Environmental Protection in the Contiguous Zone

Article 33.1 of UNCLOS provides that in the contiguous zone, a coastal state may exercise the control necessary to "(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea…"

10 National Invasive Species Act of 1996, P.L. 105-332, 16 U.S.C. 4711 (1996). Both the Senate and the House are currently considering legislation to substantially strengthen this program to require ballast water treatment for ships coming into all U.S. ports (S. 525 and H.R. 1080).

There is a need to clarify the term "sanitary laws" to ensure these include environmental measures to protect human or ecosystem health within the territorial sea. These would include, for example, laws to prevent the contamination of fish or shellfish consumed by people, waters used for recreation, and the Clean Air Act standards which protect human health from the impairment of air quality from vessel emissions. International agreements negotiated in the time since UNCLOS have adopted a similarly broad definition of "sanitary." [11]

We urge the Senate to include an interpretive statement on this issue as part of its advice and consent, to be included with the instrument of accession. The statement must clarify that "sanitary laws" under Article 33.1 include all laws and regulations that provide direct or indirect protection to human health, welfare or the marine environment.

F. Regulation of Industrial and Other Polluting Operations At Sea

The U.S. currently regulates certain industrial facilities such as seafood processing vessels, aquaculture facility discharges, and offshore oil and gas operations under the permitting requirements of Sections 402 and 403 of the Clean Water Act. The U.S. also regulates certain cruise ship operations in the waters around Alaska. Additional measures will likely be necessary to address environmental issues arising from other industrial activities on vessels.

UNCLOS, if interpreted too narrowly, could constrain the United States' ability to adopt and enforce these important measures. As noted earlier, Article 21.2 imposes limits on laws and regulations relating to "innocent passage." Article 211 also raises similar issues. We urge the Senate to include an interpretive statement on this issue as part of its advice and consent, to be included with the instrument of accession. The statement must clarify that these vessels are not engaging in or innocent passage as defined in Articles 18 and 19, and that the U.S. is free to regulate vessels operating in a capacity other than innocent passage as necessary to protect against polluting discharges from these vessels.

G. Defining Clear Grounds for Inspection

Article 226 of UNCLOS limits port state inspections to "required documents" except in certain cases, such as where there are "…. [c]lear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents. This would make many enforcement cases difficult, such as those brought by the U.S. to determine whether a vessel is treated with a toxic antifouling agent such as tributyltin, or to determine whether a vessel is in compliance with a ballast water management performance standard.

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11 *E.g*. Article XX(b), General Agreement on Tariffs and Trade, (1994): Agreement on the Application of Sanitary and Phytosanitary Measures, World Trade Organization.

We urge the Senate to include in the record an interpretive statement which establishes that “clear grounds” includes at least “probable cause” and “reasonable suspicion,” and that it is not intended to preclude the right or ability of a port state to take appropriate samples or tests.

H. Dispute Settlement Provisions as a Potential Bar to Protective National Action

UNCLOS is one of the few international environmental agreements requiring binding settlement for many environmental and conservation disputes. States may choose among four options for binding settlement: the International Court of Justice, the Tribunal for the Law of the Sea, an arbitral tribunal, or a special expert arbitral tribunal constituted to hear a dispute over navigation, fisheries, marine environmental protection, or marine scientific research.

There is some concern that the Convention's dispute settlement provisions could be used “politically” to try to prevent a state from enforcing domestic laws that authorize or mandate trade measures. With regard to trade-related challenges, these kinds of laws often are placed into one of two categories, i.e. U.S. laws that apply unilateral standards to foreign actions (e.g., MMPA, Sea Turtle amendments), and U.S. laws addressed to nations that are diminishing the effectiveness of an international agreement (e.g., Pelly Amendments).

The U.S. has taken the position, and TOC agrees, that UNCLOS was not intended to cover trade measures. It imposes no obligations on states relating to such measures, and the history of its negotiation makes it clear that conservation measures were not intended to encompass trade measures. There is therefore no substantive basis in the Convention for challenges to trade measures based on national standards.

We remain concerned, however, that other nations may attempt to challenge trade measures or sanctions under the Convention's dispute settlement provisions in order to try to discredit those standards and gain an advantage in the World Trade Organization, where trade measures based on the standards could be challenged. Where multilateral processes fail to resolve pressing environmental problems, national action remains a necessary and effective option. The U.S. may both serve to protect against the problem, and to encourage positive international action and raise awareness of the problem.[12]

12 For example, in 1991, TOC and other groups petitioned the United States to certify the Government of Japan under the Pelly Amendments. The certification was for "undermining the effectiveness of international programs for the conservation of sea turtles" due to Japan's annual import of 20,000 kg of hawksbill sea turtle shell, and thousands of skins of the olive ridley turtle from Mexico. Mexico shortly thereafter ended the olive ridley harvest in order to avoid trade sanctions, and Japan agreed to phase out the trade by the end of 1992. The threat of Pelly Amendment sanctions, while never imposed, in conjunction with international pressure, played a

Therefore, TOC urges the Senate to include interpretive language clarifying that there is no substantive basis in the Convention for those kinds of challenges, and that the Convention does not affect U.S. authority to utilize these measures.

IV. Issues Requiring Leadership from the U.S. in the Implementation and the Future of UNCLOS

The vision of UNCLOS as a constitution was introduced at the beginning of this testimony, and it must be revisited here. As a constitution, UNCLOS is not meant to be an inflexible, stagnant document. Rather, its provisions must be interpreted over time, and its processes applied to our expanding environmental awareness about our world's oceans and the resources within them. In fact, subsequent multilateral environmental agreements have both reaffirmed and expanded upon UNCLOS's regime for the marine environment.[13]

The United States will be in a better position to address the existing deficiencies or limitations in the rule of law for the oceans if it becomes a signatory to UNCLOS. In its 1998 joint statement, which provides the basis for my next remarks, the environmental community urged the United States to embrace its leadership role in the world by ensuring that UNCLOS serves as a framework for securing more protective regimes for the conservation of marine ecosystems and wildlife. This role must continue beyond accession to participation and negotiation for improved international environmental practices over time. I would like to take this opportunity to briefly mention a few of these emerging and important issues.

A. <u>Precautionary approach</u>

The U.S. Commission on Ocean Policy and the Pew Oceans Commission on which I served have both confirmed that our oceans are in crisis.[14] While we wait for the final recommendations of the Federal Oceans Commission, the Pew Oceans Commission recognized that to address the problems confronting our oceans, a new ethic is needed, one which, in the face of uncertainty, urges

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crucial role in preventing the extinction of the hawksbill sea turtles and in ending the illegal harvest of olive ridley turtles in Mexico.

13 At the time of the first meeting of UNCLOS and the Stockholm Convention in 1972, there were relatively few international agreements concerning the environment. Since 1972, almost every county has adopted at least one piece of environmental legislation, and there are more than 870 legal instruments that contain at least some provisions focusing on the environment. *See* Edith Brown Weiss, *Introductory Note to United Nations Conference on Environment and Development*, 31 I.L.M.814 (1992); see also Jonathan L. Hafetz, *Fostering Protection of the Marine Environment and Economic Development: Article 121(3) and the Third Law of the Sea Convention*, 15 AM. UNIV. I.L.R. 583, 592 (2000).

14 While the U.S. Commission on Ocean Policy's final findings and recommendations are not yet published, draft recommendations and findings are available on the Commission's website at <http://www.pewoceans.org>.

caution and protection. The precautionary approach today is endorsed internationally as a fundamental policy.

It is absolutely critical that such an approach is utilized for our world's oceans. Relatively little is known about our oceans and the resources they contain. Yet we are already witnessing the consequences of failing to embrace the precautionary principle in our treatment of the marine environment. Throughout history the oceans have been treated as unlimited and resilient. We have generally exploited our resources, in the oceans as on land, in absence of unanimous agreement that these resources are at risk. As a result, proof of our error is beginning to pour in. The draft report from the federal oceans commission concluded last year that our oceans are in trouble. Specifically, the trouble comes from overfishing,[15] coastal development and habitat loss,[16] runoff[17] and point source pollution[18] and climate change.[19] In a larger sense, however, the trouble comes primarily from our inability to make prudent decisions for the future in the face of uncertainty today. We have treated our oceans as an infinite resource, and now we must face the incontrovertible proof that we are devastating a finite one.

The environmental community noted in 1998 that the concept "precautionary principle" did not exist at the time UNCLOS was negotiated, and that consequently the term did not appear in the Convention. However, we urged then and TOC urges now that the United States play a leadership role in future Convention amendments to ensure the appropriate application of this principle to guide decision-making. Fortunately, the Convention, as a constitution, does establish some principles and tools that may provide a framework for future

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15 In 2001, the U.S. Government could only assure that 22 percent of fish stocks under federal management (211 of 959 stocks) were being fished sustainably (NMFS, 2002). New England cod, haddock, and yellowtail flounder reached historic lows by 1989. Atlantic halibut are commercially extinct in U.S. waters, and populations of some rockfish species have dropped to less than 10 percent of their historic levels. (MacCall and He, 2002). A recent study in *Science* reports that highly migratory species of sharks, including blue, thresher and hammerhead sharks, have declined by as much as 60-90% in the northwestern Atlantic *since 1986*.

16 More than one fourth of all the land converted from rural to suburban or urban uses since the time of European settlement of the United States occurred during the 15 year period between 1982 and 1997 (the last year for which figures are available) (NRI, 2000).

17 More than 13,000 beaches were closed or under pollution advisories in 2001 (NRDC 2002), and a recent National Academy of Sciences study estimates that the oil runoff from land-based sources is equal to an Exxon Valdez oil spill – 10.9 million gallons – every eight months (NRC 2002).

18 In the U.S., animal feeding operations produce about three times the amount of sewage produced by the human population. Despite this, only 15% of all animal feeding operations have Clean Water Act permits to operate (EPA 2002). In one week a typical 3,000 passenger cruise ship generates about 1 million gallons of graywater (water from shower, laundries and dishwashing), which is exempt from the Clean Water Act.

19 Global air temperature is expected to warm by 2.5 to 10.4 degrees F in the 21st century, affecting sea-surface temperatures and raising the global sea level by 4 to 35 inches (Intergovernmental Panel on Climate Change, 2001).

application of the precautionary approach.[20] Moreover, subsequent multilateral agreements related to UNCLOS do include use of the precautionary principle, including the Straddling Stocks Agreement.[21] We therefore believe this approach is compatible with UNCLOS and urge the United States to work to ensure that subsequent changes to UNCLOS appropriately utilize the precautionary approach.

B. Fisheries Conservation Measures

Part V of UNCLOS established the regime of the EEZ, the 200-mile area wherein coastal states have sovereign rights to explore and exploit, as well as to conserve and manage, their marine resources. The Convention recognizes the authority of the coastal state over the exploitation of living resources in its EEZ, yet qualifies this right by the overarching duty in the Convention to protect the marine environment.

UNCLOS adopts as a goal of management in Article 61(3) the Maximum Sustainable Yield, qualified by environmental and economic factors. There is some concern that harvest rates based on MSY do not take natural variability and scientific uncertainty sufficiently into account. At the time UNCLOS was negotiated, many fisheries were still expanding. As more and more fisheries become overexploited, it is clear that using MSY as a management target very often results in overfishing and depletion. Optimum fishing effort for sustainable exploitation must now be below or well below the level of effort corresponding to MSY, according to the U.N. Food and Agricultural Organization.

However, an even larger problem is in the failure of implementation to ensure accuracy in reporting, transparency and enforcement. TOC urges the United States to take a leadership role through UNCLOS and other treaties to ensure better implementation and enforcement of fish conservation measures.

In particular, UNCLOS did not resolve major issues regarding the management, exploitation and conservation of living marine resources, particularly the highly migratory species of fish and populations of fish that straddled the boundaries between EEZs or between EEZs and the high seas. The Convention's provisions related to straddling stocks and highly migratory fish stocks are extremely general.[22] The failure of governments and fishing industry to deal effectively with

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20 These principles and tools may include environmental impact assessment and monitoring requirements, caution in the introduction of new technologies and new or alien species, and the establishment of critical habitat for marine life. The definition of pollution, which includes harm to living resources and marine life, is also complimentary to precautionary approaches.

21 The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995).

22 They require nations only to "seek...to agree upon the measures necessary" for cooperation (straddling stocks) and to "cooperate ... with a view to ensuring conservation" (highly migratory species).

these species has led to widespread overfishing and conflicts between nations. Today several straddling and highly migratory fish stocks are in a state of collapse.

Recognizing UNCLOS's limitations for addressing these species, further environmental agreements have been negotiated and signed by the United States. The U.N. Fish Stocks Agreement was negotiated to address some of the deficiencies of UNCLOS by elaborating on the duties of states to manage and conserve straddling and highly migratory fish stocks and ecologically related species. The Agreement's provisions are enforceable through the Convention's dispute resolution system, thus reinforcing enforcement and compliance opportunities for state parties to the Convention. The U.N. Fish Stocks Agreement has provided the basis to revise existing regional management agreements in the central and western Pacific and in the eastern Pacific Ocean. These regional management agreements are key to undertaking further reforms in relation to such critical issues as over-capacity, overfishing and unacceptable fishing practices that have contributed so greatly to the current fish crisis.

We mention them in our testimony to note that the United States has already taken leadership in the negotiation of improvements to UNCLOS and should continue to do so in the future.[23] The majority of highly migratory fish stocks lack the precautionary, transparent management programs dictated by the Straddling Stocks Agreement while shark and ray populations have no international fishery management measures whatsoever. To halt the decline of sharks and safeguard other migratory species, the U.S. must work after accession for the further progressive development of international law.

IV. Conclusion

In conclusion, we strongly support U.S. accession to the Convention. We urge the Committee to develop interpretive language as necessary in its advice and consent to reconcile UNCLOS provisions with U.S. statutory law and to preserve the ability of the U.S. to act to protect and conserve its marine environment. We also urge the Senate to include report language encouraging the United States to fully commit to its role as a world leader in advancing environmental protections for areas where UNCLOS needs further development. It is our hope that with accession, the United States will lead by example so that we may protect, maintain and restore our magnificent ocean trust for future generations.

23 Other recent positive actions by the United States include efforts to promote a United Nations General Assembly Resolution to stop the practice of finning, the wasteful practice of slicing a shark's fins off while at sea while discarding the rest of the shark.