The Association of the Bar of the City of New York

Office of the President

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September 19, 2005

Hon. Richard G. Lugar
Chairman, U.S. Senate Committee on Foreign Relations
306 Hart Senate Office Building
Washington, D.C. 20510-1401

Hon. Joseph R Biden Jr.
Ranking Minority Member, U.S. Senate Committee on Foreign Relations
201 Russell Senate Office Building
Washington, D.C. 20510

Re: Sen. Treaty Doc. 103-39: United Nations Convention on the Law of the Sea and 1994 Agreement related to same

Dear Senators Lugar and Biden:

I write on behalf of the New York City Bar Association and its Committee on International Environmental Law and Environmental Law to urge the Senate Committee on Foreign Relations to promptly take up and report out favorably once again the above-referenced Treaties at the earliest opportunity so that they may be put before the full Senate for its advice and consent during the 109th Congress.

The Association was established in 1870, and its membership now includes over 22,000 attorneys, judges and legal scholars in the New York metropolitan area, many other states, and numerous foreign countries. The Association works to advance the rule of law and foster the informed discussion of significant legal and public policy matters of the day. Much of this work takes place through various standing Committees, including the Committee on International Environmental Law and Environmental Law.

As a maritime city, New York has the nation's third busiest international harbor, the largest fish market on the East Coast, famed ocean beaches and significant natural coastal areas. Therefore, an effective legal framework for the protection of the marine environment and regulation of international shipping is a high priority for our city and region. In addition, the terrorist attacks of September 11, 2001 underscored the fact that New York City is literally on the front lines in the effort to protect and enhance U.S. national security. While military power has its role to play in such an effort, at least as important is the

development of and resort to agreed international rules of conduct and dispute resolution mechanisms that provide an alternative to armed conflict.

It is for these reasons that we were dismayed that your good work on these Treaties-- culminating in a unanimous vote to support them on February 24, 2004 and a report to the full Senate on March 11, 2004--came to naught when the Senate leadership chose to seek additional consideration by other committees and thus refrained from putting the treaties to a full Senate vote by the end of the 108th Congress. As your Committee must therefore consider them again in the 109th Congress, we urge that this be done without delay.

As you are aware, the President has determined that U.S. accession to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS", or the Convention) and ratification of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the 1994 Agreement") is strongly in the interest of the United States. These treaties' importance to U.S. security, commerce and to the proper management of the marine environment are such that it is critical that the U.S. become a party to them, especially as UNCLOS has had the force of international law since 1994.

As the impressive roster of witnesses before your Committee have already testified, UNCLOS is critical to U.S. interests for a number of reasons. The Convention creates a legal regime to safeguard the right of innocent passage through territorial seas, international straits, archipelagic sea lanes and international waters. For example, it guarantees U.S. ships the right of innocent passage through the narrow international straits in the Persian Gulf that are vital both for the protection of Persian Gulf oil lanes and for the unimpeded transit required by the U.S. fleet during the current conflict in Iraq. Our Committee's comments below focus on the Convention's provisions concerning protection of the marine environment and the sustainable management of ocean fisheries.

Background

Traditional "freedom of the seas" doctrine limited the jurisdiction of states to a narrow belt of sea along a nation's coast – traditionally three miles wide. The remainder of the seas was to be free to all and belonging to no one. After President Truman in 1945 unilaterally extended U.S. jurisdiction over all natural resources on the U.S. continental shelf, other nations followed suit, leading to conflicting claims and sovereignty disputes. Nations such as Saudi Arabia in certain strategic areas asserted claims to a 12-mile wide territorial sea rather than the traditional three-mile limit; by 1973 sixty-six nations claimed the 12-mile limit, while eight states claimed a limit of 200 nautical miles. The U.S. and its allies, noting that a 12-mile limit would effectively put under national jurisdiction over 100 straits used for international navigation, insisted on the traditional three-mile limit.

Successive U.S. administrations recognized the need for a comprehensive legal framework for the sea that takes into account economic and other interests beyond this narrow zone, especially due to advances in fishing, offshore oil and mineral resource extraction technology, the emergence of new forms of ocean pollution, and evolving security concerns since World War II. The rise of large "factory" fishing trawlers and resulting decline in fisheries, the enormous growth in oil carriage by sea and the discovery of undersea oil and mineral deposits all led to the need for a system to manage the conflicts that would result in the absence of an agreed legal regime. The U.S. was already a party to two prior Conventions on the Law of the Sea when the U.S. and the former Soviet Union pressed the United Nations General Assembly in 1967 to initiate work on a third Convention. The resulting Convention that emerged over the ensuing 15-year effort is the product of the largest international negotiating project ever undertaken.[1] Two important bodies created pursuant to the Convention are now functioning, regrettably without U.S. participation: the International Tribunal for the Law of the Sea, devised to settle ocean-related disputes arising from the application or interpretation of the Convention, and the International Seabed Authority, which helps to regulate activities including resource extraction on the deep seabed beyond national jurisdiction.

Protection of the Marine Environment

The Convention addresses six main sources of ocean pollution: land-based and coastal activities; continental-shelf drilling; potential seabed mining; ocean dumping; vessel-source pollution; and pollution from or through the atmosphere. U.S. domestic laws such as the Clean Water Act, Oil Pollution Act of 1990, the Ocean Dumping Ban Act and other statutes provide a number of strong protections of near-shore coastal waters. However, the reach of such laws generally do not extend beyond the three-mile limit from shore of U.S. jurisdiction. By contrast, under the Convention, the U.S. and other coastal states are entitled to exclusive jurisdiction to the "territorial sea" extending 12 miles from the coast, and are entitled to the exclusive use of marine resources within 200 nautical miles from the coast, the so-called "Exclusive Economic Zone" (EEZ). Within the territorial sea, the coastal state's jurisdiction includes the ability to enforce its national standards and anti-pollution measures. States are also given the obligation to adopt measures to prevent and limit pollution and to facilitate marine research in the EEZ.

[1] The U.S. delegation's role in negotiating the Convention has had key support over the terms of seven U.S. Presidents, from Resolution 2340 of the General Assembly in 1967 setting up an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, to the convening of the first session of the Third Conference on the Law of the Sea, held in New York City in December, 1973, the resumption of the eleventh session in September 1982, and culminating with the 1994 Agreement Related to the Implementation of Part XI of the Convention, concerning seabed mining.

Within its EEZ, the coastal state is granted jurisdiction under the Convention for the protection and preservation of the marine environment. Thus the U.S. could control, prevent and reduce marine pollution from dumping, land-based sources or seabed activities subject to national jurisdiction, or from or through the atmosphere. The U.S. could address jurisdiction over marine pollution from foreign vessels only for the enforcement of laws and regulations adopted in accordance with the Convention or for "generally accepted international rules and standards." Many such rules and standards have already been adopted through the competent international organization: the International Maritime Organization.

To ensure that there is responsibility assigned for marine pollution on the high seas, the Convention assigns the duty for marine pollution to the "flag State" where the ship is registered and whose flag it flies, to enforce the rules adopted for the control of marine pollution from ships, no matter where the violation occurs. In addition, the Convention allows the port State (where a ship is destined) to enforce any type of international rule or national regulations adopted in accordance with the Convention or applicable international rules as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals.

Sustainable Fisheries

Global fisheries hauled in some 15 million tons in 1938; by 1989, this rose to 86 million tons. Depleting fisheries led to intense competition and conflicts. It has been noted that from 1974 to 1979 alone, some 20 disputes arose over cod, anchovies or tuna and other species between the United States and Peru, the United Kingdom and Iceland, and Morocco and Spain. The claims by Peru, Chile and Ecuador of a 200-mile wide territorial sea was intended mainly to protect fishing resources from foreign fleets. The feeble 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas was virtually ineffective in settling these disputes.

The UNCLOS Convention gives states parties the obligation to set maximum sustainable yield on fisheries within their exclusive economic zone and provides a way out of the overfishing dilemma. Each coastal State is to determine the total allowable catch for each species within its economic zone and is also to estimate its harvest capacity and what it can and cannot itself catch. Coastal States are obliged to give access to others, particularly neighboring States and landlocked countries, to the surplus of the allowable catch. Such access must be done in accordance with the conservation measures established in the laws and regulations of the coastal State.

Legal Regime for Exploitation of Seabed Mineral Resources

Certain opponents to U.S. accession to UNCLOS focus their attention on the Convention's provisions regulating the exploitation of mineral resources on the deep sea bed beyond national jurisdiction, pursuant to the declaration of the U.N. General Assembly in 1970 that such resources are "the common heritage of mankind." The presence of manganese nodules in the Pacific Ocean at depths of two to three miles is a potential resource that would come within the Convention's purview. While such deep seabed nodules have not yet led to significant commercial exploitation, the Convention and the subsequent 1994 Agreement on Part XI provide a mechanism to protect the interests of those who have already invested resources in seabed exploration. Moreover, it is essential that such mining activity be properly regulated. The International Seabed Authority created under the Convention is empowered to assess the potential environmental impact of a given deep seabed mining operation, recommend changes, formulate rules and regulations, establish a monitoring program and recommend emergency orders by the Authority's Council to prevent serious environmental damage. States are held liable for any damage caused by either their own enterprise or contractors under their jurisdiction. Disputes over seabed activities will be arbitrated by an 11-member Seabed Disputes Chamber, within the International Tribunal for the Law of the Sea. We believe this legal regime to be a workable system that protects U.S. economic and environmental interests.

Dispute Resolution under the Convention

The Convention generally allows parties a choice among four different dispute settlement procedures: submission to the International Tribunal for the Law of the Sea, adjudication by the International Court of Justice, submission to binding arbitration procedures or submission to special arbitration tribunals with expertise in specific types of disputes. These procedures all involve binding third-party settlement. Certain exceptions are permitted for cases involving national sovereignty. We note that international disputes require a mechanism for peaceful resolution. The procedures available under UNCLOS are reasonable and constitute a landmark achievement in the propagation of the rule of law. Recent news reports of a conflict between Japan and China over rights of passage on the seas highlight the fact that the dispute is subject to resolution under UNCLOS, a fact that is surely in the U.S. interest.

Pending formal accession, the U.S. government has pledged to observe the principal provisions of the Convention, many of which derive from long-standing tenets of international law and custom. This commitment is essential for our national efforts at sustainable fisheries, among other things. However, the Convention's innovative concepts of the EEZ, the right of "transit passage" through international straits and other important provisions now have the benefit of near-universal acceptance and deserve formal U.S. acceptance. The U.S. National Commission on Ocean Policy has noted, "The National Commission on Ocean Policy unanimously recommends that the United States of America immediately accede to [UNCLOS]. Time is of the essence if the United States is

to maintain its leadership role in ocean and coastal activities." We strongly agree. For a nation such as the United States -- committed to the rule of law and careful stewardship of marine resources – swift action by your Committee to report favorably again to the full Senate followed by a prompt Senate vote for accession to this important Convention and ratification of the 1994 Agreement are essential.

Sincerely,

Bettina B. Plevan

Bettina B. Plevan

cc: Sen. Charles Schumer
Sen. Hillary R. Clinton