STATEMENT

of

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on behalf of the

AMERICAN BAR ASSOCIATION

submitted to the

SENATE FOREIGN RELATIONS COMMITTEE

for the hearing on the

LAW OF THE SEA CONVENTION

June 14, 2012
Mr. Chairman and Members of the Committee:

The American Bar Association (ABA) welcomes this opportunity to express, once again, its strong support for U.S. accession to the UN Convention on the Law of the Sea.

Since the ABA first endorsed this Convention in 1994, the value of universally agreed upon rules for the oceans has become ever more apparent and the benefits of such a widely agreed upon treaty framework more evident.

► Challenges have been made to vital U.S. navigation rights in the South China Sea and elsewhere. Those rights are clearly defined in the treaty.

► New technology has made possible the exploitations of resources in the Arctic, for example on the Outer Continental Shelf. The treaty provides the only framework for any claims beyond 200 miles.

► Financing for deep seabed mining is unlikely to be available to U.S. companies without clear legal right to the sites. The treaty provides the only mechanism through which companies may secure those rights.

The list goes on, and the time is now. Acceding to the Convention is unquestionably in the economic, national security and foreign policy interests of the United States. So also is reasserting the leadership role of the United States in advancing and shaping the rule of law in the oceans as it evolves over time.

The American Bar Association is the largest professional organization in the world, with nearly 400,000 members representing lawyers, judges, legal educators, and affiliated professionals from across the country and abroad. The ABA and its members have been involved in this issue for over three decades, adopting a series of policy recommendations culminating in 1994 with a recommendation supporting U.S. accession to the treaty and to the Agreement relating to the implementation of Part XI. For more than ten years, U.S. accession to the treaty has been a legislative priority for the ABA, and it is my privilege, as President of the ABA, to restate our support for the treaty in this statement.
this treaty has a remarkable history of support. With the exception of the deep seabed mining provisions that have now been corrected by the 1994 Agreement, which we discuss below, the Law of the Sea Convention has been supported by every Secretary of State, Chairman of the Joint Chiefs of Staff, and State Department Legal Advisor since its inception during the Nixon administration. Support has also been expressed by representatives of all of the principal stakeholders affected -- the military, the energy industry, the telecommunications industry, the shipping industry, fisheries, and environmental organizations, among others. Seldom, if ever, has there been such unanimity of responsible opinion on the importance of the United States becoming a party to a treaty.

This treaty has been in force since November of 1994 and more than 160 countries are party to it, yet in all of that time nothing has occurred to suggest that anything in the treaty, and the practices of states under it, have in any way adversely affected U.S. interests. To the contrary, it is evident that the treaty has accomplished what it set out to do: create a stable, certain legal regime to which all nations can subscribe. Over these years, the United States has observed the treaty and participated in meetings and committees established under the treaty to the extent possible absent our being a party. Nevertheless, as a result of not being a party, the United States has been unable to fully take advantage of its benefits and protections.

Nowhere is this more evident than in regard to resources and activity in the Arctic Ocean. The Convention accords coastal States sovereign rights over the continental shelf beyond the 200-mile zone where the geologic margin so extends and establishes a process through which a country may seek to delineate the geographical outer limits of its shelf. This is an especially important provision for the United States, which may have claims as far as 600 miles in some areas, notably in Alaska. So far a number of States, including Russia and Canada, have claimed jurisdiction in the Arctic. The extent and nature of these claims are subject to review by the Commission on the Limits of the Continental Shelf, to which only State Parties may elect representatives. Therefore, the U.S. currently has no seat at this table where critical discussions are being held and decisions being made that impact our interests in the Arctic and other areas around the world.
Another critical area where the U.S. is missing valuable opportunities to advance its interests is in the area of deep seabed mining. As oil and mineral extraction becomes possible in these distant areas, certainty of jurisdiction is essential to stability, and perhaps also to the energy security of this nation. A company may not gain legal rights to a deep seabed mining site without being sponsored by a party to the Convention, and U.S. business interests have made it clear that they cannot invest significant resources in this activity without that legal certainty. The United States also may not currently officially participate in the work of the International Seabed Authority, and thus directly influence and control the course of rule-making for deep ocean resource exploitation. This is an area where the 1994 Agreement provides significant and unique advantages to the United States. In accordance with that Agreement, the United States will become a permanent member of the governing Council of the International Seabed Authority and of the Finance Committee, which operate by consensus, once it becomes a party to the Convention. From that point forward, no decisions will be able to be made over the objections of the United States.

Some questions have been raised with respect to possible restrictions under the Convention on U.S. military and intelligence activities. In our view, and more importantly in the view of the Department of Defense, as emphasized by the testimony of the Secretary of Defense and Chairman of the Joint Chiefs of Staff, this emphatically is not the case. To the contrary, these considerations underline the importance of the protections in the Convention. It is essential to U.S. security interests that key sea and air routes remain open as a matter of international legal right to help guarantee global mobility of our armed forces. The codification in this treaty of traditional freedoms of the seas was a key achievement by the U.S. negotiators, as was the limitation of the territorial sea to 12 nautical miles at a time when many states were claiming far broader jurisdiction. Furthermore, with respect to navigation in territorial seas, the treaty merely repeats prior rules with respect to a requirement that submarines navigate on the surface in foreign territorial seas. What the treaty confirms, as an additional protection, is the right of passage through, over, and under international straits, which is not embodied in prior conventions to which the United States is a party.
Opponents have raised alarm regarding the jurisdiction of the International Tribunal on the Law of the Sea created under the Convention; their objections on this issue are misplaced. The United States, in accordance with provisions of choice in the Convention, will elect arbitral procedures for certain categories of disputes rather than submit to the jurisdiction of that Tribunal or the International Court of Justice. The United States also will opt out of all mandatory dispute settlement with respect to military and certain other activities. Thus, contrary to opponents’ claims, the Convention does not and will not award any control over US military activities to any international court or international bureaucracy.

Members of the Committee who are familiar with the history of the negotiations of the Law of the Sea Convention will recall that the United States did not initially sign the Convention in 1982 because of concerns relating to certain deep-seabed mining provisions of Part XI that did not adequately protect possible U.S. future interests. Even at that time, with the exception of these provisions, there was broad agreement that the Convention greatly served the interests of the United States. Because of the importance the ABA attaches to such a rule of law respecting the oceans, the ABA supported efforts to fix the controversial provisions of the deep-seabed mining regime and recommended that a new effort be made to determine what changes and clarifications would make Part XI acceptable to the United States and to its negotiating partners. Such an effort was undertaken by the first Bush administration and ultimately resulted in the 1994 Agreement. At that time the ABA thoroughly reviewed these new provisions and concluded that the objections set forth by the United States in 1982 had been fully satisfied by this new Agreement, which, in effect, substitutes for any differing provisions in the original text. There no longer appears to be any rationale that would support our continuing nonparticipation in an agreement that so effectively stemmed the rising tides of claims of national jurisdiction in the oceans and that will continue to serve our vital national interests in the future.

The rule of law governing the oceans is not static, and the Convention will provide the platform for additional legal rules on future uses and protections of the oceans. However universally accepted the Convention’s provisions may now appear, they may erode over time if the United States fails to exercise the kind of continuing leadership and participation that led to this extraordinary achievement in the first place. One has to look no farther than to China’s
territorial claims to the entire South China Sea region and Iran’s threats to close the Strait of Hormuz as evidence of existing or emerging challenges based on national interests. We, of course, look to the United States Navy to steadfastly defend U.S. security interests, so it is worth repeating that the Navy has consistently supported ratification of this Convention.

This treaty represents a unique moment in the development of the rule of law. It establishes an equitable framework of law to balance often conflicting interests in an area – the world’s oceans – that by its nature requires agreed upon rules as an alternative to uncertainty and unilateral claims. As the world’s leading maritime and naval power, it is past time for the United States to become a party to the Convention. As Secretary of Defense Leon Panetta has said, “This is not even a close call.”

The American Bar Association strongly urges this Committee to forward, with a favorable recommendation, this treaty to the Senate for its advice and consent to accession to the Convention. We appreciate the opportunity to provide this statement for the record.