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Mr. Chairman,

Thank you for inviting me to testify today on this important issue, which I believe, has broad and important implications. Some of these implications—especially those concerning deep seabed mining and technology transfer—have been the most widely discussed. But I believe the Treaty also raises some constitutional and political issues with broad ramifications and implications, and I continue to think it raises security issues as well.

I hold no position in the United States government today and have no responsibilities in relation to the Treaty. However, I had prolonged and serious dealings with the Law of the Sea Treaty during my years as Ronald Reagan's Permanent Representative to the United Nations and a member of his Cabinet and National Security Council. I might add that I was also a member of his Commission on Space.

I have been a professor of Government at Georgetown University for most of my professional life. I am now a Senior Fellow at the American Enterprise Institute. I have sought to remain abreast of developments concerning the United Nations. Last year I served as head of the U.S. delegation to the United Nations Human Rights Commission.

Those of us concerned with foreign affairs in the Reagan Administration became deeply involved in the Law of the Sea Treaty, which had been under discussion since 1958 and had nearly been completed by the time Ronald Reagan was inaugurated in January 1981. It is accurate to say that the Reagan Administration believed that the issues raised by the Treaty were basic and important and that both the political and economic

stakes were high. I will share some of our experiences and perspectives because I believe they are also relevant today.

The Treaty begins from the assumption that the seabed and its wealth are part of the "common heritage of mankind" and its benefits should be shared by all, protected against exploitation by any country or group, and administered by the United Nations. In 1968, Resolution 2467 was passed and vested jurisdiction over the Treaty in the "Standing Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction." In 1970, the General Assembly voted by an overwhelming majority to convene a conference on the Law of the Sea. Negotiations took shape when all parties agreed to the notion of a "common heritage," although disagreements soon emerged between developed and developing countries on technology, sovereignty, and the extent and kind of regulation that should and could be imposed on seabed mining.

Negotiations continued for more than a decade—during which the Treaty came to be viewed as the cornerstone of the New International Economic Order (N.I.E.O.) and of the associated efforts to use U.N. regulatory power as an instrument for restructuring international economic relations and redistributing wealth and power. The General Assembly is the institution through which the N.I.E.O. operates. It operates on the principle of one country, one vote.

During the decade that the Law of the Sea Treaty took shape, the basic assumptions of the N.I.E.O. concerning the obligations of the "North" to the "South" gained wider acceptance and expanded their influence and scope. The regulatory functions of the U.N. grew and the resistance of the industrialized countries was eroded. Then Secretary of State Henry Kissinger had laid out conditions for U.S. participation in the proposed

technology transfer—guaranteeing U.S. representation on its governing body and limiting production controls—but these conditions were ignored and eventually dropped by the American government itself.

By the time Ronald Reagan took office, the Law of the Sea Treaty was very nearly completed and a final session was scheduled to begin on March 9, 1981, to be completed by the end of the summer. These plans were interrupted when the Reagan Administration announced before the session opened that it intended to conduct a full-fledged review of U.S. policy with regard to the LOS Treaty *and would not be ready to reach its final conclusions* by the scheduled time.

The announcement produced both relief and consternation. It should have come as no surprise. The Law of the Sea Treaty was, and I believe, is disadvantageous to American industry—especially in their participation in seabed mining—and to American interests generally. It should have been no surprise that a pro-business government interested in restoring American power would oppose the Treaty.

Viewed from the perspective of U.S. interests and Reagan Administration principles, it was a bad bargain. However, the Law of the Sea Treaty promised some things that Americans wanted very much: a commitment to freedom of navigation, territorial limits set at 12 miles, establishment of economic zones of 200 miles, and protection of navigation rights of all through international straits. The U.S. also regarded as positive the certain international agreements protecting marine mammals and migratory species. These protections were especially welcome at a time when a good many countries were arbitrarily extending their territorial claims over straits and vital sea lanes. But the Reagan Administration believed that the cost was too high, especially since most of these

benefits had been or could be achieved through bilateral agreements or through existing organizations such as the Intergovernmental Marine Consultative Organization of the U.N. Environment Program (UNEP).

The LOS Treaty establishes *a sweeping claim of jurisdiction over the seabed and all its mineral wealth. It creates an International Seabed Authority in which it vests control of two thirds of the Earth's surface.* Under the LOS Treaty *the power of the Seabed Authority would be vested in an Assembly made up of all participating states and an Executive Council of 36 members elected by the Assembly to represent investors, consumers, exporters of affected minerals, developing states, and all the geographical areas of the world. The formula for representation guaranteed that the industrialized "producer" countries would be a permanent minority. And they would have a majority of obligations. Most importantly, votes of the Assembly would be on the basis of one vote/one country, with a two-thirds majority binding on all parties.*

A company desiring to get a contract for seabed exploration would be required to identify two promising sites, one of which would be claimed by the Authority to mine itself or to otherwise dispose of, the other of which may be given to the company. The company would be required to provide its technology to the Authority, which would also be provided to members with the capital necessary for mining. *Special taxes would be imposed and special care would be taken to protect existing producers of minerals against competition from minerals available in sea.* Worst of all, there was no guarantee that qualified applicants ready to meet these requirements would be granted permission for mining.

Certain consequences of the LOS Treaty seemed wholly predictable:

- *It vested control over seabed mining in countries that did not possess the necessary technology.*
- Its governing structure guaranteed a permanent majority to the less developed countries of the G-77.
- It burdened companies who would be interested in mining with unusual costs and obligations and provided various permanent advantages to their competition. Private companies would bear the expense of developing technology, of prospecting, of paying taxes. The Authority would bear none of these. Moreover, the private company would be required to sell its technology to buyers and at prices determined by the Authority. The duration and extent of the mining rights would be determined by the Authority.
- These regulatory powers would protect markets and prices from the competition of seabed mining.

From the Reagan Administration's point of view, the most disturbing aspect of the LOS Treaty was the structure of decision making. We felt the U.S. role in decisions should reflect our political and economic interests in the Treaty and our contributions to UN operations. The G-77 was determined to treat all nations alike, and the U.S. as one nation among 180. We were *not guaranteed a seat* on the 36 member executive council. *All questions could be decided by a two-thirds majority vote in the Assembly.* Any aspect of the Treaty adopted by consensus could be amended by a simple two-thirds vote. Thus,

the G-77, which constitutes two-thirds of the members, could change any aspect of a meticulously negotiated convention.

President Reagan outlined six concerns which needed to be addressed to make the Treaty acceptable to the U.S.: the most important of these were that the Treaty should not deter development of seabed mining; that its decision making structure should reflect and protect economic interests and contributions of participating states; and that it should be susceptible to ratification by the U.S. Senate.

OPEC had stimulated a broad desire for cartelizing other needed mineral products. The LOS Treaty would become an instrument for assisting in the development of such cartels to insure high prices by controlling supplies.

The G-77 was unwilling to accommodate basic American concerns. Bangladesh's representative Imam UL-Hak spoke for the Group of 77 of which he was chairman. He reproached the Reagan Administration for delaying proceedings asserting that "the U.S. is overly preoccupied with the extension of the Assembly's power." The G-77, he underscored, "has consistently rejected the concept of veto, weighted voting, or voting by chambers." He chided the U.S. for seeking unequal power. He utterly ignored the unequal contribution the U.S. would make because of its advanced technology. In short, Ul-Hak explicitly rejected each of the Reagan Administration's concerns. No concessions would be made. Basically, the G-77's position was that the U.S. could take it or leave it. There were a good many influential Americans who thought we should take it.

But not at top levels of the Reagan Administration. An Interagency Senior Advisory Group on the Law of the Sea was convened in which most departments were represented, including State, Defense, Commerce, Transportation, CIA, NSC, Treasury, Energy,

OMB, Interior, and White House staff. Their conclusions were reported in a memorandum of March 4, 1981:

1. The LOS was unacceptable;
2. Both the Treaty and the U.S. delegation must be closely examined;
3. An immediate review must be undertaken;
4. The existing delegation must not preempt the Administration's options.

To this end the decision was made to issue written instructions to the delegation, other nations were to be informed of the review, a new Ambassador to LOS should be appointed, and to insure fidelity to the Administration's orientations, it was recommended that consideration be given to replacing several high ranking members of the U.S. delegation.

The Administration did not really want to "dash the hopes of mankind," which they were often accused of. But on the other hand, it did not want to make it impossible for humans to utilize the minerals of the ocean floor. It didn't want to discourage the development of technology for seabed mining. It didn't want to encourage the development of new cartels. And it didn't want to agree to revolutionary doctrines of property. The notion that the oceans or space are the "common heritage of mankind" was—and is—a dramatic departure from traditional Western conceptions of private property. Most members at upper levels of the Reagan Administration were reluctant to put our foot on that slippery slope. But there were a good many Republicans as well as Democrats who thought it important for the U.S. to continue to participate in negotiations.

An influential bipartisan group urged full support and constructive participation in the Law of the Sea Conference. They argued that the Treaty would serve U.S. foreign policy interests, promote the rule of law, friendly relations among states, and the peaceful settlement of disputes. Today, their heirs still believe the treaty will guarantee these benefits.

No American commentator denied that the provisions concerning seabed mining were prejudicial to industrial nations, but they believed we should go along anyway. Many of the strongest proponents of the LOS believed that new global institutions were needed to deal with the global interdependence, which they thought characterized the contemporary world. They would have preferred guaranteed U.S. representation on LOS governing bodies and some sort of veto, such as that possessed by the five permanent members of the Security Council or a rule of consensus which gave all an effective veto power. But they thought we should settle for the treaty as it was.

The Reagan Administration also saw serious constitutional questions. How could the constitutional requirement that treaties be ratified by the Senate be met if the contents of the agreement could be altered by a two-thirds vote of the members? This provision for easy amendment by an Assembly majority made the Treaty an open ended commitment. Henceforth, the United States would be bound by what two-thirds of the Assembly said we should be bound by. That is, we would be bound by decisions of the G-77, a prospect that could not but appall anyone who had taken a good look at decisions and policies endorsed by the G-77 in those years.

Decisions were made by consensus inside the G-77, but the G-77 rejected application of the same principle for decision making in the LOS Assembly. The

operation of the rule of consensus inside the G-77 guaranteed that the interests and needs of individual G-77 members would be taken into account, but there would be no parallel institutional arrangement to take account of the interests of developed nations.

In the view of the Reagan Administration, U.S. concerns rested on experience and taxable interests. The Treaty proponents' case rested on hopes—that the Law of the Sea Treaty would enhance international peace by advancing international cooperation and a sense of obligation that we should do what a majority of nations asked of us. Among Democrats, liberal Republicans, and within the Department of State, these feelings were strong enough to delay a U.S. decision on the Law of the Sea Treaty for nearly two years. Then the U.S. decided not to participate in the Prep Com conference. That decision not to participate in the Prep Com conference confronted us with another decision of importance for U.S. policy vis-à-vis the U.N. system. *The General Assembly voted 132 to 4 on a resolution that judged the costs of the LOS Prep Com as falling under the general U.N. budget.*

This confronted the U.S. with another, immediate decision.

To pay or not to pay the assessed share of the expenses of the Prep Com conference in which the U.S. would not be participating? As usual, the issue was more complex than it seemed. At the heart was the question of U.S. financial obligations under the U.N. Charter and international law. Is the U.S. required to pay all charges assessed by the U.N.? Is failure to do so a violation of international law?

Some opinions outside and inside the State Department held that failure to pay the assessed portion of the budget constituted a violation of our obligations under the U.N. charter and therefore would be illegal. A bipartisan majority of Congress, however, had

passed a law which the President had signed on authorizing withholding a U.S. contribution to any expenditure whose principle purpose was to aid and abet the PLO and SWAPO, which regularly claimed the right to pursue their political goals by force. Some believed we were legally bound to do whatever a U.N. body decided. However that interpretation was not the only one.

The International Court of Justice in the Certain Expenses Case, however, had held that an assessed expense was not automatically valid. To create collective obligation to pay, the expense must be legitimate. Legitimate expenses were those necessary to the implementation of the fundamental principles of the U.N. Charter. Only essential activities tied to the U.N. Charter's fundamental purposes created an obligation. The grounds cited by the State Department's legal advisor in 1982 for withholding U.S. contributions to the Prep Com was the relation of the LOS Prep Com to the U.N. Charter. The Prep Com was not created by the General Assembly or the Security Council and was not answerable to the U.N. It was "established by a treaty regime separate from the U.N. Charter." Therefore, he concluded, "a good case can be made that the LOS Prep Com expenses are expenses of a different entity, not lawful expenses of the U.N. within the meaning of the Charter and thus not properly assessable against non-consenting members. That was a relief.

However, the fact that the expenses of the LOS Prep Com were so readily increased under the U.N. program budget—and by that vote of 132 to 4—illustrated the realism of the U.S. concern about our relative isolation in the U.N., and also about a new trend in the U.N. policy toward defining extraordinary expenses into the U.N.'s core budget. This redefinition is an easy solution to the problem of financing activities for which it is

difficult to secure voluntary contributions, and as usually, entails little or no cost to the majority voting to add on expenses.

The decision of the U.S. not to participate in the LOS Treaty seems to me even better today than when it was made. There has been time to observe the decline of OPEC and the benefits of that decline, time to experience the cavalier fashion in which the G-77 is ready to impose obligatory burdens on developed countries, and there has been an opportunity to see that when the U.S. declines to go along with a scheme that is incompatible with American interests but beloved by the global establishment, the sky does not fall.

The Law of the Sea Treaty was the first of a number of issues in which the Reagan Administration's convictions and electoral commitments contradicted the orientations of the liberal establishment that is dominant in much of our society. And it proved more difficult to alter the treaty than generally expected.

Important events affecting the Treaty have occurred in the years following the Reagan Administration and modifications of the Treaty have taken place. But the modifications have not been major. The Treaty is fundamentally the same. On October 7, 1999, President Clinton transmitted to the U.S. Senate the 1982 Convention on the Law of the Sea and the 1994 Agreement relating implementation of Part XI of the Convention. On November 16, 1994, the treaty entered into force but without accession by the United States.

The most important modifications of the Treaty dealt with seabed mining. They specifically assert that the provisions requiring mandatory technology transfer "shall not apply." These mandatory provisions are replaced by a set of general principles on

technology transfer. Modifications also eliminate some of the competitive advantages of the Enterprise, and the terms on which it becomes operative. These amendments are obviously desirable, but they do not address the basic structure or consequences of the Treaty. They do not significantly affect the structure of decision making. It will still operate on the basis of one country, one vote.

I have read much of the discussion of the Treaty and I regret to say that I remain concerned that its ratification will diminish our capacity for self government, including, ultimately, our capacity for self defense.

The end of the Cold War has, of course, also had a significant impact on the contexts in which the LOS will function. The world is no longer divided into East and West confronting one another. This will take some of the hostility out of the North/South competition. Of course I welcome the change that will assure the U.S. a seat in the principal governing body of the 36 member executive council, but this one permanent seat does not guarantee influence.

These changes are very welcome but they will not render the United Nations institutions necessarily receptive to or supportive of U.S. goals, needs and values. Americans had an opportunity to observe the problems U.N. institutions can confront us with when the U.S. President and Secretary of State sought Security Council support for actions against Saddam Hussein's continued, repeated violations of the terms of the cease fire and U.N. sanctions imposed at the end of the first Gulf War.

The unanimous vote in favor of resolution 1441 made it clear that the entire Security Council agreed about the facts concerning Iraq's past violations of sanctions and the armistice. But France announced it was none the less ready to veto any resolution that

called for a use of force. Russia also promised a veto. The U.S. one seat on the governing body does not give us the influence that we have as a permanent member on the Security Council with a veto. It guarantees a voice and a vote, not a veto.

The United Nations is a political body whose many members have strongly held views that are often different than those of the United States.

The United States *often* finds it difficult to persuade other nations to see the world as we do. Simply making the case does not necessarily solve the problem.

A distinguished military official suggested today that we should join the Treaty so that we can be inside it and "lead."

I suggest that Senators who vote on these issues spend at least a year in a U.N. body, with the responsibility for passing or preventing the passage of a resolution. It's enlightening.