COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

STATEMENT OF

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BEFORE THE COMMITTEE ON FOREIGN RELATIONS

UNITED STATES SENATE

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Introduction

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify before the Committee today on this subject of strategic importance.

As the Commander of U.S. Pacific Command (PACOM), I join Secretary Clinton, Secretary Panetta, Chairman Dempsey, my fellow Combatant Commanders, and numerous other current and former leaders within the Department of Defense and United States Government in recommending that the United States accede to the Law of the Sea Convention. After careful reflection, I am fully confident that our accession to this Convention would advance U.S. national security interests in the PACOM area of responsibility (AOR). Specifically, the Convention sets forth and locks-in a rules-based order that protects military activities which are vital to our operations in defense of the nation, as well as our allies and partners.

As you know, the United States is refocusing on the Pacific after more than 10 years of war. As noted by Secretary Panetta, "We continue to face a challenging and complex global security environment, with multiple transnational threats including violent extremism, the destabilizing behavior of nations like Iran and North Korea, military modernization across the Asia-Pacific, and turmoil in the Middle East and North Africa." All of the foregoing challenges must be viewed against the backdrop of the world's increasing dependence on trade and commerce to and from the Asia-Pacific region.

It is critical for the United States to maintain its leadership role in the Pacific in order to best protect our vital security interests. As the Secretary of Defense stated in his testimony, a key component of our strategy is to re-energize and strengthen our network of defense and security partnerships throughout the Asia Pacific region. An area of universal interest among our

allies and partners is protection of the rights and freedoms that underpin all nations' access to and uses of the world's oceans. Joining the Convention will ensure seamless integration of international legal authorities between our forces and those of our partners and will place the United States in the best possible position to continue to lead international efforts in the maritime domain.

Most important to me as the Commander of U.S. Pacific Command are the protections contained in the Convention for our navigational rights and freedoms, over-flight rights and freedoms, military activities, and our rights to transit international straits and choke points without impediment. With more than half the world's ocean area within my AOR, forces assigned to me rely on these basic rights, freedoms, and uses daily to accomplish their mission. All of the foregoing rights and freedoms are specifically protected by the Convention.

As we look into the future, our status as a non-party will increasingly disadvantage the United States. Presently, the United States is forced to rely on customary international law as the basis for asserting our rights and freedoms in the maritime domain. In situations where coastal states assert maritime claims that exceed the rights afforded to them by the Convention, USPACOM challenges such claims through a variety of means including the U.S. Freedom of Navigation program, military-to-military communications, and diplomatic protests issued through the State Department. When challenging such excessive claims through military-to-military or diplomatic exchanges, the United States typically cites customary international law and the relevant provisions of the Convention. Unfortunately, because we are not a party to the Convention, our challenges are less credible than they would otherwise be. Other States are less persuaded to accept our demand that they comply with the rules set forth in the Convention, given that we have not joined the Convention ourselves.

In addition, as you know, customary international law depends in part on State practice and is subject to change over time. This is less so in the case of treaty or convention-based international law, which comes from written and agreed upon terms and conditions that are contained in such treaties or conventions. Ironically, by not being a party to the Convention and relying on customary international law, our rights within the maritime domain are less well defined than the rights enjoyed by virtually all of the other nations within the PACOM AOR, and around the world with over 160 Nations as parties. Moreover, by remaining outside the Convention, we leave ourselves potentially in a situation where other nations feel they can ignore the Convention's provisions when dealing with the United States, in favor of what they may view as less clear and more subjective obligations that may exist in customary international law.

As the Asia Pacific region continues to rise, competing claims and counter claims in the maritime domain are becoming more prominent. Nowhere is this more prevalent than in the South China Sea. Numerous claimants have asserted broad territorial and sovereignty rights over land features, sea space, and resources in the area. The United States has consistently encouraged all parties to resolve their disputes peacefully through a rules-based approach. The Convention is an important component of this rules-based approach and encourages the peaceful resolution of maritime disputes. Here again though, the effectiveness of the U.S. message is somewhat less credible than it might otherwise be, due to the fact that we are not a party to the Convention.

Some States in the USPACOM AOR have adopted deliberate strategies vis-à-vis the United States to try to manipulate international law to achieve desired ends. Such strategies are infinitely more achievable when working within the customary international law realm, versus the realm of treaty-based law. By joining the Convention, we greatly reduce this interpretive

maneuver space of others and we place ourselves in a much stronger position to demand adherence by others to the rules contained in the Convention – rules that we have been following, protecting and promoting from the outside for many decades.

Additionally, while convention or treaty-based international law is less subject to change and interpretation, it is not immune from change. Parties can collectively agree to change the rule-set in a treaty or adopt particular interpretations of its provisions, in accordance with the terms of the treaty. Given that over 160 nations are currently parties to the Convention, if the rule-set were to change, we might no longer be able to argue that the existing, favorable set of rules under the Convention reflects customary international law. We would be forced to either accept the new rule-set or act as a persistent objector, either of which would come with its own risks. Moreover, our continued status as a non-party allows States an enhanced ability to co-opt the existing text of the Convention and attempt to re-interpret its rules contrary to the original intent that we and other maritime powers helped to negotiate. It would be much more beneficial for the United States to lead the international community in this crucial area of international law from within the Convention, rather than from the outside.

In the past, questions have been raised about whether U.S. accession would harm or otherwise undermine our security interests. It is important to answer these questions directly and factually. Questions include the following:

Will accession to the Convention force us to surrender U.S. jurisdiction over military vessels? The answer is no. The Convention specifically preserves the sovereign immunity of warships and exempts them from the exercise of foreign jurisdiction. Given that the Convention is clear on this point, exclusive U.S. jurisdiction over our warships would be better protected through accession than is currently the case.

Will accession restrict U.S. military operations and activities? Here again, the answer is no. The Convention in no way restricts our ability or legal right to conduct military activities in the maritime domain. As stated by the Secretary of Defense, "U.S. accession to the Convention preserves our freedom of navigation and over-flight rights as bedrock treaty law – the firmest possible legal foundation for these activities."

Will accession subject the U.S. military to the jurisdiction of international courts? Again, the answer is no. The Convention specifically permits nations to exempt from international dispute resolution, "disputes concerning military activities, including military activities by government vessels and aircraft." State Parties individually determine what constitute "military activities." Current and former leadership within the U.S. government have given repeated assurances that the United States would take full advantage of this clause in its accession documents to exempt U.S. military activities and protect them from the jurisdiction of international courts and tribunals. In fact, this is specifically outlined in this Committee's Draft Resolution of Advice and Consent of 2007 and continues to be supported by the current Administration.

Will accession hamper our ability to conduct maritime interdiction operations, outside the piracy realm? The answer here is no, as well. The U.S. conducts a wide range of maritime interdiction and related operations with our allies and partners, virtually all of whom are parties to the Convention. We rely on a broad range of legal authorities to conduct such operations, including the Convention, U.N. Security Council Resolutions, other treaties, port state control measures, flag state authorities, and if necessary, the inherent right of self-defense. Accession would strengthen our ability to conduct such operations by eliminating any question of our right to avail ourselves of the legal authorities contained in the Convention and by ensuring that we

share the same international legal authorities as our partners and allies.

In conclusion, the United States is currently in a situation where we operate outside of a treaty that we were largely responsible for negotiating through which we obtained all our stated objectives, and that has been joined over 160 other nations, including virtually all of our allies and key partners. We conduct our actions consistent with many of its terms, which we regard as customary international law, but we do not obtain the benefits of the Convention available only to parties. Now more than ever, the United States must be a leader in preserving the rights, freedoms, and uses of the oceans that enable us to protect our vital security interests in the maritime domain around the globe. The diminishing group of countries outside the Convention includes land-locked nations such as Uzbekistan, Tajikistan, Afghanistan, and Bhutan, as well as rogue nations such as North Korea and Iran. To best protect our vital national security interests in the years to come, now is the time for the United States to lock-in a stable legal framework for the maritime domain, and send a clear message to other nations in the PACOM AOR that the maritime freedoms codified in the Convention are worth preserving and the Convention's rule of law is worth upholding.