Cedeño's request to remand with instructions to permit the filing of an amended complaint.[6]

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

Senate Foreign Relations Committee Holds Hearings on the Law of the Sea Convention

In May 2012, the Senate Foreign Relations Committee held another round of hearings on U.S. accession to the Law of the Sea Convention, the first since 2007. Senior administration and military officials, including Secretary of State Hillary Clinton, Secretary of Defense Leon Panetta, and Chairman of the Joint Chiefs of Staff, General Martin Dempsey, urged U.S. accession to the Convention, contending that continued failure to do so badly undermines U.S. economic and security interests.[1] Clinton testified that nonparticipation prejudiced the ability of U.S. companies to deal with changing circumstances, citing the increased technological ability of U.S. oil companies to exploit deepwater energy resources, the warming Arctic, and the arrival of deep-seabed mining. She also sought to answer conservative critics' objections to the Convention, but some Republican senators disputed her rebuttals.[2] A substantial excerpt from Clinton's statement follows:

> I am well aware that this treaty does have determined opposition, limited but nevertheless quite vociferous. And it's unfortunate because it's opposition based in ideology and mythology, not in facts, evidence, or the consequences of our continuing failure to accede to the treaty. . . .
>
> We believe that it is imperative to act now. No country is better served by this convention than the United States. As the world's foremost maritime power, we benefit from the convention's favorable freedom of navigation provisions. As the country with the world's second longest coastline, we benefit from its provisions on offshore natural resources. As a country with an exceptionally large area of seafloor, we benefit from the ability to extend our continental shelf, and the oil and gas rights on that shelf. As a global trading power, we benefit from the mobility that the convention accords to all commercial ships. And as the only country under this treaty that was given a permanent seat on the group that will make decisions about deep seabed mining, we will be in a unique position to promote our interests.
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> . . . .
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> Now, one could argue, that 20 years ago, 10 years ago, maybe even five years ago, joining the convention was important but not urgent. That is no longer the case today. Four new developments make our participation a matter of utmost security and economic urgency.
>
> First, for years, American oil and gas companies were not technologically ready to take advantage of the convention's provisions regarding the extended U.S. continental shelf. Now they are. The convention allows countries to claim sovereignty over their continental shelf far out into the ocean, beyond 200 nautical miles from shore. The relevant area for the United States is probably more than 1.5 times the size of Texas. In fact, we believe it could be considerably larger.

[6] *Id.* at 37–38 (citations omitted).

[1] Mark Landler, *Law of the Sea Treaty Is Found on Capitol Hill, Again*, N.Y. TIMES, May 24, 2012, at A7; Walter Pincus, *Treaty on the Seas in Rough Senate Waters*, WASH. POST, May 29, 2012, at A9.

[2] Landler, *supra* note 1; Pincus, *supra* note 1.

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U.S. oil and gas companies are now ready, willing, and able to explore this area. But they have made it clear to us that they need the maximum level of international legal certainty before they will or could make the substantial investments, and, we believe, create many jobs in doing so needed to extract these far-offshore resources. If we were a party to the convention, we would gain international recognition of our sovereign rights, including by using the convention's procedures, and therefore be able to give our oil and gas companies this legal certainty. Staying outside the convention, we simply cannot.

The second development concerns deep seabed mining, which takes place in that part of the ocean floor that is beyond any country's jurisdiction. Now for years, technological challenges meant that deep seabed mining was only theoretical; today's advances make it very real. But it's also very expensive, and before any company will explore a mine site, it will naturally insist on having a secure title to the site and the minerals that it will recover. The convention offers the only effective mechanism for gaining this title. But only a party to the convention can use this mechanism on behalf of its companies.

So as long as the United States is outside the convention, our companies are left with two bad choices—either take their deep sea mining business to another country or give up on the idea. Meanwhile, as you heard from Senator Kerry and Senator Lugar, China, Russia, and many other countries are already securing their licenses under the convention to begin mining for valuable metals and rare earth elements. . . . If we expect to be able to manage our own energy future and our need for rare earth minerals, we must be a party to the Law of the Sea Convention.

The third development that is now urgent is the emerging opportunities in the Arctic. As the area gets warmer, it is opening up to new activities such as fishing, oil and gas exploration, shipping, and tourism. This convention provides the international framework to deal with these new opportunities. We are the only Arctic nation outside the convention. Russia and the other Arctic states are advancing their continental shelf claims in the Arctic while we are on the outside looking in. As a party to the convention, we would have a much stronger basis to assert our interests throughout the entire Arctic region.

The fourth development is that the convention's bodies are now up and running. The body that makes recommendations regarding countries' continental shelves beyond 200 nautical miles is actively considering submissions from over 40 countries without the participation of a U.S. commissioner. The body addressing deep seabed mining is now drawing up the rules to govern the extraction of minerals of great interest to the United States and American industry. It simply should not be acceptable to us that the United States will be absent from either of those discussions.

Our negotiators obtained a permanent U.S. seat on the key decision-making body for deep seabed mining. I know of no other international body that accords one country and one country alone—us—a permanent seat on its decision making body. But until we join, that reserved seat remains empty.

So those are the stakes for our economy. And you will hear from Secretary Panetta and General Dempsey that our security interests are intrinsically linked to freedom of navigation. We have much more to gain from legal certainty and public order in the world's oceans than any other country. U.S. Armed Forces rely on the navigational rights and freedoms reflected in the convention for worldwide access to get to combat areas, sustain our forces during conflict, and return home safely all without permission from other countries.

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Now as a non-party to the convention, we rely—we have to rely—on what is called customary international law as a legal basis for invoking and enforcing these norms. But in no other situation at which—in which our security interests are at stake do we consider customary international law good enough to protect rights that are vital to the operation of the United States military. So far we've been fortunate, but our navigational rights and our ability to challenge other countries' behavior should stand on the firmest and most persuasive legal footing available, including in critical areas such as the South China Sea.

. . . .

Critics claim we would surrender U.S. sovereignty under this treaty. But in fact, it's exactly the opposite. We would secure sovereign rights over vast new areas and resources, including our 200-mile exclusive economic zone and vast continental shelf areas extending off our coasts and at least 600 miles off Alaska. I know that some are concerned that the treaty's provisions for binding dispute settlement would impinge on our sovereignty. We are no stranger to similar provisions, including in the World Trade Organization which has allowed us to bring trade cases; many of them currently pending against abusers around the world. As with the WTO, the U.S. has much more to gain than lose from this proposition by being able to hold others accountable under clear and transparent rules.

Some critics invoke the concern we would be submitting to mandatory technology transfer and cite President Reagan's other initial objections to the treaty. Those concerns might have been relevant decades ago, but today they are not. In 1994, negotiators made modifications specifically to address each of President Reagan's objections, including mandatory technology transfer, which is why President Reagan's own Secretary of State, George Shultz, has since written we should join the convention in light of those modifications having been made.

Now some continue to assert we do not need to join the convention for U.S. companies to drill beyond 200 miles or to engage in deep seabed mining. That's not what the companies say. . . . Under current circumstances, they are very clear. . . . These companies are refuting the critics who say, "Go ahead, you'll be fine." But they're not the ones—the critics—being asked to invest tens of millions of dollars without the legal certainty that comes with joining the convention.

Now some mischaracterize the payments for the benefit of resource rights beyond 200 miles as quote "a UN tax"—and this is my personal favorite of the arguments against the treaty—that will be used to support state sponsors of terrorism. Honestly, I don't know where these people make these things up, but anyway the convention does not contain or authorize any such taxes. Any royalty fee does not go to the United Nations; it goes into a fund for distribution to parties of the convention. . . . If we don't join the convention, our companies will miss out on opportunities to explore vast areas of continental shelf and deep seabed. If we do join the convention, we unlock economic opportunities worth potentially hundreds of billions of dollars, for a small percentage royalty a few years down the line.

I've also heard we should not join this convention because quote "it's a UN treaty." And of course that means the black helicopters are on their way. Well, the fact that a treaty was negotiated under the auspices of the United Nations, which is after all a convenient gathering place for the countries of the world, has not stopped us from joining agreements that are in our interests. We are a party to dozens of agreements negotiated under the UN auspices on everything from counterterrorism and law enforcement to health, commerce, and

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> aviation. And we often pay fees under those treaties recognizing the benefits we get dwarf those minimal fees.
>
> And on the national security front, some argue we would be handing power over the U.S. Navy to an international body. Patently untrue, obviously absolutely contrary to any history or law governing our navy. . . . Disputes concerning U.S. military activities are clearly excluded from dispute settlement under the convention.
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> And neither is it true that the convention would prohibit intelligence activities. The intelligence community has once again in 2012, as it did in 2007, as it did in 2003, confirmed that is absolutely not true.
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> So whatever arguments may have existed for delaying U.S. accession no longer exist and truly cannot be even taken with a straight face. The benefits of joining have always been significant, but today the costs of not joining are increasing. So much is at stake, and I therefore urge the Committee to listen to the experts, listen to our businesses, listen to the Chamber of Commerce, listen to our military, and please give advice and consent to this treaty before the end of this year.[3]

INTERNATIONAL ECONOMIC LAW

United States Adopts New Model Bilateral Investment Treaty

In April 2012, the U.S. Department of State and the Office of the United States Trade Representative released the text of the new U.S. model bilateral investment treaty[1] (BIT). U.S. negotiators will use the new model text as a guide in future investment treaty negotiations with other countries. The text does not alter core investment protections set out in the previous model adopted in 2004 but adds provisions dealing with state-owned enterprises, enhanced transparency, labor and environmental protection, and other matters. While the new model does not require legislative approval, bilateral investment treaties require Senate advice and consent. An excerpt from the two agencies' announcement of the new model text follows:

> Like the predecessor 2004 model BIT, the 2012 model BIT continues to provide strong investor protections and preserve the government's ability to regulate in the public interest. The Administration made several important changes to the BIT text so as to enhance transparency and public participation; sharpen the disciplines that address preferential treatment to state-owned enterprises, including the distortions created by certain indigenous innovation policies; and strengthen protections relating to labor and the environment.
>
> *BACKGROUND*
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> Since February 2009, when the Administration initiated a review of the United States' (2004) model BIT to ensure that it was consistent with the public interest and the Administration's overall economic agenda, the Administration has sought and received extensive input from Congress, companies, business associations, labor groups, environmental and other non-governmental organizations, and academics. . . .

[3] U.S. Dep't of State Press Release, Statement of Secretary of State Hillary Rodham Clinton, The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification (May 23, 2012), *at* http://www.state.gov/secretary/rm/2012/05/190685.htm.

[1] The new model text is available online at http://www.state.gov/e/eb/ifd/bit/index.htm.

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