

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

ANDREW WHEELER, MAJORITY STAFF DIRECTOR
KEN CONNOLLY, MINORITY STAFF DIRECTOR

December 7, 2005

Mr. Lawrence A. Kogan, Esq.
CEO
Institute for Trade, Standards, and Sustainable Development
116 Village Blvd, Ste 200
Princeton Center
Princeton, NJ 08540-5700

Re: ITSSD Proposed Study

Dear Mr. Kogan:

I understand that ITSSD is considering further investigating a potentially critical but little understood aspect of the UN Convention on Law of the Sea (UNCLOS) that is of great concern and interest to the U.S. Senate Committee on Environment and Public Works. For the reasons set forth below, I believe that this research proposal is worthy of serious review and consideration and would encourage your efforts to pursue it further.

As I understand it, the purpose of the ITSSD research proposal is to evaluate the extent to which countries are reading a broad application of the Precautionary ('better safe than sorry') Principle into the UNCLOS, with the intent of imposing new public international law obligations (i.e., environmental and health constraints) upon the U.S. economy *and* military. The precautionary principle is an evolving international legal norm that has thus far been incorporated into a number of international environmental treaties reviewed by this Committee. Prior ITSSD research has revealed that the precautionary principle has been implemented broadly and subjectively as a disguised trade barrier by certain governments via national and/or regional legislation that strictly regulates uncertain future risks to the environment and human and animal health and safety posed by specific agricultural and industrial activities and technological innovations. As so employed, the precautionary principle favors banning or severely restricting targeted substances, products and activities if it is merely *possible* that they or the processes used for their manufacture, formulation or assembly *might* cause uncertain health or environmental harm sometime in the uncertain distant future. It does not focus on the probable occurrence of actual risks under real life circumstances (i.e., with reference to actual use and exposure, or pursuant to a scientific risk assessment).

Research should focus primarily on the legal constraints that such a reading of the UNCLOS would place upon the development, use and/or deployment by the U.S. of new industrial *and* military technologies and related activities undertaken on or below the high seas and in the atmosphere above it. It should also seek to identify the potential economic and social impacts that such a legal *re*interpretation of the treaty would have upon the local, regional and

national industrial and technology supply chains (infrastructures) that support the U.S. military establishment. Lastly, ITSSD research should endeavor to ascertain whether this evolving practice could ultimately undermine U.S. economic freedom and compromise U.S. national security.

This Committee recognizes that UNCLOS is a comprehensive treaty with many articles and provisions and policy objectives. It is, undoubtedly, a significant international political instrument. Yet, as ITSSD preliminary research has pointed out, UNCLOS is part and parcel of a much larger evolving public international law universe, and it is informed and, to some extent, shaped by evolving legal principles, such as the precautionary principle, that are incorporated within other subsequently enacted treaties but *not expressly incorporated within it*. The international legal order in which the United States now finds itself is other than static, and it has become increasingly apparent that efforts are being waged to incorporate new treaty norms into preexisting treaties. Also, the risks posed to U.S. national interests by an overly broad and subjective application of the precautionary principle are undeniable. Consequently, the Committee is extremely interested in seeing ITSSD research on this subject go forward.

Although a review of the UNCLOS is not currently on this Committee's agenda, the Committee may likely be called upon again in the future to reevaluate whether accession to it is in the U.S. national interest. For this reason, the Committee would welcome the presentation by ITSSD of any findings it produces in the course of its research.

Very truly yours,



James M. Inhofe
Chairman
U.S. Senate Committee on
Environment & Public Works