UNCLOS Alchemy

By Lawrence A. Kogan, Esq.*

U.S. State Department Legal Adviser John B. Bellinger III's recent letter to the editor ("LOST will benefit U.S." – Washington Times 10/31/07)[1] reflects but another example of the true battle in which we are all, in one way or another, now engaged - namely, the battle against ignorance, apathy and bad ideas.

The letter to the editor proclaims that US ratification of the United Nations Convention on the Law of the Sea (UNCLOS) will provide "enormous national security...advantages to the United States, including clear legal rights of navigation for our military through and over the world's oceans". Yet it fails to mention the severe economic, legal and security-related costs associated with subjugating the US military's absolute customary international law right to freedom of navigation to environmental concerns.

Much to the contrary, the US military's right to freedom of navigation has been steadily eroding since the1990's as the result of the Clinton-Gore administration's 'enlightened' "military operations other than war" policy[2] and the 'lawfare' tactics employed by other UNCLOS parties[3] with the help of environmental extremist groups. The European Union and its member states, for example, have continued to convert their economic rights over their exclusive economic zones (EEZs) into legal sovereign claims by establishing environmental 'Particularly Sensitive Sea Areas' (PSSAs) all along European coastlines, a bad idea to which the president's ill-informed advisers,[4] and apparently, some ignorant developing country governments,[5] have increasingly warmed. And, environmental extremist groups have continued to press for the creation of more and more public ocean trusts, consistent with the utopian 'common heritage of mankind' doctrine, within other coastal states' EEZs, known as 'Marine Protected Areas' - at the expense of coastal state economic rights and flag states' legal right to freedom of navigation. Consequently, US military and commercial vessels must now tread lightly when navigating through these environmental sanctuaries and may even be legally compelled to avoid them altogether, costing time, resources and perhaps US national security.[6]

Environmentalists have also been working alongside liberal US federal judges to strictly reinterpret US environmental laws, consistent with Europe's Precautionary Principle and UN Environment Program (UNEP) multilateral treaty law that the US has thus far refused to ratify, including those of UNCLOS, to preclude the US navy's free deployment of sonar detection technology during essential routine military training exercises within US territorial waters and EEZs, all at the expense of our national security. This has occurred along both US coastlines and in the Hawaiian Islands and Puerto Rico despite the absence of scientific evidence demonstrating that the technologies used actually cause substantial harm to marine life.[7]

In addition, the letter to the editor declares that ratification of the UNCLOS is necessary to provide the US with "economic sovereign rights over enormous oil, gas and other resources" in light of the 'gold rush' claims now being staked by Russia and other countries...to Artic resources." However, it neglects

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to mention how legal commentators agree that the contest between Russia, Norway, Denmark, Canada and the US over the Artic continental shelf areas essentially amounts to a legal border dispute among contiguous and/or adjacent states that need NOT be resolved through the redistributionist mechanisms of the UNCLOS.[8]

Contrary to an August Financial Times article the battle for Artic oil [9]does NOT hinge on a UN panel. UNCLOS jurisdiction is necessary in this case only to preserve the legal authority of the otherwise unsustainable bureaucracies established by the treaty – the Commission on the Limits of the Continental Shelf, to ensure the legal existence of a global commons in the Artic – 'the Area' - , the living and nonliving resources of which could then be regulated and taxed by the International Seabed Authority and later reallocated and distributed among other UNCLOS parties.[10] In other words, the State Department should be candid with the American people, and not promote the false pretense that the US government needs to ratify the UNCLOS to peaceably resolve in America's favor this apparent race over Artic resources. The US may pursue diplomatic negotiations with the Russian government or, if necessary, resort to a mutually agreed upon international legal forum to sort out competing claims, *without* the US ever ratifying the UNCLOS. Indeed, the Government of Peru recently chose to pursue this course of action in an effort to resolve its territorial sea dispute with neighboring Chile, noting along the way, its express lack of desire to sign and ratify the UNCLOS. In other words, Peru was determined NOT to subject its local and regional affairs to the scrutiny and oversight of the world body.[11]

Lastly, the letter to the editor states that the US would not be committed to implement Kyoto standards, presumably within US sovereign territory (land, air, internal and territorial waters), if it were to ratify the UNCLOS, even though practically ALL other UNCLOS parties are also parties to the underlying UN Framework Convention on Climate Change which the Kyoto Protocol is designed to implement. The letter makes this bold assertion, furthermore, although it is more likely than not that the requirements of the Kyoto Protocol will be construed by other UNCLOS parties as extending to the global commons, namely to the 'Area', consistent with UN Agenda 21, in order to protect the marine environment from the potential environmental hazards associated with oil, gas and mining exploitation.

If the US government does not intend, in the future, either to ratify the Kyoto Protocol or to adopt federal Kyoto-style (-lite) greenhouse gas emissions cap and trade regulatory measures within the territorial US, and does not plan for US government and/or commercial vessels, platforms and/or other man-made structures (e.g., rigs) operating on the high seas to submit to international greenhouse gas emissions standards developed, administered and enforced by the International Maritime Organization,[12] expressly referred to as an 'expert' UNCLOS international standards body,[13] for purposes of implementing the UNCLOS obligation to protect and preserve the marine environment consistent with international law and standards, including the Kyoto Protocol, why then would the US oil and gas industries work so diligently, silently and unobtrusively to secure a special amendment to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London Protocol 1996) (IMO - LC-LP.1/Circ.11)?[14]

Shouldn't the U.S. Congress be afforded the opportunity to investigate whether the US oil and gas industry trade associations especially sought this amendment because it would allow their members to sequester (pump back into the seabed floor) the carbon dioxide and other greenhouse gases emitted

during the process of oil and gas drilling and extraction, which would entitle them not only to escape liability for 'pollution dumping' under the prior terms of the convention's protocol, but also to economically profit under forthcoming US greenhouse gas regulations from the resulting offset credits that such sequestration would generate? Isn't public transparency and accountability, consistent with US constitutional due process, called for in this situation?

Here is a timeline / table which readers may find helpful in visualizing the following sequence of events from which they may then draw their own conclusions:

Date	***Initiative***	***Subject Matter***
February 10, 2007	London Protocol Amendment enters into force [15]	Deep Sea Drilling/Mining CO2 Sequestration no longer deemed a 'pollutant'
April 2007	Atlantic Council Issues Report *Law & the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law* [16]	Recommends that the US ratify the UNCLOS to improve America's image with Europeans
April 30, 2007	White House Press Release: EU-US Summit a Political Success[17]	Greater Transatlantic Economic and Regulatory Cooperation Pursued
May 14, 2007	Washington Note blog entry [18]	US-EU officials meet to discuss UNCLOS
May 15, 2007	White House Press Release: President Submitting UNCLOS to US Senate for Ratification [19]	Senate Foreign Relations Committee Hearings on UNCLOS

As noted, the London Protocol amendment went into force on February 10, 2007. On April 30, 2007, the White House issued a press release proclaiming the 2007 EU-US transatlantic summit a political 'success'. On May 15, 2007, approximately two weeks later and 90 days following the entering into force of the London Protocol amendment, the White House announced President Bush's desire to seek U.S. Senate ratification of the UNCLOS. On May 14th, 2007, one day before the issuance of the White House press release, an unsubstantiated but thought-provoking entry entitled, "Bush Will Push the Law of the Sea", appeared on the internet-based Washington Note blog. It corroborated a recommendation contained within a recent April 2007 report issued by the Atlantic Council of the United States and co-authored by a former State Department legal adviser.

Reasonable persons may find, in light of all of the above information, that the US State Department had unwisely pursued greater short-term transatlantic economic and regulatory integration in the mistaken belief that it would restore America's positive image abroad and improve US national security. State Department and other government officials have effectively testified in support of this objective.[20] [21] [22] Unfortunately, the facts also reveal that the price to be paid to secure Europe's cooperation on promoting and expanding the President's Proliferation Security Initiative [23] will likely be far too high, especially if it entails the long-term surrender to Europe of America's unique constitutional sovereignty over its own economic, legal and political affairs upon the ratification of the UNCLOS.[24]

The fundamental question then that all Americans should now ask themselves and their elected representatives is why have the various congressional committees possessing oversight jurisdiction thus far refused to hold open public hearings to consider whether the benefits are commensurate with the costs that US ratification of the UNCLOS is likely to generate. Arguably, if such hearings had already been commenced, the congress might now be, in the words of former Congressman Lee H. Hamilton, engaged in the throes of an "extensive debate [of the kind] written into the very structure of our congressional system." [25] I believe that Mr. Hamilton is not only correct, but that he would also agree that, no matter the shape a serious and constructive debate over UNCLOS ratification ultimately assumes, the American people, in the end, will have greatly benefited from it - by both avoiding the onset of political apathy and by witnessing the conversion of truly bad or misconceived ideas into good and useful ones.

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[1] *See* John B. Bellinger, III, "LOST will benefit U.S.", Washington Times Letter to the Editor (Oct. 31, 2007) at: http://www.washingtontimes.com/apps/pbcs.dll/article?AID=/20071031/EDITORIAL/110310008/1013/EDITORIAL&template=printart .

[2] *See* "Myths & Realities #2: U.S. Naval Freedom of Navigation and Avoidance of LOST Tribunal Jurisdiction Despite Europe's Aggressive Use of the Precautionary Principle?", ITSSD Journal on the Law of the Sea Treaty at: http://itssd.blogspot.com/2007/10/myth-realities-2-concerning-un-law-of_31.html .

[3] *See* Lawrence A. Kogan, "U.S. Military Review of the Law of the Sea Treaty Lacking", ITSSD Journal (Oct. 4, 2007) at: http://itssd.blogspot.com/2007/10/us-military-review-of-law-of-sea-treaty_04.html .

[4] "...I have instructed the U.S. delegation to the International Maritime Organization (IMO) to submit a proposal for international measures that would enhance protection of the Papahānaumokuākea Marine National Monument, the area including the Northwestern Hawaiian Islands. Last June, I issued a proclamation establishing the Monument, a 1,200-mile stretch of coral islands, seamounts, banks, and shoals that are home to some 7,000 marine species. The United States will propose that the IMO designate the entire area as a Particularly Sensitive Sea Area (PSSA) –- similar to areas such as the Florida Keys, the Great Barrier Reef, and the Galapagos Archipelago –- which will alert mariners to exercise caution in the ecologically important, sensitive, and hazardous area they are entering. This proposal, like the Convention on the Law of the Sea, will help protect the maritime environment while preserving the navigational freedoms essential to the security and economy of every nation." *See* "President's Statement on Advancing U.S. Interests in the World's Oceans" White House Press Release (May 15, 2007) at: http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html .

[5] *See* Sam Bateman,"UNCLOS and its Limitations as the Foundation for a Regional Maritime Security Regime" Institute of Defence and Strategic Studies, Nanying Technological University, Singapore (April 2006) at pp. 14-18, at: http://www.isn.ethz.ch/pubs/ph/details.cfm?lng=en&id=27159 .

[6] This subject matter will be addressed in a forthcoming entry of the ITSSD Journal's Myths & Realities on the Law of the Sea Treaty series.

[7] *Id*.

[8] *See, e.g.*, Julian Ku, "Peru Will Not Ratify Law of the Sea Treaty", Opinio Juris (9/5/07) at: http://www.opiniojuris.org/archives/archive_2007_09_02-2007_09_08.shtml .

[9] *See* Michael Peel and Daniel Dombey, "Battle for Artic Oil Hinges on UN Panel", Financial Times (Aug. 10, 2007) at: http://us.ft.com/ftgateway/superpage.ft?news_id=fto081020071404008525 .

[10] *See* Lawrence A. Kogan, "Myths & Realities Concerning the UN Law of the Sea Treaty: LOST Does Incorporate Europe's Contra-WTO Precautionary Principle!", ITSSD Journal (Oct. 6, 2007) at: http://itssd.blogspot.com/2007/10/myths-and-realities-concerning-un-law_06.html .

[11] *See* "Peru Will Not Sign U.N. Law of the Sea in Border Dispute with Chile", LivinginPeru.com (Sept. 4, 2007) at:

http://www.livinginperu.com/news-4632-politics-peru-will-not-sign-u-n-law-sea-border-dispute-with-chile .

[12] *See* Lawrence A. Kogan, "Myths & Realities #4 Concerning UN Law of the Sea Treaty: LOST, Land-Based Activities & Sources of Marine Pollution, and the Precautionary Principle" (Oct. 17, 2007) at fn#s 12 and 13, at: http://itssd.blogspot.com/2007/10/myths-realities-4-concerning-un-law-of_5097.html .

[13] *See* UNCLOS Annex VIII, "Special Arbitration", Articles 1 and 2: "Article 1 - Subject to Part XV, any party to a dispute concerning the interpretation or application of the articles of this Convention relating to...(2) protection and preservation of the marine environment... may submit the dispute to the special arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based. Article 2 - A list of experts shall be established and maintained in respect of each of the fields of...(2) protection and preservation of the marine environment... The lists of experts shall be drawn up and maintained, in the field of... in the field of navigation, including pollution from vessels and by dumping, by the International Maritime Organization..." The Bush Administration, within its resolution of ratification to UNCLOS, has expressly stated that it has chosen to submit to jurisdiction under UNCLOS Annex VIII Special Arbitration for matters other than those deemed to constitute 'military activities'.

[14] *See* "Notification of Entry into Force of the 'CO2 Sequestration' Amendments to Annex 1 to the London Protocol 1996", 1996 PROTOCOL TO THE CONVENTION ON THE PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER (LONDON PROTOCOL 1996) LC-LP.1/Circ.11 (Feb. 16, 2007) at: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17756/11.pdf .

[15] *Id*., at p. 1.

[16] While reasonable persons could disagree about the meaning and veracity of this statement it does, nevertheless, suggest that the White House might have followed one of the key recommendations made by former Department of State Legal Adviser, William H. Taft IV contained within a recently released April 2007 report issued by the Atlantic Council. In the report entitled, *Law & the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law*, Mr. Taft and his co-author recommended that, "The United States and Europe should make clear their commitment to working together to strengthen the international legal system through a public declaration... The United States and European Union should further demonstrate their commitment to this declaration through some additional actions. The United States should join at least one multilateral agreement that will enhance its reputation as a leader in the international legal field while also furthering U.S. interests. *In particular, securing ratification of the UN Convention on Law of the Sea would reinforce the U.S. position as a leader not only in legal, but also environmental matters — topics on which the U.S. reputation has dropped considerably in recent years, especially in Europe*" (emphasis added) *See* William H. Taft IV and Frances G. Burwell, "Law & the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law", The Atlantic Council of the United States Policy Paper (April 2007) at pp. 13-14, at: http://www.acus.org/docs/070417_Law%20_&%20_The_Lone_Superpower.pdf .

[17] *See* "EU/US Summit: April 30, 2007, White House, Washington, DC" European Union, Delegation of the European Commission to the USA at: http://www.eurunion.org/partner/summit/20070430sum.htm . See, e.g., "2007 EU-U.S. SUMMIT STATEMENT ENERGY SECURITY, EFFICIENCY, AND CLIMATE CHANGE" at: http://www.eurunion.org/partner/summit/Summit20070430/EnergSecur&ClimChnge.pdf ; "Joint Report on the Roadmap for US-EU Regulatory Cooperation" at: http://www.eurunion.org/partner/summit/Summit20070430/JtReptRoadmapUSEURegCoop042007.pdf .

[18] *See* Scott Paul "Big News: Bush Will Push Law of the Sea", The Washington Note (May 14, 2007) at: http://www.thewashingtonnote.com/archives/002128.php . Despite its questionable nature, the entry seems to place Mr. Bellinger at a then-recent meeting with high-level European diplomats speaking about the UNCLOS. The curious entry was made by Mr. Scott Paul, Deputy Director of Government Relations at Citizens for Global Solutions, formerly known as the World Federalist Association *See* "About Scott Paul", The Washington Note at: http://www.thewashingtonnote.com/about.php ; *See* "World Federalist Institute – About Us", Citizens for Global Solutions website at: http://globalsolutions.org/wfi ; "The United States and the Law of the Sea: Time to Join", In the Beltway – Citizens for Global Solutions at: http://globalsolutions.org/in_the_beltway/united_states_and_law_sea_time_join . According to Mr. Paul, "I recently heard a story about a meeting between [John] Bellinger and a group of high-level European diplomats that got me really fired up about UNCLOS. Bellinger promised the Europeans that the Bush Administration wanted to cooperate more closely and take a more multilateral approach in its foreign policy. *The Europeans responded that so long as the US refuses to join the Law of the Sea – the most common-sense international agreement on the map – they will view these promises with a great deal of skepticism* (for me, it'd take more than just UNCLOS to convince me of this supposed change of heart)" (emphasis added). *See* Scott Paul "Big News: Bush Will Push Law of the Sea", The

Washington Note, *supra*; "Big News: Bush Will Push the Law of the Sea" Securing America.com (May 14, 2007) at: http://securingamerica.com/ccn/node/12104#comment-210149 . .

[19] *See* "President's Statement on Advancing U.S. Interests in the World's Oceans" *supra*.

[20] *See* "Written Testimony of Deputy Secretary of Defense, Gordon England, Before the Senate Foreign Relations Committee – 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", (Sept. 27, 2007) at pp. 3, 5-7, at: http://www.senate.gov/~foreign/testimony/2007/EnglandTestimony070927.pdf

[21] *See* WRITTEN TESTIMONY OF JOHN D. NEGROPONTE, DEPUTY SECRETARY U.S. DEPARTMENT OF STATE BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE ON SEPTEMBER 27th, 2007, 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]
at pp. 2, 5-6, 18, at: http://www.senate.gov/~foreign/testimony/2007/NegroponteTestimony070927.pdf .

[22] *See* Statement of Admiral Patrick M. Walsh, U.S. Navy Vice Chief of Naval Operations Before the Senate Committee on Foreign Relations Hearing on the Law of the Sea Convention (Sept. 27, 2007) at pp. 6-8, 10, at: http://www.senate.gov/~foreign/testimony/2007/WalshTestimony070927pdf .

[23] According to US State Department lawyer Susan Biniaz, "Several countries, including Indonesia and Malaysia, have refused to join the US-led PSI unless and until the US joins UNCLOS". *See* Peter Buxbaum, "US Administration Pushes UNCLOS" ISN Security Watch (8/23/07) at: http://www.isn.ethz.ch/news/sw/details.cfm?id=18027 . "During his confirmation hearings for Chief of Naval Operations before the Senate Armed Services Committee on September 27, Admiral Roughead stated that he saw in the Pacific that some countries would avoid participating with us in the proliferation security initiative because we are not party to the Law of the Sea Convention." See STATEMENT OF PROFESSOR BERNARD H. OXMAN BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS (Oct. 4, 2007) at p.2, at: http://www.senate.gov/~foreign/testimony/2007/OxmanTestimony071004.pdf .

[24]*Id.* "Washington says that signing on to the UN Convention of the Law of the Sea will give the US more power in the war on terror, but some question at what expense...'We want to get more countries involved,' said Biniaz. 'Joining UNCLOS will enable other countries to participate in PSI with the understanding we are following international law.' ***Biniaz also noted that the US does not have a proxy fighting for its interests within UNCLOS or on the international tribunal***" (emphasis added).*** *Id*.

[25] According to Mr. Hamilton, "Most people are uncomfortable with disagreement and debate. As individuals, this is fine; but as citizens, I would argue that we should not only get used to it, we should be pleased by it. It has been a constant in American politics, and let us hope it always will be. Extensive debate is written into the very structure of our congressional system. At every level, from subcommittees through committees to the floor of each chamber and then to the conference committees that bring members from each house of Congress together, there is the presumption of discussion, debate, disagreement and even argument. Our Founders understood the importance of conflict in the system, both as a way for all views to be represented, and as a process for building common ground among them. For the fundamental fact of our democracy is that Americans, despite all that unites us, nonetheless have much that divides us: different philosophies, different prospects in life, different backgrounds, different communities, different ways to define what is in our self-interest, what is in our community's interest, and what is in our nation's best interest. It's true that these divisions can be exacerbated by special interests, the media and politicians all seeking to exploit them to their own ends, but that doesn't mean the initial differences don't exist. They do. And it is Congress' job to sort through them as it strives to find the majorities it needs to move forward on legislation. If there weren't conflict, Congress wouldn't be doing its job." *See* Lee H. Hamilton, "Debate Good for the System", The Washington Times Commentary (Oct. 31, 2007) at: http://www.washingtontimes.com/article/20071031/COMMENTARY/110310012/1028/election .