

Declarations and Statements with Respect to the 1982 UNCLOS: Potential Legal Disputes between the United States and China after U.S. Accession to the Convention

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This article discusses the implications of U.S. accession to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) for the future development of Sino-American relations in the areas of ocean law and politics. The declarations and understandings contained in the Senate Resolution of Advice and Consent to U.S. Accession to the UNCLOS are examined in detail in the context of previous maritime conflicts between the United States and China.

Keywords accession, China, Law of the Sea Convention, legal disputes, United States

Introduction

Article 310 of the United Nations Convention on the Law of the Sea (hereafter UNCLOS)¹ allows states and entities to make declarations or statements regarding the Convention's application at the time of signature, ratification, or accession, which do not purport to exclude or modify the legal effect of the provisions of the Convention.² Article 287, paragraph 1, provides that states and entities, when signing, ratifying, or acceding to the Convention, or at any time thereafter, may make declarations specifying the fora for the settlement of specific disputes arising under the UNCLOS.³ In addition, Article 298, paragraph 1, allows states and entities to declare that they are exempt from the application of the compulsory binding procedures for the settlement of disputes under the Convention in respect to certain specified categories of disputes.⁴ As of November 23, 2004, 33 states or entities had made declarations or statements upon signing the UNCLOS, 55 upon ratification or accession, and 10 at some point thereafter.⁵

On February 25, 2004, the U.S. Senate Foreign Relations Committee voted 19–0 to send the resolution of ratification of the UNCLOS to the full Senate for advice and consent. The resolution contains 2 declarations made in accordance with Article 287 (1)

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and Article 298 (1) of the Convention, 24 declarations and statements made pursuant to Article 310, and 5 conditions relating to procedures within the United States for considering proposed amendments to the UNCLOS.⁶ Since state parties to the UNCLOS are not allowed to make reservations,⁷ the U.S. declarations and statements are not reservations *per se*, but are instead indicative of America's view of certain law of the sea issues in relation to the application or interpretation of specific provisions of the Convention. While under international law these declarations and statements are without legal effect, the U.S. accession to the UNCLOS and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with annex, adopted on July 28, 1994 (hereafter the 1994 Deep Sea-Bed Implementing Agreement)⁸ is subject to the declaration and policy statements contained in the Senate Advice and Consent Resolution.

The two declarations made under Articles 287 and 298 concern the dispute settlement procedure under the UNCLOS. The first five understandings made in accordance with Article 310 relate principally to freedom of navigation, overflight, and related uses of the sea laid out in the Convention. The sixth understanding expresses the U.S. view that those declarations and statements made by other states, which purport to limit navigation, overflight, or other rights and freedoms in ways not permitted by the UNCLOS, contravene the Convention. These declarations and statements of understanding have the potential to give rise to legal disputes between the United States and China given the fact that China also made declarations upon ratification of the UNCLOS in June 1996.⁹ Based on the declarations, it appears that Beijing and Washington have different interpretations of several UNCLOS provisions, such as those governing the right to draw straight baselines from which the breadth of the territorial sea is measured, the right to exercise innocent passage through the territorial sea by warships, and the right to conduct military surveillance activities in the exclusive economic zones (EEZ) of the coastal state. These differing interpretations could be a potential source of friction between the two states.

Over the past ten years or so, the United States has cited, *inter alia*, UNCLOS Article 7 (straight baselines), Article 17 (right of innocent passage), Article 38 (right of transit passage), Article 46 (definition of archipelagoes and archipelagic state), Article 47 (archipelagic baselines), Article 58 (rights and duties of other states in the Exclusive Economic Zone), Article 87 (freedom of the high seas), and Article 246 (marine scientific research in the Exclusive Economic Zone and on the continental shelf) to challenge foreign coastal states'—including China's—"excessive maritime claims."¹⁰ The *Yinhe* incident (1993),¹¹ the *Kitty Hawk* incident (1994),¹² the *EP-3* aerial collision incident (2001),¹³ and the *USNS Bowditch* incident (2002),¹⁴ are the four examples cited in this paper to demonstrate the possibility of legal disputes between the United States and China arising from the declarations and statements made by China when acceding to or ratifying the UNCLOS and expected to be made by the United States upon accession to the UNCLOS. In addition, it is noted that the main reason for China's decision not to join the U.S.-led Proliferation Security Initiative (PSI) was concern over the problem of inconsistency between the actions taken on the high seas (including in the EEZ) under the PSI, and the application of specific provisions of the UNCLOS.¹⁵

The purpose of this article is to examine the implications of U.S. accession to the UNCLOS on the development of Sino-American relations in ocean law and politics. After providing a brief background on the U.S. Senate Resolution of Advice and Consent to accession to the UNCLOS, the paper will analyze and identify those declarations and understandings contained in the Senate Resolution that are believed to have the

potential to give rise to legal disputes between the United States and China. In addition to the relevant Chinese maritime legislation and the declarations China made when ratifying the UNCLOS, examples of previous disputes between the United States and China over the use of the oceans and the exercise of legal rights at sea in accordance with contemporary international law will be addressed.

Background on Senate Resolution of Advice and Consent to U.S. Accession to the UNCLOS

The UNCLOS, considered “[a] Constitution for the Oceans,”¹⁶ was opened for signature on December 10, 1982. The Convention, consisting of 17 parts, 9 annexes, and 320 articles, entered into force on November 16, 1994. Designed to regulate the use and utilization of 70% of the Earth’s surface, the UNCLOS has been praised as the most comprehensive political and legislative work ever undertaken by the United Nations. Numerous new concepts related to the use of the oceans were developed in the Convention, such as transit passage; archipelagic waters; Exclusive Economic Zones; and the International Sea-Bed Authority.

As of February 1, 2005, 148 states and entities are party to the Convention,¹⁷ but the United States is not a party. In fact, the United States is the only permanent member of the U.N. Security Council and the only NATO member that is not yet a party to the UNCLOS. The main reason for former President Reagan’s decision not to become a party during the early 1980s was U.S. concern over the deep seabed mining regime set out in Part XI of the Convention. President Reagan stated in 1982 that while “[t]hose extensive parts dealing with navigation and overflight and most other provisions of the convention are consistent with United States interests . . . the deep seabed mining part of the convention does not meet United States objectives.”¹⁸

President Reagan’s statement specified particular objections to the deep seabed mining regime, which included the lack of adequate U.S. representation in decision-making about deep seabed mining, the requirements for industrialized states to transfer technology related to deep seabed mining to developing states, the institution of rules providing for artificial limits on production of deep seabed minerals, and the implementation of burdensome regulations and financial costs on private companies seeking to conduct deep seabed mining. These deep seabed mining issues had to be resolved before the United States would become a party to the UNCLOS. From 1990 to 1994, the United Nations coordinated efforts to revise Part XI of the Convention. On July 28, 1994, the 1994 Deep Sea-Bed Implementing Agreement was adopted, which substantially revised the deep seabed mining provisions of the Convention to meet the U.S. concerns.¹⁹ Following the adoption of the 1994 Deep Sea-Bed Implementing Agreement and the U.S. signature of the Agreement on July 29, 1994, President Clinton on October 7, 1994 transmitted the UNCLOS and the 1994 Agreement to the United States Senate for its advice and consent for accession and ratification, respectively.²⁰

Senator Claiborne Pell, then-chair of the U.S. Senate Foreign Relations Committee, strongly urged U.S. accession to the UNCLOS in 1994.²¹ However, control in the Senate shifted to the Republican Party as a result of the 1994 elections and this made it unlikely that the Senate Foreign Relations Committee would hold hearings that might lead to Senate ratification of the Convention. The primary impediment to the hearings was Senator Jesse Helms, the new chair of the Foreign Relations Committee, who strongly opposed U.S. accession to the UNCLOS. In response to Senator Helms’ reluctance to hold the needed hearings, in May 1998, four Senators (John McCain, Olympia Snowe,

John Chafee, and Frank H. Murkowski) sent a letter to Chairman Helms, urging his committee to favorably consider U.S. accession to the Convention.²² For eight years no action was taken by the Senate Foreign Relations Committee.

A window of opportunity opened at the end of 2002 when Senator Helms retired from the Senate and Senator Dick Lugar became the Chair of the Committee. In addition, there was concern that as the UNCLOS would be opened for amendment as of November 2004,²³ if the United States were not party, then the United States would not have the right to attend any reviewing conference that may be established and thus not be in a position to protect against any proposed amendments that might affect U.S. maritime rights and interests. As a result, in October 2003, the Senate Foreign Relations Committee held two public hearings on the UNCLOS. On February 25, 2004, the Committee, by a unanimous vote of 19–0 recommended that the U.S. Senate give its advice and consent for accession to the UNCLOS and ratification of the 1994 Deep Sea-Bed Implementing Agreement subject to the declarations and understandings contained in the Senate resolution of advice and consent.²⁴

It seems that the UNCLOS has won the support of many groups who were at odds, including environmentalists, fishing interests, the oil and gas industry, the shipping industry, the State and Commerce departments, and the Navy.²⁵ In November 2001, Ambassador Sichan Siv, U.S. Representative on the U.N. Economic and Social Council, in a statement before the U.N. General Assembly stated: “[b]ecause the rules of the Convention meet U.S. national security, economic, and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the Convention.”²⁶ U.S. Ambassador Mary Beth West reiterated the Administration’s support for U.S. accession to the UNCLOS in remarks at a U.N. meeting in April 2002.²⁷

Despite overwhelming support for the Convention in the Senate, U.S. accession to the UNCLOS continues to be held up by a dozen right-wing Republican Senators backed by a coalition of national groups who see the Convention as another step toward global government. From a political perspective, President Bush is worried about alienating this core right-wing constituency, particularly at a time when some members of that group are complaining that his resort to the United Nations for help in Iraq suggests abandonment of the Administration’s anti-multilateralist stance.²⁸ Echoing these concerns, Senator Bill Frist, the Republican Senate majority leader, stated that he wanted several other committees, including those dealing with the environment and intelligence, to take another look at the UNCLOS. Accordingly, in March, April, and May 2004, the Senate Environment and Public Works Committee, the Senate Armed Service Committee, and even the House International Relations Committee held hearings on the UNCLOS. It has been reported that the main reason for holding these extra hearings was “election-year fears, which the White House apparently shares, of archconservatives who regard the treaty as a whole and seabed authority in particular as threats to U.S. sovereignty.”²⁹

If 2004 had not been a presidential election year, it might have been possible to see U.S. accession to the UNCLOS before November 2004. It is likely that the United States will accede to the UNCLOS in 2005. As mentioned, the Bush Administration supports U.S. accession to the Convention in general. It seems apparent that the so-called “election-year fear” will not exist after his re-election. Senator John Kerry has publicly supported U.S. accession to the Treaty. In his statement submitted to the hearings on the UNCLOS held by the Senate Foreign Relations Committee in October 2003, Senator Kerry stated: “I have been a long time supporter of this Treaty.”³⁰ He also said that “[t]he Law of the Sea secures important rights for our military, for our commercial interests, and for the

protection of our marine environment. . . . I strongly advocate that the Senate move forward to provide its advice and consent on the Law of the Sea Convention.”³¹

The Declarations and Statements to Be Made by the United States when Acceding to the UNCLOS

Believing that the UNCLOS and the 1994 Deep Sea-Bed Implementing Agreement advance U.S. national security interests, economic interests, and U.S. interests in the protection of the environment, the Senate Foreign Relations Committee, on February 25, 2004, considered the two treaties and ordered them favorably reported by a vote of 19–0, with the recommendation that the Senate advice and consent to U.S. accession to the UNCLOS and ratification of the 1994 Deep Sea-Bed Implementing Agreement, be subject to two declarations, twenty-four statements of understanding, and five conditions contained in the official resolution of advice and consent.³²

Table 1, included as an appendix to this article, summarizes the declarations and statements contained in the Senate Advice and Consent Resolution. The two declarations to be made under Articles 287(1) and 298(1) concern the dispute settlement procedure under the UNCLOS. Declaration 1 states that the U.S. chooses special arbitration (Annex VIII) for all the categories of disputes where it may be applied and arbitration (Annex VII) for all other disputes. Declaration 2 excludes disputes regarding maritime boundaries between the United States and its neighboring states, disputes between the United States and foreign countries concerning military activities and certain law enforcement activities, and disputes in respect to functions of the UN Security Council assigned to it by the UN Charter from the binding dispute settlement procedures provided in Part XV of the UNCLOS. In addition, Declaration 2 states that the U.S. consent for accession to the UNCLOS is conditioned upon the understanding that, under Article 298(1), each state party has the exclusive right to determine whether its activities are or were “military activities” and that such determinations are not subject to review.³³

The first five statements of understanding contained in the Senate Advice and Consent Resolution address specific issues raised by the UNCLOS with respect to freedom of navigation and overflight and related uses of the sea, all of which are considered critically important to U.S. military interests and its need for global mobility. Understanding 1 states that nothing in the UNCLOS impedes the inherent right of self-defense or rights during armed conflict, including any Convention provisions referring to “peaceful conflict” or “peaceful purposes.”³⁴ Understandings 2, 3, and 4 assert the right of innocent passage in the territorial sea, the right of transit passage in straits used for international navigation and in archipelagic waters, and high seas freedoms of navigation and overflight in the EEZ.³⁵ Understanding 5 claims that certain activities, conducted in marine areas under a coastal state’s jurisdiction, such as military activities and operational oceanography, are not considered to be marine scientific research activities and therefore do not require consent from coastal states under the UNCLOS.³⁶ Understanding 6 expresses the U.S. view that those declarations and statements made by other states parties that purport to limit navigation, overflight, or other rights and freedoms in ways not permitted by the UNCLOS contravene the Convention.³⁷

Understandings 7 to 12 address principally the environment-related aspects of the UNCLOS, including provisions of the Convention concerning enforcement activities regarding marine pollution. Understanding 7 confirms that the UNCLOS does not limit a state party’s ability to prohibit or restrict imports in order to, among other things, promote or require compliance with environmental and conservation laws, norms, and

objectives. Understanding 8 ensures that certain provisions of the UNCLOS apply only to a particular source of marine pollution (namely, pollution from vessels) and not other sources of marine pollution, such as dumping. Understanding 9 harmonizes the “clear grounds” standard provided in Articles 220 and 226 of the UNCLOS with the U.S. “reasonable suspicion standards,” while Understanding 10 sets forth the limits of the applicability under Article 228 (2) of certain marine pollution proceedings. Understanding 11 harmonizes aspects of Article 230 (governing the use of monetary penalties in cases involving pollution of the marine environment by foreign vessels) of the UNCLOS with U.S. law and practice for the enforcement of pollution laws. Understanding 12 clarifies that the marine pollution provisions of the UNCLOS, specifically sections 6 and 7 of Part XII, do not limit a state party’s authority to impose penalties, *inter alia*, for nonpollution offenses or for marine pollution violations that take place in a state party’s ports, rivers, harbors, or offshore terminals.³⁸

Understanding 13 ensures that the UNCLOS confirms and does not constrain the longstanding right of a state party to impose and enforce the conditions of entry for foreign vessels into its ports, rivers, harbors, or offshore terminals.³⁹ Understanding 14 makes clear that Article 21(2) of the UNCLOS would not serve as a restriction on the “design, construction, manning or equipment” of foreign ships.⁴⁰ Understanding 15 makes it clear that the UNCLOS supports a coastal state’s own regulation of discharges into the marine environment resulting from industrial operation.⁴¹ Understanding 16 affirms that the UNCLOS supports the ability of a coastal State, such as the United States, to exercise its domestic authority to regulate the introduction of alien or new species into the marine environment, and that a variety of Convention provisions might be applicable, depending upon the circumstances, e.g., Articles 21, 56, 196, or 211, to address problems related to the issue of invasive species.⁴² Understanding 17 makes it clear that the United States already implements the “living marine resource” provisions of the UNCLOS through a variety of domestic laws, in particular, the Magnuson-Stevens Fishery Conservation and Management Act.⁴³ Understanding 18 notes that the United States provided direct support to the establishment of the international moratorium on commercial whaling that is in place and that the U.S. lends its support to the creation of sanctuaries and other conservation measures. This understanding also indicates, with respect to Article 65 of the UNCLOS, that cooperation through international organizations applies not only to large whales but to all cetaceans.⁴⁴ Understanding 19 makes clear that the term “sanitary laws and regulations” in Article 33 of the UNCLOS is not limited to the transmittal of human illnesses, but may include, e.g., laws and regulations to protect human health from pathogens being introduced into the territorial sea.⁴⁵

Understandings and declarations 20 to 24 contained in the Senate Advice and Consent Resolution generally address procedural and constitutional matters related to the deep sea-bed mining regime. Understanding 20 reinforces the 1994 Deep Sea-Bed Implementing Agreement which makes it clear that decisions adopted by procedures other than the consensus procedure set out in Article 161(8)(d) will not result in substantive binding obligations on the United States.⁴⁶ Understanding 21 makes it clear that no assessed contributions can be decided by the Assembly, the primary body of the International Sea-Bed Authority, without the agreement of the United States in its capacity as a member of the regime’s Finance Committee.⁴⁷ Understanding 22 provides that, for the United States, decisions made by the Sea-Bed Disputes Chamber are to be enforceable only in accordance with the procedures established by implementing legislation, and are to be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States.⁴⁸ Understanding 23 makes clear the basic rules

for amending Annex VI of the UNCLOS, which relates to the Sea-Bed Disputes Chamber established under the Convention to resolve certain disputes arising in connection with deep sea bed mining.⁴⁹ Finally, understanding 24 states that the UNCLOS and the 1994 Deep Sea-Bed Implementing Agreement do not mandate private rights of action or other enforceable legal rights in U.S. courts.⁵⁰

The table attached as an appendix to this article does not include the five conditions contained in the Senate Advice and Consent Resolution, mainly because they relate to internal U.S. procedures for considering proposed amendments to the UNCLOS. These conditions are not made pursuant to the provisions of the UNCLOS, but arise as a result of the treaty clause (Article 2, Section 2) of the U.S. Constitution. The first three conditions provide for the U.S. President to inform and consult with the Senate Foreign Relations Committee about proposed amendments to the UNCLOS. The fourth condition provides that all amendments to the UNCLOS, other than amendments under Article 316 (5)⁵¹ of a technical or administrative nature, are to be submitted by the U.S. President to the Senate for its advice and consent. The fifth condition also relates to Article 316(5), which authorizes that any amendment relating exclusively to activities in the Area⁵² and any amendment to Annex VI⁵³ to enter into force for all state parties on the year following the deposit of instruments of ratification or accession by three fourths of the states parties to the UNCLOS. To avoid the possibility of such amendments being adopted and entering into force without U.S. ratification, the fifth condition declares that the United States will take all necessary steps under the UNCLOS to make sure that amendments implemented under these procedures are adopted in conformity with the U.S. Constitution.⁵⁴

Selected U.S. Declaration and Understandings that Are Believed to Have the Potential to Give Rise to Legal Disputes with China after U.S. Accession to the UNCLOS

Among the two declarations and the twenty-four statements of understanding to be made by the United States in accordance with Articles 298(1) and 310 of the UNCLOS upon its accession to the Convention, the following are believed to have the greatest potential to give rise to legal disputes between the United States and China in the areas of ocean law and politics: the second declaration concerning the exclusion of certain categories of disputes from dispute settlement procedure; the first five understandings that relate principally to the U.S. right of innocent passage, transit passage, freedom of navigation and overflight in the maritime zones of foreign countries, and the right to conduct survey activities in the exclusive economic zone that are not considered marine scientific research and, therefore, do not require authorization from the coastal state; and the sixth understanding concerning the U.S. position on those declarations or statements made by other state parties to the UNCLOS that are in violation of the Convention provisions, in particular, Article 310.

The Second Declaration

Article 298 (1)(b) provides that when signing, ratifying, or acceding to the UNCLOS or at any time thereafter, a state may, without prejudice to the obligations arising under section 1 of Part XV of the Convention, declare in writing that it does not accept any one or more of the procedures provided for in section 2, Part XV of the Convention with respect to “disputes concerning military activities, including military activities by

government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.”⁵⁵ The U.S. declaration made pursuant to Article 298(1)(b) indicates that the U.S. consent to accession to the UNCLOS is conditioned upon the understanding that, “under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were ‘military activities’ and that such determinations are not subject to review.” However, it must be noted that Article 309 of the UNCLOS disallows states from making reservations or exceptions to the Convention unless expressly permitted by other articles of the UNCLOS. While Article 298(1)(b) allows states to exclude disputes concerning military activities from the compulsory dispute settlement procedures provided in section 2, Part XV of the Convention, it is not clear if State Parties have the exclusive right to determine whether their activities are or were “military activities” and that such determinations are not subject to review. It is also problematic for the United States to declare that its consent to accession to the UNCLOS is conditioned upon the aforementioned understanding. If the second declaration to be made by the United States when acceding to the UNCLOS is considered consistent with Article 298 and Article 310, other state parties to the Convention are also entitled, after their signing, ratifying, or acceding to the UNCLOS, or “at any time thereafter” to making the same declaration. Accordingly, it is believed that this declaration could give rise to legal dispute between the United States and foreign countries, including China. The declaration would also have the potential to destabilize the legal order at sea if followed by other state parties to the UNCLOS.

The First Understanding

The first understanding to be made by the United States underscores the importance of U.S. concern over its rights under international law to take appropriate actions in self-defense or in times of armed conflict, including, where necessary, the use of force. This understanding states that nothing in the UNCLOS impairs the inherent right of self-defense or rights arising during armed conflict, including any Convention provisions referring to “peaceful uses” or “peaceful purposes.” For instance, Article 88 of the UNLCOS reads that “[t]he high seas shall be reserved for peaceful purposes”; Article 141 provides that “[t]he Area shall be open to use exclusively for peaceful purposes by all States whether coastal or land-locked, without discrimination and without prejudice to the other provisions of the Part;” and Article 301 states that “[i]n exercising their rights and performing their duties under this Convention, State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”

This understanding has the potential to give rise to legal disputes between the United States and China, and with other countries, such as North Korea. Under this interpretation of the Convention, the United States is taking the position that it has the authority to undertake interdiction on the high seas (including in EEZs) if it is believed that the vessels concerned carry weapons of massive destruction (WMD) or related material.⁵⁶ U.S. Under Secretary of State John Bolton explained that interdiction taken under the Proliferation Security Initiative (PSI), would be “not only legitimate, it’s necessary self-defense.”⁵⁷ China, however, opposes the U.S. proposal to intercept ships suspected of carrying WMD-related materials on the high seas and warns that such actions would

create a situation in which conflicts at sea might occur. On February 17, 2004, Chinese foreign ministry spokeswoman Zhang Qiyue stated that, while China agreed with the principles of the PSI, it was concerned with the legality and potential consequences of some of its actions, particularly regarding vessel interception.⁵⁸ On November 4, 2004, the spokeswoman further elaborated the Chinese position on the PSI by stating that:

We agree with the objective of PSI. But the Chinese side thinks that relevant measures under PSI should be taken within the reign of international law in accordance with relevant principles of UN Charter. We hold reservation on the PSI's possibility of taking coercive interception beyond the reign of international law.⁵⁹

Rear Admiral William L. Schachte of the U.S. Navy, when testifying at the hearing on the UNCLOS before the House International Relations Committee on May 12, 2004, stated:

. . . the Convention provides a solid legal basis for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of WMD, including: exclusive port and coastal state jurisdiction in internal waters, territorial seas and national airspace; coastal state jurisdiction in the 24 nm contiguous zone; flag state jurisdiction over its vessels on the high seas; and universal jurisdiction over stateless vessels. Ultimately, the U.S. always has the right to exercise self-defense, unaffected by the LOS Convention. The Convention's preamble is quite clear in this regard—that is, “matters not regulated by the Convention continue to be governed by the rules and principles of general international law.” Thus, matters such as self defense under the UN Charter and belligerent rights under the law of armed conflict are unaffected by the Convention.⁶⁰

The 1993 *Yinhe* incident that occurred in the Yellow Sea is relevant to the concerns regarding maritime interception and is noted for the purpose of demonstrating the potential legal dispute that could arise between the United States and China after U.S. accession to the UNLCOS. In July 1993, because of suspicions that the Chinese cargo-liner *Yinhe* was carrying chemical weapon precursors, thiodiglycol and thionyl chloride bound for Iran, the United States took the extraordinary step of ordering the vessel then on the high seas to follow its warships, while military aircraft took photos. After the *Yinhe* arrived at the port of Damman in Saudi Arabia, an inspection of the cargo was conducted by representatives of the government of Saudi Arabia, in the presence of Chinese representatives. Technical experts were also dispatched by the U.S. government to take part in the process of inspection. The results of the inspection showed that the *Yinhe* was not carrying any WMD-related materials. China subsequently accused the United States of obstructing the vessel's normal shipping operation and seriously infringing upon its sovereignty and right to freedom of navigation in international waters.⁶¹

The Second Understanding

The second U.S. statement of understanding regarding innocent passage in the territorial sea of a coastal state also has the potential to give rise to legal disputes between the

United States and China. Article 19, paragraph 1 of the UNCLOS provides that “[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.” In addition, “such passage shall take place in conformity with this Convention and with other rules of international law.” Article 19, paragraph 2 contains a list of activities that render passage noninnocent, including weapons practice, spying, propaganda, launching or taking on board aircraft or military devices, embarking or disembarking persons or goods contrary to customs, fiscal, immigration or sanitary regulations, willful and serious pollution, fishing, research or survey activities, and interference with coastal communication or other facilities.⁶² In addition, by reading Article 19(1) together with Article 19(2)(1), the provisions of the UNCLOS seem to have narrowed a foreign country’s right of innocent passage in a coastal state’s territorial sea as compared to the innocent passage rights set out in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.⁶³

The second U.S. understanding, however, states that:

- (A) all ships, including warships, regardless of . . . cargo, armament, means of propulsion, flag, origin, destination, or purpose, enjoy the right of innocent passage;
- (B) article 19(2) contains an exhaustive list of activities that render passage non-innocent;
- (C) any determination of non-innocence of passage by a ship must be made on the basis of acts it commits while in the territorial sea, and not on the basis of . . . cargo, armament, means of propulsion, flag, origin, destination, or purpose; and
- (D) the Convention does not authorize a coastal State to condition the exercise of the right of innocent passage by any ships, including warships, on the giving of prior notification to or the receipt of prior permission from the coastal State.⁶⁴

According to the Senate Foreign Relations Committee’s elaboration on this understanding, the “purposes” of a ship are not relevant to the enjoyment of innocent passage, such that a determination of noninnocence cannot be made on the basis of a ship’s “purposes.”⁶⁵ Therefore, all ships, including warships, submarines, and oceanographic survey vessels, enjoy the right of innocent passage through the territorial sea. The Committee also indicates that the list of activities contained in Article 19(2) of the UNCLOS in no way narrows the right of innocent passage the United States currently enjoys under the 1958 Territorial Sea Convention⁶⁶ and customary international law.

While Article 20 of the UNCLOS provides that “[i]n the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag,” the Committee states that “failure to do so is not characterized as inherently not ‘innocent’.”⁶⁷ Rear Admiral William L. Schachte in his statement made at the hearing before the House International Relations Committee on the UNCLOS on May 12, 2004 states:

Although the Convention recognizes the right of innocent passage and what activities constitute innocent passage in the territorial sea, the Convention imposes no obligation on parties to refrain from activities, such as intelligence gathering, that do not qualify for the right of innocent passage. Thus, Article 20 of the Convention merely states what a submarine must do to

qualify for innocent passage in the territorial sea. This article merely repeats the rule concerning submerged transits from the 1958 Convention on the Territorial Sea, a convention to which the U.S. is a party. This rule has been the consistent position of nations, including the United States, for more than 70 years and it has never been interpreted as prohibiting or otherwise restricting intelligence collection activities or submerged transits in the territorial sea for purposes other than innocent passage. In short, if or when the need arises to collect intelligence in a foreign territorial sea, it will be business as usual for the Navy and nothing in the LOS Convention will prohibit that activity.⁶⁸

At the same hearing, William H. Taft, Legal Adviser to the U.S. Department of State, in response to a question that was raised regarding whether the UNCLOS (in particular, Articles 19 and 20) prohibits intelligence activities or submerged transit in the territorial sea of other states, stated that the Convention does not prohibit such activities.⁶⁹ He further pointed out that the Convention's provisions on innocent passage are very similar to Article 14 in the 1958 Convention on the Territorial Sea and Contiguous Zone, of which the United States is a contracting party. He stated that the UNCLOS is more favorable than the 1958 Convention both because the list of noninnocent activities is more exhaustive and also because it generally uses objective, rather than subjective, criteria in the listing of acceptable and unacceptable activities in the territorial sea of coastal states.

In the second statement of understanding, the Senate Foreign Relations Committee reiterates the U.S. position that the UNCLOS does not authorize a coastal state to condition the right of innocent passage by any ships, including warships, on prior notification to or the receipt of prior permission from the coastal state. However, it should be noted that China has claimed that warships are required to receive prior approval from the Chinese authority before entering its territorial sea. Paragraph 3 of the 1958 Declaration of the Government of the People's Republic of China on China's Territorial Sea provides that:

No foreign vessels for military use and no foreign aircraft may enter China's territorial sea and the air space above it without the permission of the Government of the People's Republic of China. While navigating Chinese territorial sea, every foreign vessel must observe the relevant laws and regulations laid down by the Government of the People's Republic of China.⁷⁰

In 1982 when the UNCLOS was opened for signature, the Deputy Head of the Chinese delegation to the Third United Nations Conference on the Law of the Sea reaffirmed China's view that the Convention provisions relating to innocent passage do not prejudice the right of coastal states to demand that warships receive prior approval before entering territorial sea.⁷¹ Article 6 of the People's Republic of China Law on the Territorial Sea and the Contiguous provides that "[f]oreign ships for military purposes shall be subject to approval by the Government of the People's Republic of China for entering the territorial sea of the People's Republic of China."⁷² Under Article 8 of the same law:

Foreign ships passing through the territorial sea of the People's Republic of China must comply with the laws and regulations of the People's Republic

of China and shall not prejudice the peace, security and good order of the People's Republic of China. . . . The Government of the People's Republic of China shall have the right to take all necessary measures to prevent and stop non-innocent passage through its territorial sea. Cases of foreign ships violating the laws or regulations of the People's Republic of China shall be handled by the relevant organs of the People's Republic of China in accordance with the law.⁷³

When ratifying the UNCLOS in June 1996, China also made a declaration, which states that:

[t]he People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or given prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State.⁷⁴

In August 1992, the United States protested the Chinese claim to require prior permission before warships may engage in innocent passage.⁷⁵

As far as submarines' right of innocent passage is concerned, Article 7 of China's Territorial Sea Law is identical with Article 20 of the UNCLOS, which states that "[i]n the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag." On November 16, 2004, the Chinese government admitted that its *Han*-class nuclear submarine strayed into the Japanese territorial sea for "technical reasons" and its Vice Foreign Minister Wu Dawei conveyed an apology to Japanese Ambassador Koreshige Anami in Beijing for the incident.⁷⁶ The potential for legal disputes between the United States and China regarding submerged transit in the territorial sea by U.S. submarines or other underwater vehicles for purposes other than innocent passage exists, as is indicated in the U.S. second statement of understanding that the failure of a submarine to navigate on the surface and to show its flag "is not characterized as inherently not 'innocent'."⁷⁷ This view was reiterated in the prepared statement of William H. Taft:

A ship does not, of course, enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act in the territorial sea aimed at collecting information to the prejudice of the defense or security of the coastal State, but such activities are not prohibited by the Convention.⁷⁸

The Third Understanding

The third understanding addresses the U.S. concern over the right of transit passage in straits used for international navigation and the right of passage in archipelagic sea lanes through archipelagic waters. The United States understands, concerning Part III (straits used for international navigation) and Part IV (archipelagic states) of the UNCLOS, that:

(A) all ships and aircraft, including warships and military aircraft, regardless of, for example, cargo, armament, means of propulsion, flag, origin,

- destination, or purpose, are entitled to transit passage and archipelagic sea lanes passage in their “normal mode”;
- (B) “normal mode” includes, *inter alia*—
 - (i) submerged transit of submarines;
 - (ii) overflight by military aircraft, including military information;
 - (iii) activities necessary for the security of surface warships, such as formation steaming and other force protection measures;
 - (iv) underway replenishment; and
 - (v) the launching and recovery of aircraft;
 - (C) the words “strait” and “straits” are not limited by geographic names or categories and include all waters not subject to Part IV that separate one part of the high seas or exclusive economic zone from another part of the high seas or exclusive economic zone or other areas referred to in article 45;
 - (D) the term “used for international navigation” includes all straits capable of being used for international navigation; and
 - (E) the right of archipelagic sea lanes passages is not dependent upon the designation by archipelagic States of specific sea lanes and/or air routes, and, in the absence of such designation or if there has been only a partial designation, may be exercised through all routes normally used for international navigation.⁷⁹

U.S. military vessels and aircraft frequently conduct routine transits through the Straits of Malacca; air and surface units also frequently transit Indonesian archipelagic waters exercising the right of archipelagic sea lanes passage and transit the Philippine archipelagic waters in exercising its high seas freedoms, transit passage, and innocent passage, as applicable.⁸⁰

This U.S. understanding has the potential to give rise to legal disputes not only between the United States and coastal strait states such as Indonesia and Malaysia, but also between the United States and China. Article 38, paragraph 2 of the UNCLOS provides that “[t]ransit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.” Under Article 39, paragraph 1, ships and aircraft, while exercising the right of transit passage, shall, *inter alia*, proceed without delay through or over the strait; refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering the strait, or in any other manner in violation of the principles of international law embodied in the UN Charter; and refrain from any activities other than those incident to their normal modes of continuous and expeditions transit unless rendered necessary by *force majeure* or by distress. In accordance with Article 40, when exercising the right of transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities unless they have obtained prior permission from the states bordering straits. Accordingly, the U.S. interpretation of the term “normal mode” could possibly be challenged by foreign countries, in particular states bordering straits.

The United States claims that the term “used for international navigation” includes all straits capable of being used for international navigation and that, therefore, its warships and aircraft are entitled to the right of transit passage in all these international

straits. This interpretation has the potential to give rise to legal disputes between the United States and China, given the fact that the Taiwan Strait meets the definition provided in Article 36 of the UNCLOS, which provides that:

[t]his Part [Part III: straits used for international navigation] does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedom of navigation and overflight, apply.⁸¹

The Regional Maritime Security Initiative (RMSI), proposed by the United States in March 2004 for the East Asian region, lays out a framework for facilitating the sharing of intelligence among the governments of the Asia-Pacific region and their navies that would allow them to identify, monitor, and intercept transnational maritime threats in the region, in particular, the Malacca Straits.⁸² Controversy surrounding the RMSI can be cited to demonstrate the potential for legal disputes between the United States and China, and between the United States and other states bordering straits used for international navigation over the legal interpretations laid out in the third U.S. statement of understanding. China is concerned that the RMSI will expand the right of transit passage, encroach upon the sovereignty and sovereign rights of states bordering straits, and contravene the UNCLOS.⁸³ During the negotiations at the Third United Nations Conference on the Law of the Sea, China was highly critical of the position taken by the maritime powers, in particular the United States, which demanded free transit through all straits used for international navigation, including those straits lying within the 12-mile territorial sea limit. China insisted that “a strait lying within the territorial sea, whether or not it is frequently used for international navigation, forms an inseparable part of territorial sea of the coastal state.”⁸⁴ Chinese negotiators insisted that foreign vessels of military purposes must obtain prior notification or permission from the states bordering the strait before passing through the straits within territorial seas. The two states bordering the Straits of Malacca, namely Indonesia and Malaysia, strongly opposed the actions proposed by the United States under the RMSI mainly because “there is no legal justification for foreign navies or aircraft to patrol the Straits of Malacca and the airspace above.”⁸⁵

The Fourth Understanding

The fourth U.S. understanding contained in the Senate Advice and Consent Resolution reiterates the longstanding U.S. position that military forces have the right to undertake various activities in the EEZ of foreign coastal states, in particular, navigation and overflight and all other uses of the sea related to freedoms of navigation and overflight, including, *inter alia*, “military activities, such as anchoring, launching, and landing of aircraft and other military devices, launching and recovering water-borne craft, operating military devices, intelligence collection, surveillance and reconnaissance activities, exercises, operations, and conducting military surveys.”⁸⁶ This understanding involves the interpretation of Article 58 of the UNCLOS.⁸⁷ The United States and China were at odds with each other over the interpretation and application of Article 58 and other relevant provisions of the UNCLOS both in the *Kitty Hawk* and *EP-3* incidents that occurred in October 1994 and April 2001, respectively.

On October 27–29, 1994, a U.S.–China confrontation occurred in the Yellow Sea when the American aircraft carrier *Kitty Hawk* sent planes to drop sonic devices to monitor a Chinese nuclear submarine. In response, Chinese fighter planes flew within sight of the U.S. planes. While Pentagon spokesman Major Steve Manuel claimed that “U.S. navy ships and aircraft operated only in international waters and airspace in a routine, non-threatening manner,”⁸⁸ the Chinese officials asserted that “another such incident could lead to military clash.”⁸⁹

On April 1, 2001, a U.S. Navy *EP-3* surveillance aircraft collided with a Chinese *J-8* interceptor over the South China Sea, some 87 miles off the coast of Hainan Island. The U.S. reconnaissance flight was operating in the airspace over China’s 200-mile EEZ. The damaged U.S. aircraft issued an alarm and made an emergency landing on the nearest airfield: the Chinese military airbase Lingshui on Hainan Island. The damaged Chinese *J-8* fighter jet crashed into the water and the pilot died.⁹⁰

Immediately after the collision, China charged the United States with responsibility for the incident, stating that:

[b]y veering and ramming the Chinese jet at a wide angle in violation of the flight rules, the US surveillance [aircraft] caused the crash of the Chinese jet. The surveillance flight conducted by the US aircraft overran the scope of “free over-flight” according to international law. The move also violated the United Nations Convention on the Law of the Sea, which stipulates that any flight in airspace above another nation’s exclusive economic zone should respect the rights of the country concerned. Thus, the US plane’s actions posed a serious threat to the national security of China. Meanwhile, such an action was also against the consensus reached by the two countries in May last year [2000] on avoiding risky military actions in sea areas. According to the consensus, when military airborne vehicles encounter each other in international airspace, both sides should properly observe the current international law and practices, and take into consideration the flight safety of the other side so as to avoid dangerous approaches and possible collisions. It should also be pointed out that after the incident the US surveillance plane intrude China’s airspace and landed at a Chinese airport without permission from the Chinese side, a move that further violated the regulations set forth by international and Chinese law, thus constituting a gross encroachment upon China’s sovereignty and territorial airspace.⁹¹

In addition to demanding an apology, China also called upon the United States to end its frequent reconnaissance flights off its coast.⁹²

In response, the United States claimed that the *EP-3* was flying an overt reconnaissance and surveillance mission in international airspace; that the *EP-3* was on autopilot and did not deviate from a straight and level path until it was hit by the Chinese jet; and that the crew of the *EP-3* had made some 25 to 30 attempts to broadcast distress signals before landing at the Chinese airport.⁹³ The United States blamed the Chinese pilots for having become increasingly aggressive in approaching and tailing the American surveillance aircraft on a routine reconnaissance mission off the coast of China. The United States did not consider it appropriate to apologize, but asked for the immediate return of the crew and the aircraft.⁹⁴

Article 11 of China’s Exclusive Economic Zone and Continental Shelf Act of 1998 states:

Any State, provided that it observes international law and the laws and regulations of the People's Republic of China, shall enjoy in the exclusive economic zone and the continental shelf of the People's Republic of China freedom of navigation and overflight and of laying submarine cables and pipelines, and shall enjoy other legal and practical marine benefits associated with these freedoms. The laying of submarine cables and pipelines must be authorized by the competent authorities of the People's Republic of China.⁹⁵

Although it is China's position that the United States must observe China's laws and regulations when exercising the freedom of navigation and overflight in China's EEZ, the United States does not take this view. During the negotiation at the Third United Nations Conference on the Law of the Sea, the United States took the following position:

the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principle of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement.⁹⁶

In addition, the United States interprets the phrase "other internationally lawful uses of the sea related to these freedoms" contained in Article 58(1) of the UNCLOS as including military activities such as task force maneuvering, flight operations, military exercises, naval survey, information-gathering, and weapons testing and firing.⁹⁷

Clearly the United States and China interpret differently the rights and freedoms referred to in Article 58 of the UNCLOS:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, *and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention* [emphasis added].
2. Articles 88 to 115 and other pertinent rules of international law to the exclusive economic zone in so far as they are not incompatible with this Part.

The italicized wording in Article 58 was perceived as vital by the maritime powers, and in particular the United States, mainly because, in their interpretation, it implies the legality of naval maneuvers and reconnaissance flights in a coastal state's EEZ as an activity "associated with the operation of ships, aircraft." The cross-reference in Articles 58–87—"the freedoms referred to in article 87"—is also important to maritime nations, because it lists the major freedoms of the high seas, which include the freedom of navigation, the freedom of overflight, and the freedom to lay submarine cables and pipelines; and, accordingly, foreign states' freedoms in a coastal state's EEZ are the same as those on the high seas. Moreover, the phrase "and other internationally lawful uses of the sea related to these freedoms" implies that other states may enjoy other, unspecified freedoms in a coastal state's EEZ in addition to the ones listed in Article 58(1). Furthermore, Article 58(2) makes a general cross-reference to Articles 88–115 and other pertinent

rules of international law as applying to the EEZ insofar as they are not incompatible with the EEZ part of the UNCLOS. However, some coastal states interpreted Article 58 much more narrowly, arguing that it does not authorize foreign states to carry out military activities in a coastal state's EEZ, and that the consent of the coastal state is required before conducting such activities.

It is therefore possible that legal disputes between the United States and China over the application and interpretation of Article 58 of the UNCLOS could arise or will continue after the United States accedes to the Convention.

The Fifth Understanding

The fifth understanding concerns marine scientific research and is believed to be another potential source for legal disputes between Washington and Beijing following U.S. accession to the UNCLOS. The understanding states that the term "marine scientific research" does not include, *inter alia*, "(A) prospecting and exploration of natural resources; (B) hydrographic surveys; (C) military activities, including military surveys; (D) environmental monitoring and assessment pursuant to section 4 of Part XII (Protection and Preservation of the Marine Environment) of the Convention; or (E) activities related to submerged wrecks or objects of an archaeological and historical nature."⁹⁸ Accordingly, U.S. activities conducted in marine areas under coastal states' jurisdiction—such as military activities and operational oceanography—are not considered marine scientific research activities and therefore do not require consent from coastal states. It is China's position, however, that certain activities conducted in its EEZ, and particularly those conducted by navy vessels, can only take place following the obtaining of prior approval from Chinese authorities.

During the past five years, U.S. research vessels have, on two occasions, been asked to leave the Chinese EEZ. On March 21, 2001 in the Yellow Sea, the *USNS Bowditch*, a U.S. oceanographic research vessel, was approached by a Chinese warship in China's EEZ and was asked to alter its course and exit the waters.⁹⁹ It was reported in mid-September 2002 that Chinese military patrol aircraft and ships again harassed the *USNS Bowditch* while it was conducting research work off the coast of northern China in the Yellow Sea.¹⁰⁰ While the United States claimed that the vessel had the right to conduct oceanographic work in the international waters, Chinese Foreign Ministry spokeswoman Zhang Qiyue stated at a press conference that "the *Bowditch*, a U.S. navy vessel, recently had engaged in activities in China's EEZ without approval" and that "such [an] act violates the principles of international law, infringes on China's rights and interests as well as jurisdiction over the EEZ."¹⁰¹

The Sixth Understanding

The last understanding that is seen as having the potential to raise legal disputes between Washington and Beijing concerns the U.S. position that any declaration or statement made by state parties to the UNCLOS purporting to limit navigation, overflight, or other rights and freedoms of all states in ways not permitted by the Convention contravenes the UNCLOS. As mentioned above, China made four declarations in June 1996 when it ratified the UNCLOS, including one asserting the right of a state to have a foreign state obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal State.¹⁰² This declaration has the potential to limit the U.S. right of navigation and therefore would be

seen by the United States as contravening the Convention provisions, in particular, Article 17. In September 1996, the U.S. official reaction to China's baseline declaration appeared in the *International Herald Tribune*, which reported that "the United States has implicitly warned Beijing that it will not respect a formal Chinese declaration that would restrict freedom of movement by American warships and military aircraft in Asian waters."¹⁰³ The report also noted that the United States considered the Chinese Act to be in violation of international law. This view was also communicated to the PRC government through diplomatic channels.¹⁰⁴

Another Chinese government declaration made on May 15, 1996 announced China's straight baselines along parts of its coast.¹⁰⁵ From these straight baselines China measures the breadth of its territorial sea, contiguous zone, and its other claimed maritime zones. China claims two sets of straight baseline systems in this Declaration. The first system comprises 49 baselines along features on, and adjacent to, its southeastern coast and Hainan Island. The second straight baseline system encompasses the disputed Paracel Islands, located in the northern part of the South China Sea. The U.S. position is that the length and location of many of China's straight baseline segments are such that they do not meet the criteria set forth in Article 7 of the UNCLOS. In addition, the United States noted that China is not allowed to establish archipelagic straight baselines around the Paracel Islands, since Article 46(a) of the UNCLOS states clearly that "'archipelagic State' means a State constituted wholly by one or more archipelagoes and may include other islands"; and Article 46 (b) defines the term "archipelago" as "a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such." As a continental state, therefore, it is asserted that China cannot establish archipelagic straight baselines around the Paracel Islands.¹⁰⁶ As far as the Paracel Islands are concerned, "[r]egardless of whose sovereignty the Paracel Islands comes under, straight baselines cannot be drawn," since the Convention "is quite clear in stating that an archipelagic State 'means a State constituted wholly by one or more archipelagoes and may include other islands.'"¹⁰⁷

It should also be noted that the location of the aerial collision between the U.S. *EP-3* and the Chinese *J-8* fighter in April 2001 is not far away from the waters surrounding the Paracel Islands in the South China Sea. In short, it is likely that U.S. accession to the UNCLOS will give rise to legal disputes between the United States and China over the declarations made by the Chinese government relating to the right of innocent passage for warships and the legitimacy of drawing straight baselines and archipelagic straight baselines to measure the breadth of China's territorial sea.

Concluding Remarks

From the perspective of China, the second declaration and the first six statements of understanding contained in the Senate Advice and Consent Resolution have great potential to give rise to legal disputes in its territorial sea and EEZ. It is also believed that the legitimacy or validity concerning some of the declarations and statements of understandings to be made by the United States upon accession will be questioned by other state parties to the Convention. The four incidents examined in the paper, namely, the *Yinhe* incident (1993), the *Kitty Hawk* incident (1994), the *EP-3* aerial collision incident (2001), and the *Bowditch* incident (2002), demonstrate the possibility of legal disputes between Washington and Beijing. To help avoid incidents at sea or to deal with potential legal

disputes between the United States and China after U.S. accession to the Convention, it would be helpful for the two countries to expand maritime security consultation under the framework of the U.S.-China Military Maritime Safety Consultation Agreement signed in 1998,¹⁰⁸ and include law of the sea issues, in particular the application and interpretation of Articles of 7, 19, 20, and 58 of the UNCLOS, on the list for discussions at future meetings.¹⁰⁹

Notes

1. For the text, see UN Doc. A/Conf.62/122, October 7, 1982, 1833 *United Nations Treaty Series* 397. For a brief historical review regarding the UN's efforts to produce the 1982 UNCLOS, see United Nations, Department of Public Information, *A Quiet Revolution: The United Nations Convention on the Law of the Sea* (New York: United Nations, 1984).

2. Article 310:

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

3. Article 287, paragraph 1:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

4. Article 298, paragraph 1:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

- (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
- (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;
- (iii) this subparagraph does not apply to any sea boundary dispute finally settled by

an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

5. The declarations and statements are available on the United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea (DOALOS), website at: <www.un.org/Depts/los/index.htm>.

6. For the text of the Resolution of Advice and Consent to Ratification, see “United Nations Convention on the Law of the Sea,” Report to Accompany Treaty Doc. 103–39, Senate, 108th Congress, 2nd Session, *Exec. Rpt.* 108–10, at 17–22. The declarations and understandings are also reproduced as an Appendix to John A. Duff, “A Note on the United States and the Law of the Sea: Looking Back and Moving Forward,” *Ocean Development and International Law*, Vol. 35 (2004), pp. 214–219.

7. Article 309 reads: “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”

8. For the text, see *International Legal Materials*, Vol. 33 (1994), p. 1309.

9. Available on the DOALOS website, *supra* note 5.

10. The term “excessive maritime claims” is defined by J. Ashley Roach and Robert Smith, *United States Responses to Excessive Maritime Claims* (Martinus Nijhoff, The Hague, 1996), at 15, as “[c]laims by coastal States to sovereignty, sovereign rights or jurisdiction over ocean areas that are inconsistent with the terms of the LOS Convention.”

11. From August 26 to September 4, 1993, the United States had sent its warships and military aircraft to follow the Chinese cargo-liner *Yinhe* that was suspected of carrying chemical weapon precursors, thiodiglycol and thionyl chloride, bound for Iran. China issued a statement (September 4, 1993), in which the Chinese Foreign Ministry accused the United States of infringing upon China’s sovereignty and its right to freedom of navigation in international waters. This incident is discussed in detail below and see Zhao Lihai, “On Legal Responsibility for the *Yinhe* Incident,” *Central Political Management Cadre Academy Review*, 1994 (in Chinese), at 36, 40–43; Li Yin, “The *Yinhe* Incident and International Law: On State’s Sovereignty, Freedom of Navigation, and State Responsibility,” *Politics and Law Journal*, No. 3, 1994, at 61–64 (in Chinese); and Lin Fong, “The *Yinhe* Incident and International Law,” *Law Review*, No. 3, 1994, at 80–81 (in Chinese).

12. In 1994, the American aircraft carrier *Kitty Hawk* and a Chinese nuclear submarine squared off in international waters off China’s coast in the Yellow Sea in an encounter that demonstrated the potential for naval conflict between the United States and China. See “Faceoff Between U.S. Ships, Chinese Sub Is Revealed,” *Los Angeles Times*, December 14, 1994, at A1. See also *infra* notes 88–89.

13. Regarding this incident, see Yann-huei Song, “The EP-3 Collision Incident, International Law and Its Implications on the U.S.-China Relations,” *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 19, (2001), pp. 1–15. See also *infra* notes 90–94.

14. See “U.S. says Chinese vessels harassed Navy oceanographic research ship,” *The Detroit News*, September 28, 2002, available at <www.detroitnews.com/2002/nation/0209/28/nation-599254.htm>. See also *infra* notes 99–101.

15. Respecting the Proliferation Security Initiative (PSI), see “The Proliferation Security Initiative” webpage on the U.S. Department of State website dated 28 July 2004, available at <www.state.gov/t/np/rls/other/34726.htm>. This webpage contains the “Statement of Interdiction

Principles,” dated 4 September 2003, which sets out the approach to be taken by states involved in the PSI regarding interdiction at sea. More generally on the PSI, see Michael Byers, “Policing the High Seas: The Proliferation Security Initiative,” *American Journal of International Law*, Vol. 98, (2004), pp. 516–525.

16. Remarks by Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea, on December 6 and 11, 1982 at the final session of the Conference at Montego Bay, Jamaica, available on the DOALOS website, *supra* note 5.

17. A chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements is available on the DOALOS website, *supra* note 5.

18. Statement by President Reagan, “U.N. Convention on the Law of the Sea—1982,” available in the website of Council of Ocean Law at: <http://www.oceanlaw.org/reagan82.html>.

19. It is worth noting that numerous other Western industrialized states had similar concerns regarding the deep sea-bed mining regime in UNCLOS and had not up to that time become party to UNCLOS.

20. “Message from the President of the United States transmitting United Nations Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982 (the Convention) and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, adopted at New York, July 28, 1994 (the Agreement), and signed by the United States, subject to ratification, on July 29, 1994.” S. Treaty Doc. 39, 103d Cong., 2d session. IV (1994).

21. See “Current Status of the Convention on the Law of the Sea,” *Hearings* before the Committee on Foreign Relations, United States Senate, 103rd Cong., 2nd sess., August 11, 1994.

22. Marjorie Ann Browne, *The Law of the Sea Convention and U.S. Policy*, CRS Issue Brief for Congress, Congressional Research Service, the Library of Congress, updated June 2, 2004, p. CRS-14.

23. Under Article 312, para. 1, “[a]fter the expiry of a period of 10 years from the date of entry into force of this Convention, a State Party may, by written communication addressed to the Secretary-General of the United Nations, propose specific amendments to this Convention, . . . and request the convening of conference to consider such proposed amendments.”

24. See Report to accompany Treaty Doc. 103–39, *supra* note 6.

25. See the statements made by these groups at *Hearings* on the U.N. Convention on the Law of the Sea (Treaty Doc. 103–39), October 14, 2003 and October 21, 2003, Annex II to Report to accompany Treaty Doc. 103–39, *supra* note 6.

26. Ambassador Sichan Siv, U.S. Representative on the United Nations Economic and Social Council, Statement in the General Assembly on Oceans and Law of the Sea, New York, November 27, 2001, available on the website of U.S. Department of State at: <www.state.org/g/oes/rls/rm/6796.htm>.

27. Noted in Browne, *supra* note 22, p. CRS-2.

28. Jim Lobe, “Right-Wing Republicans Sinking Law of the Sea, Again,” *Inter Press Service*, August 27, 2004, available at: <www.commondreams.org/headlines04/0603-07.htm>.

29. “Rescuing the Law of the Sea,” *The New York Times*, August 22, 2004.

30. Prepared Statement of Senator John F. Kerry, in the Report to accompany the Treaty Doc. 103–39, *supra* note 6, p. 159.

31. *Id.*

32. Report to accompany Treaty Doc. 103–39, *supra* note 6.

33. *Ibid.*, at 8.

34. *Id.*

35. *Ibid.*, at 8–9.

36. *Ibid.*, at 10.

37. *Id.*

38. *Ibid.*, at 10–11.

39. *Ibid.*, at 11.

40. *Id.*

41. *Id.*
42. *Ibid.*, at 12.
43. *Ibid.*, at 12–13.
44. *Ibid.*, at 13.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Ibid.*, at 14.
49. *Id.*
50. *Ibid.*, at 15.
51. Article 316, paragraph 5: “[a]ny amendment relating exclusively to activities in the Area and any amendment to Annex XI shall enter into force for all States Parties one year following the deposit of instruments of ratification or accession by three fourths of the States Parties.”
52. Defined in Article 1, paragraph 1 as: “the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”
53. Annex VI contains the Statute of the International Tribunal for the Law of the Sea.
54. Report to accompany Treaty Doc. 103–39, *supra* note 6, at 15.
55. Article 297, paragraph 2 relates to disputes concerning the interpretation or application of the provisions of the UNCLOS with regard to marine scientific research. Article 297, paragraph 3 relates to disputes concerning the interpretation or application of the provisions of the UNCLOS with regard to fisheries.
56. Greg Sheridan, “US ‘free’ to tackle N Korea,” *The Australian*, July 9, 2003.
57. *Deutsche-Pressre Agentur*, July 10, 2003.
58. “Beijing silent on alleged Chinese nuclear weapons designs found in Libya,” *Agence France Presse*, February 17, 2004.
59. Foreign Ministry Spokesperson Zhang Qiyue’s Press Conference on 4 November 2004, available on the website of Ministry of Foreign Affairs of the People’s Republic of China at <www.fmprc.gov.cn/eng/xwfw/s2510/t169072.htm>.
60. “The United Nations Convention on the Law of the Sea,” *Hearings* before the Committee on International Relations, House of Representatives, 108th Congress, 2nd session, May 12, 2004, at 23.
61. “Foreign Ministry statement on *Yinhe* affairs; public apology from USA demanded,” BBC Summary of World Broadcasts (LexisNexis News on-line search), September 6, 1993. For a detailed discussion on the incident, see Zhao Lihai, *supra* note 11; Li Yin, *supra* note 11 and Lin Fong, *supra* note 11.
62. See Article 19 (2)(a)–(k).
63. Article 19 (2)(l) reads that “any other activity not having a direct bearing on passage.” See R.R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester University: Juris Publishing, 1999, 3rd edition), at 85. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, 516 *United Nations Treaty Series* 205.
64. Report to accompany Treaty Doc. 103–39, *supra* note 6, at 18.
65. *Ibid.*, at 9.
66. *Supra* note 63.
67. Report to accompany Treaty Doc. 103–39, *supra* note 6, at 9.
68. Rear Admiral Schachte’s statement, *supra* note 60, at 20.
69. Prepared Statement of the Honorable William H. Taft, Legal Adviser, U.S. Department of State, “Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI Of The Law of the Sea Convention,” Senate Treaty Document 103–39; Senate Executive Report 108–10, cited in “The United Nations Convention on the Law of the Sea,” *Hearings* before the Committee on International Relations, *supra* note 60, at 40.
70. The declaration is reproduced in Myron H. Nordquist and Choon Ho Park, eds. *North America and Asia-Pacific and the Development of the Law of the Sea: Treaties and National Legislation* (London/Rome/New York: Oceana Publications, Inc., 1981) at 6. The document can

also be found in International Boundary Study, Series A, *Limits in the Seas*, No. 43: Straight Baselines: People's Republic of China (The Geographer, Office of the U.S. Geographer, Bureau of Intelligence and Research).

71. Noted in Liyu Wang and Peter H. Pearse, "The New Legal Regime for China's Territorial Sea," *Ocean Development and International Law*, Vol. 25 (1994), p. 438.

72. The text of the law can be found in United States Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, *Limits in the Seas*, No. 117, Straight Baseline Claim: China. July 9, 1996, Annex 2, at 11–14.

73. *Id.*

74. For the Chinese declaration, see the DOALOS website, *supra* note 5.

75. See Roach and Smith, *supra* note 10, at 260–263.

76. Srikanth Kondapalli, "Han-Class Submarine Incident: Portends for China-Japan Relations and Beyond," Institute for Defence Studies and Analyses, New Delhi, India, available at: www.peaceforum.org.tw.

77. Report to accompany Treaty Doc. 103–39, *supra* note 6, at 9.

78. Prepared Statement of the Honorable William H. Taft, *supra* note 69, at 40.

79. Report to accompany Treaty Doc. 103–39, *supra* note 6, at 18.

80. See William S. Cohen, Secretary of Defense, *Annual Report to the President and the Congress*, 1999, Appendix I (Freedom of Navigation). For the report and the appendix, visit the Department's web site at: www.dtic.mil/execsec/adr1999/apdx_i.html.

81. See generally Zou Keyuan, "Redefining the Legal Status of the Taiwan Strait," *International Journal of Marine and Coastal Law*, Vol. 15 (2000), 245.

82. Respecting the Regional Maritime Security Initiative, see "RMSI: The Idea, The Facts" webpage on the website of the U.S. Navy Pacific Command at www.pacom.mil/rmsi/.

83. Ji Guoxing, "U.S. RMSI Contravenes UN Convention on the Law of the Sea," *PacNet* 29, July 8, 2004.

84. See S.H. Lay, R. Churchill, et al., eds. *New Directions in the Law of the Sea*, Vol. III (New York: Oceana Publications, 1973), at 320; and UN Doc/A/AC/SC II/SR 36, 1973, at 21 and UN Doc/A/AC/138/SC II/L 34, 1973, cited in Zhiguo Gao, "China and the LOS Convention," *Marine Policy*, Vol. 15, (1991), at 204.

85. B. A. Hamzah, "NO basis for US patrols," *New Straits Times* (Malaysia), July 31, 2004, at 8.

86. Report to accompany Treaty Doc. 103–39, *supra* note 6, at 19.

87. Article 58 is reproduced below.

88. See Antonio Kamiya, "U.S. carrier, Chinese sub play cat and mouse in Yellow Sea," *Japan Economic Newswire*, December 15, 1994 and Nick Rufford, "Militant China rises fears of new cold war," *Sunday Times*, December 18, 1993.

89. Noted in Patrick E. Tyler, "As Deng Fades, China's Leaders Tighten Grip on Power," *New York Times*, December 19, 1994, at A3.

90. Elisabeth Rosenthal and David E. Sanger, "U.S. Plane in China after It Collides with Chinese Jet," *New York Times*, April 2, 2002, at A1 and John Pomfret, "U.S., Chinese Warplanes Collide over S. China Sea," *Washington Post*, April 2, 2001, at A01.

91. "FM Spokesman gives Full Account of Air Collision," Consulate General of the People's Republic of China in Houston, April 4, 2001, available at: www.chinahouston.org/news/2001403202414.html.

92. See Erik Eckholm, "China Faults U.S. in Incident; Suggests Release of Crew Hinges on Official Apology," *New York Times*, April 4, 2001, at A1.

93. See "Secretary Rumsfeld Briefs on EP-3 Collision," Defense Link of the U.S. Department of Defense, April 13, 2001, available at: www.defenselink.mil/news/Apr2001/t04132001_t0413ep3.html.

94. See Guy Gugliotta, "U.S. Expects Return of Plane, Crew," *Washington Post*, April 2, 2001, at A14 and David E. Sanger, "Powell Sees No Need for Apology; Bush Again Urges Return of Crew," *New York Times*, April 4, 2001, at A1.

95. For the Chinese text of the law, see *People's Daily*, June 30, 1998, at 2. An English version of the law can be found in *Law of the Sea Bulletin*, No. 38, 1998, at 28–31.

96. Third United Nations Conference on the Law of the Sea, *Official Records* (67th plenary meeting), Vol. 5, paragraph 81.

97. See U.S. Department of the Navy, *The Commander's Handbook on the Law of the Naval Operations*, NWP 1-14M, 1995, pp. 2-3.

98. Report accompanying Treaty Doc. 103–39, *supra* note 6, at 19.

99. Mark Oliva, “Before EP-3, China turned away U.S. research ship in international waters,” *Stars and Stripes*, May 20, 2001, available at: <www2.pstripes.osd.mil/01/may01/ed052001d.html>.

100. Bill Gertz and Rowan Scarborough, “Chinese harass ship,” *Washington Times*, September 20, 2002, at A13.

101. “Spokeswoman Says US Navy Activities Infringe Chinese Rights,” *BBC Monitoring International Reports*, September 26, 2002.

102. See *supra* note 74.

103. “U.S. Warns China on Sea Expansion,” *International Herald Tribune*, September 19, 1996.

104. *Id.*

105. Declaration of the Government of the People's Republic of China on the Baseline of the Territorial sea of the People's Republic of China on May 15, 1996 reproduced in *Limits in the Sea*, No. 117, *supra* 72, at 9–10.

106. *Ibid.*, at 5 and 8.

107. *Ibid.*, at 8. See also Article 46 of the UNCLOS.

108. The text of Agreement between Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety can be found in the website of The Nuclear Threat Initiative (NTI) at: <<http://www.nti.org/db/china/ongdoes/milmarag.htm>>.

109. The first meeting of U.S.–China Military Maritime–Air Safety working group was held in Hawaii in August 2002, and the second in Qingdao, China in December 2002. Two special meetings under the U.S.–China Military Maritime Consultation Agreement were held in Guam and Shanghai in September 2001 and March 2004, respectively.

Appendix

Table 1
 Declarations and Statements of Understandings to Be Made
 by the United States when Acceding to the Convention

Declarations and Statements	Contents	Legal basis
Declaration 1	<p>To choose the means for the settlement of disputes:</p> <p>The U.S. chooses special arbitration for all the categories of disputes of which it may be applied and arbitration for other disputes.</p>	<p>Article 287 (1) of UNCLOS</p> <p>Annex VII and Annex VIII to UNCLOS</p>
Declaration 2	<p>To exclude certain categories of disputes from dispute settlement procedures:</p> <p>The U.S. elects to exclude disputes regarding maritime boundaries between neighboring states, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the UN Security Council is exercising the functions assigned to it by the UN Charter;</p> <p>The U.S. states that U.S. consent to accession is conditioned upon the understanding that, under article 298(1), each State Party has the exclusive right to determine whether its activities are or were “military activities,” and that such determinations are not subject to review.</p>	<p>Article 298 (1) of UNCLOS</p>
Understanding 1	<p>To claim the right of self-defense:</p> <p>The U.S. states that nothing in the UNCLOS impairs the inherent right of self-defense or rights during armed conflict, including any Convention provisions referring to “peaceful conflict” or “peaceful purposes.”</p>	<p>Article 310 of UNCLOS</p>
Understanding 2	<p>To claim U.S. right of innocent passage in territorial waters.</p>	<p>Article 310 of UNCLOS</p>
Understanding 3	<p>To claim U.S. right of transit passage in straits used for international navigation and in archipelagic waters.</p>	<p>Article 310 of UNCLOS</p>
Understanding 4	<p>To claim U.S. high seas freedom of navigation and overflight in EEZ.</p>	<p>Article 310 of UNCLOS</p>

(Table continues next page)

Table 1
 Declarations and Statements of Understandings to Be Made
 by the United States when Acceding to the Convention (*Continued*)

Declarations and Statements	Contents	Legal basis
Understanding 5	To claim that certain activities, conducted in marine areas under coastal states' jurisdiction, such as military activities and operational oceanography, are not considered marine scientific research activities and therefore do not require consent from coastal states.	Article 310 of UNCLOS
Understanding 6	To express the U.S. view that those declarations and statements of other states parties that purport to limit navigation, overflight, or other rights and freedoms in ways not permitted by the UNCLOS contravenes the Convention (specifically Article 310, which does not permit such declarations and statements).	Article 310 of UNCLOS
Understanding 7	To confirm that the UNCLOS in no way limits a state party's ability to prohibit or restrict imports in order to, among other things, promote or require compliance with environmental and conservation laws, norms, and objectives.	Article 310 of UNCLOS
Understanding 8	To ensure that certain provisions of the UNCLOS apply only to a particular source of marine pollution (namely, pollution from vessels) and not other sources of marine pollution, such as dumping.	Article 310 of UNCLOS
Understanding 9	To harmonize the UNCLOS's "clear grounds" standard in Articles 220 and 226 with the U.S. "reasonable suspicion standards."	Article 310 of UNCLOS
Understanding 10	To set forth the limits of the applicability under Article 228 (2) concerning certain marine pollution proceedings.	Article 310 of UNCLOS
Understanding 11	To harmonize aspects of Article 230 (governing the use of monetary penalties in cases involving pollution of the marine environment by foreign vessels) of the UNCLOS with U.S. law and practice for the enforcement of pollution laws.	Article 310 of UNCLOS

Table 1
 Declarations and Statements of Understandings to Be Made
 by the United States when Acceding to the Convention (*Continued*)

Declarations and Statements	Contents	Legal basis
Understanding 12	To clarify that the marine pollution provisions of the UNCLOS, specifically sections 6 and 7 of Part XII, do not limit a state party's authority to impose penalties, inter alia, for nonpollution offenses or for marine pollution violations that take place in a State Party's ports, rivers, harbors, or off-shore terminals.	Article 310 of UNCLOS
Understanding 13	To ensure that the UNCLOS confirms and does not constrain the longstanding right of a state party to impose and enforce conditions for the entry of foreign vessels into its ports, rivers, harbors, or offshore terminals.	Article 310 of UNCLOS
Understanding 14	To make clear that certain types of measures would not constitute measures applying to "design, construction, manning or equipment" of foreign ships and would therefore not be limited by Article 21(2) of the UNCLOS.	Article 310 of UNCLOS
Understanding 15	To make clear that the UNCLOS supports a coastal state's regulation of discharges into the marine environment resulting from industrial operations.	Article 310 of UNCLOS
Understanding 16	To affirm that the UNCLOS supports the ability of a coastal State, such as the U.S. to exercise its domestic authority to regulate the introduction into the marine environment of alien or new species, and that a variety of Convention provisions might be applicable, depending upon the circumstances, e.g., Articles 21, 56, 196, or 211, to deal with the issue of invasive species.	Article 310 of UNCLOS
Understanding 17	To make clear that the U.S. implements the living marine resource provisions of the UNCLOS through a variety of domestic laws, in particular, the Magnuson-Stevens Fishery Conservation and Management Act.	Article 310 of UNCLOS

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Table 1
Declarations and Statements of Understandings to Be Made
by the United States when Acceding to the Convention (*Continued*)

Declarations and Statements	Contents	Legal basis
Understanding 18	<p>To note that the U.S. lent direct support to the establishment of the international moratorium on commercial whaling that is in place and that the U.S. lends current support to the creation of sanctuaries and other conservation measures.</p> <p>To indicate, with respect to Article 65 of the UNCLOS, that cooperation through international organizations applies not only to large whales but to all cetaceans.</p>	Article 310 of UNCLOS
Understanding 19	<p>To make clear that the term “sanitary laws and regulations” in Article 33 of the UNCLOS is not limited to the transmittal of human illnesses, but may include, e.g., laws and regulations to protect human health from pathogens being introduced into the territorial sea.</p>	Article 310 of UNCLOS
Understanding 20	<p>To reinforce the 1994 Deep Sea Bed Implementing Agreement that decisions adopted by procedures other than the consensus procedure in Article 161(8)(d) will involve administrative, institutional or procedural matters and will not result in binding substantive obligations on the U.S.</p>	Article 310 of UNCLOS
Understanding 21	<p>To make clear that no assessed contributions could be decided by the Assembly, the primary body of the International Sea-Bed Authority, without the agreement of the U.S. in the Finance Committee.</p>	Article 310 of UNCLOS
Understanding 22	<p>To provide that, for the U.S., decisions made by the Sea-Bed Disputes Chamber shall be enforceable only in accordance with procedures established by implementing legislation and that such decisions shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the U.S.</p>	Article 310 of UNCLOS

Table 1
 Declarations and Statements of Understandings to Be Made
 by the United States when Acceding to the Convention (*Continued*)

Declarations and Statements	Contents	Legal basis
Understanding 23	To make clear the basic rules for amending Annex VI of the UNCLOS, which relates to the Sea-Bed Disputes Chamber established under the Convention to resolve certain disputes arising in connection with deep sea bed mining.	Article 310 of UNCLOS
Understanding 24	To state that the UNCLOS and the 1994 Deep Sea-Bed Implementing Agreement do not create private rights of action or other enforceable legal rights in U.S. courts.	Article 310 of UNCLOS

Source: Text of Resolution of Advice and Consent to Ratification can be found in Senate Report to accompany Treaty Doc. 103-39 (United Nations Convention on the Law of the Sea), Exec. Rpt. 108-10, March 11, 2004, at 17-22. The table has been prepared by the author.