

United States Senate

WASHINGTON, DC 20510

July 16, 2012

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

Recently, there has been renewed interest in the United Nations Convention on the Law of the Sea, a treaty completed in 1982 and modified in 1994. After careful consideration, we have concluded that on balance this treaty is not in the national interest of the United States. As a result, we would oppose the treaty if it were called up for a vote.

Proponents of the Law of the Sea treaty aspire to admirable goals, including codifying the U.S. Navy's navigational rights and defining American economic interests in valuable offshore resources. But the treaty's terms reach well beyond those good intentions. This agreement is striking in both the breadth of activities it regulates and the ambiguity of obligations it creates. Its 320 articles and over 200 pages establish a complex regulatory regime that applies to virtually any commercial or governmental activity related to the oceans — from seaborne shipping, to drug and weapon interdiction, to operating a manufacturing plant near a coastal waterway.¹

The terms of the treaty are not only expansive, but often ill-defined. Article 194, for example, broadly requires nations to “take ... all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.” Article 207 decrees that “[s]tates shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources ... taking into account internationally agreed rules.” Article 293 empowers tribunals to enforce not only the treaty provisions but also “other rules of international law not incompatible with [the treaty].” Because the treaty authorizes international legislative and judicial bodies to give shape and substance to these and other open-ended commitments, the United States would be binding itself to yet-unknown requirements and liabilities. That uncertainty alone is reason for caution.

The treaty's breadth and ambiguity might be less troubling if there were adequate assurance that it will be enforced impartially and in a manner consistent with U.S. interests. But that is not so. The United States could block some but not all actions of the International Seabed Authority, a legislative body vested with significant power over more than half of the earth's surface.² Further, the treaty's judicial bodies are empowered to issue binding judgments even over U.S. objections. In some cases, the United States could elect to resolve disputes before a five-member arbitration tribunal, in which we would choose two arbitrators. But the United

¹ See, e.g., United Nations Convention on the Law of the Sea (UNCLOS), opened for signature Dec. 20, 1982, 1833 U.N.T.S. 397, arts. 105-108, 194, 207, 292; see also Jeremy Rabkin and Jack Goldsmith, A Treaty the Senate Should Sink, Wash. Post (July 2, 2007).

² UNCLOS, art. 161, para. 7(d); see also Jeremy Rabkin, The Law of the Sea Treaty 8, CEI (2006).

States would have no hand in selecting the decisive, fifth arbitrator, unless it could agree with the opposing party.³ Other cases would be decided by the powerful International Tribunal, which is even less accountable to the United States. Comprised of 21 foreign judges with no guaranteed U.S. seat, the tribunal can resolve any dispute concerning interpretation of the treaty. It has compulsory jurisdiction over disputes concerning the seabed beyond national borders and power to grant preliminary injunctive relief whenever it deems necessary “to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.”⁴

The method of executing tribunal judgments further concerns us. Unlike many international agreements, key provisions of the Law of the Sea treaty are drafted to be “self-executing,” meaning that certain tribunal judgments would automatically constitute enforceable federal law, without congressional legislation or meaningful review by our nation’s judiciary.⁵ As Justice John Paul Stevens noted in a concurring opinion in *Medellin v. Texas*, the Law of the Sea treaty appears to “incorporate international judgments into domestic law” because it expressly provides that decisions of the tribunal “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.”⁶ In other words, the treaty equates tribunal decisions with decisions of the U.S. Supreme Court. This means that private litigants will likely be able to invoke tribunal judgments as enforceable in U.S. courts — against the government and possibly against U.S. businesses. The United States will have no lawful choice but to acquiesce to tribunal judgments, however burdensome or unfair.⁷

The treaty could also spawn international environmental tort claims directly against U.S. businesses and citizens. A federal law called the Alien Tort Statute (ATS) gives courts the power to hear “any civil action by an alien for a tort ... committed in violation of the law of nations or a treaty of the United States.”⁸ Remarkably, even though the U.S. has not yet ratified the Law of the Sea treaty, the treaty has already been invoked as a basis for ATS litigation targeting industrial activities. In a 2002 lawsuit brought by residents of Papua New Guinea against a mining corporation, a federal district court in California held that the plaintiffs had stated a valid ATS claim under the environmental provisions of the Law of the Sea treaty.⁹ A panel of the Ninth Circuit agreed.¹⁰ Accession to the treaty would only strengthen ATS claims like this 2002 lawsuit by transforming international environmental norms into a binding treaty obligation.

In short, we are deeply concerned about the treaty’s breadth and ambiguity, the inadequate U.S. input in the treaty’s adjudicative bodies, and the automatic enforcement of

³ UNCLOS, annex VIII, arts. 1, 3(a)–(e).

⁴ *Id.*, annex VI, arts. 2, 21; *id.*, arts. 188, 290.

⁵ See generally *Medellin v. Texas*, 552 U.S. 491, 511 (2008).

⁶ *Id.* at 533 (Stevens, J., concurring) (quoting UNCLOS, annex VI, art. 39); see also Julian Ku, *International Delegations and the New World Order Court*, 81 WASH. L. REV. 1, 64-65 (2006); Comm. on Foreign Relations, UNCLOS, Sen. Exec. Rep. 108-10, at 13-15 (2004) (noting constitutional concerns with this provision).

⁷ Normally, Congress could enact implementing legislation to render the treaty non-self-executing, but the Law of the Sea treaty bars reservations. UNCLOS, art. 309; see also Ku, *supra* n. 8.

⁸ 28 U.S.C. § 1350.

⁹ *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1160-62 (C.D. Cal. 2002).

¹⁰ *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1078 (9th Cir. 2006), *withdrawn and superseded on reh'g*, 487 F.3d 1193, 1208 (9th Cir. 2007), *vacated en banc*, 550 F.3d 822 (9th Cir. 2008).

tribunal judgments in the United States. Against these risks to U.S. sovereignty, however, we have also carefully weighed the potential benefits of the treaty.

As members of the Armed Services Committee, we are mindful that the Defense Department believes this treaty would help secure the navigational freedom of our fleet. We take this recommendation seriously and recognize that the treaty would provide an additional tool to our diplomatic and military leaders in resolving maritime disputes. We also understand the commercial interests associated with treaty accession. Several U.S. businesses have explained that the treaty would enhance investment in energy development and mineral extraction by increasing certainty about ownership claims. Specifically, the treaty would codify rights to resources in the U.S. exclusive economic zone, the extended continental shelf, and the deep seabed. It would also give the United States a formal role in the Commission on the Limits of the Continental Shelf, which is now reviewing claims by treaty members in the Arctic.

At the same time, even treaty proponents recognize that these provisions primarily clarify rights that the United States already possesses under customary international law and has other means of asserting. For example, the treaty's 200-nautical-mile rule defining coastal states' exclusive economic zones is consistent with longstanding U.S. claims.¹¹ Moreover, the United States has successfully used bilateral negotiations with Russia and Mexico to define claims to the extended continental shelf in the Gulf of Mexico and the Arctic.¹² Similarly, the treaty's navigational regimes reflect the current practices of the U.S. Navy, and we believe that our maritime interests are best secured by maintaining U.S. naval power beyond challenge.

The real issue is not *whether* the United States will defend its maritime rights, but rather *who* will have the final say on the scope of those rights. We simply are not persuaded that decisions by the International Seabed Authority and international tribunals empowered by this treaty will be more favorable to U.S. interests than bilateral negotiations, voluntary arbitration, and other traditional means of resolving maritime issues. No international organization owns the seas, and we are confident that our nation will continue to protect its navigational freedom, valid territorial claims, and other maritime rights.

On balance, we believe the treaty's litigation exposure and impositions on U.S. sovereignty outweigh its potential benefits. For that reason, we cannot support the Law of the Sea treaty and would oppose its ratification.

Sincerely,



Rob Portman
Ranking Member
Subcommittee on Emerging
Threats and Capabilities,
Committee on Armed Services

Kelly Ayotte
Ranking Member
Subcommittee on Readiness
and Management Support,
Committee on Armed Services

¹¹ See President Ronald Reagan, Statement on United States Oceans Policy (March 10, 1983).

¹² See, e.g., Western Gap Treaty, June 9, 2000, U.S.-Mex., S. Treaty Doc. No. 106-39 (2000); Agreement with the U.S.S.R. on the Maritime Boundary, U.S.-Russ., June 1, 1990, S. Treaty Doc. No. 101-22 (1990).