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Chapter 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. UN Convention on the Law of the Sea

On May 23, 2012, U.S. Secretary of State Hillary Rodham Clinton testified before the Foreign Relations Committee of the U.S. Senate on the UN Convention on the Law of the Sea (“Convention”). Secretary Clinton’s testimony advocating U.S. accession to the Convention is excerpted below and available at www.state.gov/secretary/rm/2012/05/190685.htm. U.S. Secretary of Defense Leon Panetta and General Martin Dempsey, Chairman of the Joint Chiefs of Staff, also testified at the same hearing. Their testimony is available at www.foreign.senate.gov/hearings/the-law-of-the-sea-convention-treaty-doc-103-39-the-us-national-security-and-strategic-imperatives-for-ratification.

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We believe that it is imperative to act now. No country is better served by this Convention than the United States. As the world’s foremost maritime power, we benefit from the Convention’s favorable freedom of navigation provisions. As the country with the world’s second longest coastline, we benefit from its provisions on offshore natural resources. As a country with an exceptionally large area of seafloor, we benefit from the ability to extend our continental shelf, and the oil and gas rights on that shelf. As a global trading power, we benefit from the mobility that the Convention accords to all commercial ships. And as the only country under this treaty that was given a permanent seat on the group that will make decisions about deep seabed mining, we will be in a unique position to promote our interests.

* * * *

Now, one could argue, that 20 years ago, 10 years ago, maybe even five years ago, joining the Convention was important but not urgent. That is no longer the case today. Four new developments make our participation a matter of utmost security and economic urgency.

First, for years, American oil and gas companies were not technologically ready to take advantage of the convention’s provisions regarding the extended U.S. continental shelf. Now they are. The Convention allows countries to claim sovereignty over their continental shelf far out into the ocean, beyond 200 nautical miles from shore. The relevant area for the United States

is probably more than 1.5 times the size of Texas. In fact, we believe it could be considerably larger.

U.S. oil and gas companies are now ready, willing, and able to explore this area. But they have made it clear to us that they need the maximum level of international legal certainty before they will or could make the substantial investments, and, we believe, create many jobs in doing so needed to extract these far-offshore resources. If we were a party to the Convention, we would gain international recognition of our sovereign rights, including by using the Convention's procedures, and therefore be able to give our oil and gas companies this legal certainty. Staying outside the Convention, we simply cannot.

The second development concerns deep seabed mining, which takes place in that part of the ocean floor that is beyond any country's jurisdiction. Now for years, technological challenges meant that deep seabed mining was only theoretical; today's advances make it very real. But it's also very expensive, and before any company will explore a mine site, it will naturally insist on having a secure title to the site and the minerals that it will recover. The Convention offers the only effective mechanism for gaining this title. But only a party to the Convention can use this mechanism on behalf of its companies.

So as long as the United States is outside the Convention, our companies are left with two bad choices—either take their deep sea mining business to another country or give up on the idea. Meanwhile, as you heard from Senator Kerry and Senator Lugar, China, Russia, and many other countries are already securing their licenses under the Convention to begin mining for valuable metals and rare earth elements. And as you know, rare earth elements are essential for manufacturing high-tech products like cell phones and flat screen televisions. They are currently in tight supply and produced almost exclusively by China. So while we are challenging China's export restrictions on these critical materials, we also need American companies to develop other sources. But as it stands today, they will only do that if they have the secure rights that can only be provided under this Convention. If we expect to be able to manage our own energy future and our need for rare earth minerals, we must be a party to the Law of the Sea Convention.

The third development that is now urgent is the emerging opportunities in the Arctic. As the area gets warmer, it is opening up to new activities such as fishing, oil and gas exploration, shipping, and tourism. This Convention provides the international framework to deal with these new opportunities. We are the only Arctic nation outside the Convention. Russia and the other Arctic states are advancing their continental shelf claims in the Arctic while we are on the outside looking in. As a party to the Convention, we would have a much stronger basis to assert our interests throughout the entire Arctic region.

The fourth development is that the Convention's bodies are now up and running. The body that makes recommendations regarding countries' continental shelves beyond 200 nautical miles is actively considering submissions from over 40 countries without the participation of a U.S. commissioner. The body addressing deep seabed mining is now drawing up the rules to govern the extraction of minerals of great interest to the United States and American industry. It simply should not be acceptable to us that the United States will be absent from either of those discussions.

Our negotiators obtained a permanent U.S. seat on the key decision-making body for deep seabed mining. I know of no other international body that accords one country and one country alone—us—a permanent seat on its decision making body. But until we join, that reserved seat remains empty.

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Now as a non-party to the Convention, we rely—we have to rely—on what is called customary international law as a legal basis for invoking and enforcing these norms. But in no other situation ...in which our security interests are at stake do we consider customary international law good enough to protect rights that are vital to the operation of the United States military. So far we've been fortunate, but our navigational rights and our ability to challenge other countries' behavior should stand on the firmest and most persuasive legal footing available, including in critical areas such as the South China Sea.

I'm sure you have followed the claims countries are making in the South China Sea. Although we do not have territory there, we have vital interests, particularly freedom of navigation. And I can report from the diplomatic trenches that as a party to the Convention, we would have greater credibility in invoking the Convention's rules and a greater ability to enforce them.

Now, I know a number of you have heard arguments opposing the Convention. And let me just address those head-on. Critics claim we would surrender U.S. sovereignty under this treaty. But in fact, it's exactly the opposite. We would secure sovereign rights over vast new areas and resources, including our 200-mile exclusive economic zone and vast continental shelf areas extending off our coasts and at least 600 miles off Alaska. I know that some are concerned that the treaty's provisions for binding dispute settlement would impinge on our sovereignty. We are no stranger to similar provisions, including in the World Trade Organization which has allowed us to bring trade cases; many of them currently pending against abusers around the world. As with the WTO, the U.S. has much more to gain than lose from this proposition by being able to hold others accountable under clear and transparent rules.

Some critics invoke the concern we would be submitting to mandatory technology transfer and cite President Reagan's other initial objections to the treaty. Those concerns might have been relevant decades ago, but today they are not. In 1994, negotiators made modifications specifically to address each of President Reagan's objections, including mandatory technology transfer, which is why President Reagan's own Secretary of State, George Shultz, has since written we should join the Convention in light of those modifications having been made.

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Now some mischaracterize the payments for the benefit of resource rights beyond 200 miles as quote "a UN tax"—and this is my personal favorite of the arguments against the treaty—that will be used to support state sponsors of terrorism. Honestly, I don't know where these people make these things up, but anyway the Convention does not contain or authorize any such taxes. Any royalty fee does not go to the United Nations; it goes into a fund for distribution to parties of the Convention. And we, were we actually in the Convention, would have a permanent veto power over how the funds are distributed. And we could prevent them from going anywhere we did not want them to go. I just want to underscore—this is simple arithmetic. If we don't join the Convention, our companies will miss out on opportunities to explore vast areas of continental shelf and deep seabed. If we do join the Convention, we unlock economic opportunities worth potentially hundreds of billions of dollars, for a small percentage royalty a few years down the line.

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2. Other Boundary or Territorial Issues: South China Sea

On April 30, 2012, in remarks delivered after a meeting with U.S. Defense Secretary Leon Panetta, Philippines Foreign Secretary Albert del Rosario, and Philippines Defense Secretary Voltaire Gazmin, Secretary Clinton summarized the discussion during their meeting related to the South China Sea. Secretary Clinton's remarks, along with those of Secretary Panetta, are available at www.state.gov/secretary/rm/2012/04/188982.htm, and included the following:

We also discussed the evolving regional security situation. We both share deep concerns about the developments on the Korean Peninsula and events in the South China Sea, including recent tensions surrounding the Scarborough Shoal. In this context, the United States has been clear and consistent. While we do not take sides on the competing sovereignty claims to land features in the South China Sea, as a Pacific power we have a national interest in freedom of navigation, the maintenance of peace and stability, respect for international law, and the unimpeded, lawful commerce across our sea lanes. The United States supports a collaborative diplomatic process by all those involved for resolving the various disputes that they encounter. We oppose the threat or use of force by any party to advance its claims. And we will remain in close contact with our ally, the Philippines. I look forward to continuing to work closely with the foreign secretary as we approach the ASEAN Regional Forum in July.

On August 3, 2012, the U.S. Department of State issued a press statement on the U.S. position on territorial and maritime disputes in the South China Sea. That statement is excerpted below and available at www.state.gov/r/pa/prs/ps/2012/08/196022.htm. See *Digest 2010* at 513-14 and *Digest 2011* at 405-06 for Secretary Clinton's past remarks on the South China Sea disputes.

* * * *

As a Pacific nation and resident power, the United States has a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation, and unimpeded lawful commerce in the South China Sea. We do not take a position on competing territorial claims over land features and have no territorial ambitions in the South China Sea; however, we believe the nations of the region should work collaboratively and diplomatically to resolve disputes without coercion, without intimidation, without threats, and without the use of force.

We are concerned by the increase in tensions in the South China Sea and are monitoring the situation closely. Recent developments include an uptick in confrontational rhetoric, disagreements over resource exploitation, coercive economic actions, and the incidents around the Scarborough Reef, including the use of barriers to deny access. In particular, China's upgrading of the administrative level of Sansha City and establishment of a new military garrison

there covering disputed areas of the South China Sea run counter to collaborative diplomatic efforts to resolve differences and risk further escalating tensions in the region.

The United States urges all parties to take steps to lower tensions in keeping with the spirit of the 1992 ASEAN Declaration on the South China Sea and the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea. We strongly support ASEAN's efforts to build consensus on a principles-based mechanism for managing and preventing disputes. We encourage ASEAN and China to make meaningful progress toward finalizing a comprehensive Code of Conduct in order to establish rules of the road and clear procedures for peacefully addressing disagreements. In this context, the United States endorses the recent ASEAN Six-Point Principles on the South China Sea.

We continue to urge all parties to clarify and pursue their territorial and maritime claims in accordance with international law, including the Law of the Sea Convention. We believe that claimants should explore every diplomatic or other peaceful avenue for resolution, including the use of arbitration or other international legal mechanisms as needed. We also encourage relevant parties to explore new cooperative arrangements for managing the responsible exploitation of resources in the South China Sea.

As President Obama and Secretary Clinton have made clear, Asia-Pacific nations all have a shared stake in ensuring regional stability through cooperation and dialogue. To that end, the United States actively supports ASEAN unity and leadership in regional forums and is undertaking a series of consultations with ASEAN members and other nations in the region to promote diplomatic solutions and to help reinforce the system of rules, responsibilities and norms that underpins the stability, security and economic dynamism of the Asia-Pacific region.

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3. Piracy

For discussion of U.S. piracy prosecutions in 2011, see Chapter 3.B.8.

4. Freedoms of Navigation and Overflight

a. Airspace warning area—Mexico

On January 11, 2012, the United States responded, through its embassy in Mexico City, to a September 20, 2011 communication from the Secretariat for Foreign Relations of the United Mexican States. Mexico had requested that the United States modify its airspace warning area off the coast of Mexico, established in 1949. At the time the warning area was established, Mexico's territorial sea was considered to extend 9 nautical miles. The United States, through its 2012 diplomatic note, amended the coordinates of the airspace warning area to recognize a 12 nautical mile territorial sea. The substance of the U.S. diplomatic note sent in January 2012 appears below.

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The Embassy of the United States of America presents its compliments to the Secretariat of Foreign Relations of the United Mexican States and has the honor to refer to the Secretariat's diplomatic note of September 20, 2011, regarding a special use airspace warning area that lies to the West of the Pacific Coast of the United States and Mexico.

Since the establishment of Warning Area 291 (W-291) in 1949, U.S. Navy Fleet Area Control and Surveillance Facility San Diego has facilitated the safe and orderly passage of aircraft within its confines. Tens of thousands of air and surface operations take place in W-291 each year. W-291 is a necessary tool that alerts aircraft to the operations going on around them. It facilitates the timely exchange of information about the operating environment so that aircraft can operate safely and avoid incident.

During the establishment of W-291 in 1949, the original boundaries were calculated to avoid Mexico's territorial sea. In acknowledgement that Mexico's territorial sea now extends out to 12 nautical miles, the boundaries of W-291 will be amended...

The process to amend and publish the legal description of W-291 may take several months. However, in the interim and until the W-291 is redesigned and published, the U.S. Navy will continue to ensure that all naval and air operations will take place outside of 12 nautical miles offshore.

To coordinate the operational functioning of W-291 and the associated airspace, the Embassy asks that the Secretariat extend to the appropriate Mexican civil aviation officials an invitation to attend a conference with the U.S. Navy and Federal Aviation Administration (FAA) at the U.S. Navy Fleet Area Control and Surveillance Facility...

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b. Freedom of Navigation—Pakistan

On January 10, 2012 and January 13, 2012, the Ministry of Foreign Affairs of the Islamic Republic of Pakistan sent diplomatic notes to the U.S. Embassy in Islamabad concerning activities of a U.S. military survey vessel, the USNS INVINCIBLE, in the Exclusive Economic Zone ("EEZ") of Pakistan. The U.S. Embassy responded by diplomatic note on February 17, 2012, asserting that under international law, no prior notification or approval for such activities is required. Excerpts from the U.S. diplomatic note follow.

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The United States has the honor to inform the Ministry of Foreign Affairs that the USNS INVINCIBLE was engaged in the exercise of high seas freedoms. International law as reflected in the Law of the Sea Convention (the Convention), indicates that the exercise of these freedoms is not subject to coastal state requirements for prior notification or approval.

The United States notes that, as stated in Article 56 of the Convention, a coastal State's rights and jurisdiction within its exclusive economic zone are subject to the rights and duties of

other states as provided for in international law. The rights specifically preserved for ships and aircrafts of all States in the exclusive economic zone include the freedom of navigation and overflight, and other internationally lawful uses of the sea related to those freedoms, without requirement to provide prior notification to or obtain prior permission from the coastal State. These include military surveys, exercises and maneuvers.

The United States does not accept the view that a coastal state may require its prior notification or consent. As reflected in the Convention, the United States considers that all States have the right to conduct military activities within the EEZ, subject to an obligation to have due regard to coastal State resource and other rights as well as the rights of other States as set forth in the Convention. It is the duty of the flag State, not the right of the coastal State, to enforce this due regard obligation. The United States has the honor to inform the Ministry of Foreign Affairs that the USNS INVINCIBLE conducted its activities with due regard to the rights and duties referenced in Article 58 of the Convention.

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c. Archipelagic States

On January 18, 2012, the United States delivered a diplomatic note to the Dominican Republic contesting the Dominican Republic's claim to be an archipelagic state. The British Embassy and the chiefs of mission of several European Union member states delivered similar demarches in January 2012. The United States and the United Kingdom had previously contested the Dominican Republic claim to be an archipelagic state on several occasions, including by diplomatic notes delivered in 2007 and 2010. See *Digest 2010* at 522-24 and *Digest 2007* at 641-43. The substantive paragraphs of the January 2012 U.S. diplomatic note appear below.

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The Embassy of the United States of America in the Dominican Republic presents its compliments to the Ministry of Foreign Relations and has the honor to refer to Law No. 66-07 of May 22, 2007, by which the Dominican Republic:

- a) declared itself an Archipelagic State;
- b) drew straight baselines connecting a number of turning points on certain banks and keys;
- c) claimed certain bodies of waters as internal waters and others as historic bays;
- d) sets out the coordinates of the outer limits of its claimed exclusive economic zone (EEZ);
- e) purported to limit the right of innocent passage through its archipelagic waters and territorial sea (and over-flight) to those ships and aircraft not carrying cargoes of radioactive substances or highly toxic chemicals;
- f) does not recognize the right of archipelagic sea lanes passage; and
- g) claimed rights over old shipwrecks within its EEZ.

The Embassies of the United States and the United Kingdom informed the Ministry that their governments contested these claims by the Dominican Republic and requested clarifications

in U.S. Diplomatic Note 234 of October 18, 2007, and UK Diplomatic Note 64 of that same date, and in their concurrent joint representation to the Ministry of Foreign Relations.

The Embassies the United States, the United Kingdom and Japan made a similar demarche to the Ministry of Foreign Relations on December 16, 2008, requesting that the Ministry of Foreign Relations respond to the requests for clarifications contained in U.S. Diplomatic Note 234 of October 18, 2007, and UK Diplomatic Note 64 of that same date.

The Embassies of the United States and the United Kingdom made a similar demarche to the Ministry of Foreign Relations on October 28, 2010, requesting that the Ministry of Foreign Relations respond to the requests for clarifications contained in U.S. Diplomatic Note 234 of October 18, 2007, and UK Diplomatic Note 64 of that same date.

No substantive reply has yet been received from the Ministry of Foreign Relations to any of these requests for clarification.

The Embassy emphasizes that the Government of the United States of America contests the Government of the Dominican Republic's claim to be an archipelagic state and requests that the Ministry of Foreign Relations respond to these requests for clarification of the Dominican Republic's claims.

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5. Maritime Security and Law Enforcement

a. Agreement with Samoa

On June 2, 2012, the United States and Samoa signed a bilateral maritime law enforcement agreement. This is the ninth such agreement with Pacific island nations. The agreement, which entered into force upon signature, will facilitate law enforcement cooperation on counter-narcotics and fisheries. As provided for in Article 2 of the agreement, its purpose is to "strengthen ongoing cooperative maritime surveillance and interdiction activities between the parties, for the purposes of identifying, combating, preventing, and interdicting illicit transnational maritime activity." The agreement contains shiprider provisions, allowing officers of Samoa's Ministry of Police and Prison and Ministry of Agriculture and Fisheries to embark on U.S. law enforcement vessels or aircraft to conduct joint operations. These vessels or aircraft carrying "embarked officers" may be authorized on a case-by-case basis to enter the territorial sea of Samoa to assist in stopping, boarding, and searching vessels suspected of violating Samoa's laws and in arresting suspects and seizing contraband and vessels. The agreement also permits U.S. law enforcement vessels and aircraft, with embarked officers, to assist in fisheries surveillance and law enforcement activities in Samoa's exclusive economic zone. For operations without an embarked Samoan law enforcement official, the agreement further authorizes the United States to board and search suspect vessels claiming registry or nationality in Samoa and located seaward of any State's territorial sea. The full text of the agreement is available at www.state.gov/documents/organization/198382.pdf.

b. Agreement with Canada

On October 11, 2012, the Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations between the Government of the United States of America and the Government of Canada, signed at Detroit, May 26, 2009, entered into force. For further discussion of the agreement, see *Digest 2009* at 469-70. The full text of the agreement with Canada is available at <http://www.state.gov/documents/organization/153586.pdf>.

6. United States-Mexico Transboundary Hydrocarbons Agreement

On February 20, 2012, the United States and Mexico signed an agreement concerning the development of oil and gas reservoirs that cross the international maritime boundary between the two countries in the Gulf of Mexico. See State Department February 20, 2012 fact sheet, available at www.state.gov/r/pa/prs/ps/2012/02/184235.htm. Excerpts from the fact sheet summarizing the elements of the agreement appear below.

* * * *

The United States and Mexico today signed an agreement concerning the development of oil and gas reservoirs that cross the international maritime boundary between the two countries in the Gulf of Mexico. The Agreement is designed to enhance energy security in North America and support our shared duty to exercise responsible stewardship of the Gulf of Mexico. It is built on a commitment to the safe, efficient, and equitable exploitation of transboundary reservoirs with the highest degree of safety and environmental standards.

Elements of the Agreement

The United States and Mexico jointly announced their intention to negotiate a transboundary hydrocarbons agreement on June 23, 2010, following the Joint Statement adopted by Presidents Obama and Calderon at the conclusion of President Calderon's State Visit to Washington on May 19, 2010.

Upon entry into force, the current moratorium on oil exploration and production in the Western Gap portion of the Gulf of Mexico will end.

The Agreement establishes a cooperative process for managing the maritime boundary region that promotes joint utilization of transboundary reservoirs.

The Agreement provides a legal framework for possible commercial activities at the maritime boundary and sets clear guidelines for transboundary developments. It establishes incentives for oil and gas companies to voluntarily enter into arrangements to jointly develop any transboundary reservoirs. In the event such an arrangement is not achieved, the Agreement establishes a process by which U.S. companies and PEMEX can individually develop the resources on each side of the border while protecting each nation's interests and resources.

The legal certainty created by the Agreement will enable U.S. companies to explore new business opportunities and carry out collaborative projects with PEMEX.

The Agreement also provides for joint inspections teams to ensure compliance with applicable laws and regulations. Both governments will review all plans for the development of any transboundary reservoirs.

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B. OUTER SPACE

1. International Code of Conduct for Outer Space Activities

On January 17, 2012, Secretary Clinton issued a press statement regarding the U.S. decision to join with other nations to develop an International Code of Conduct for Outer Space Activities. Secretary Clinton's statement is excerpted below and available at www.state.gov/secretary/rm/2012/01/180969.htm. On the same day, the State Department issued a fact sheet about the Code of Conduct, available at www.state.gov/r/pa/pl/2012/180998.htm. The January 17 fact sheet explained that the European Union's draft Code of Conduct could serve as a foundation for developing an International Code of Conduct that would be non-legally binding and would be "focused on the use of voluntary and pragmatic transparency and confidence-building measures to help prevent mishaps, misperceptions, and mistrust in space." The fact sheet further stated that "an International Code of Conduct, if adopted, would establish guidelines for responsible behavior to reduce the hazards of debris-generating events and increase the transparency of operations in space to avoid the danger of collisions."

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The long-term sustainability of our space environment is at serious risk from space debris and irresponsible actors. Ensuring the stability, safety, and security of our space systems is of vital interest to the United States and the global community. These systems allow the free flow of information across platforms that open up our global markets, enhance weather forecasting and environmental monitoring, and enable global navigation and transportation.

Unless the international community addresses these challenges, the environment around our planet will become increasingly hazardous to human spaceflight and satellite systems, which would create damaging consequences for all of us.

In response to these challenges, the United States has decided to join with the European Union and other nations to develop an International Code of Conduct for Outer Space Activities. A Code of Conduct will help maintain the long-term sustainability, safety, stability, and security of space by establishing guidelines for the responsible use of space.

As we begin this work, the United States has made clear to our partners that we will not enter into a code of conduct that in any way constrains our national security-related activities in space or our ability to protect the United States and our allies. We are, however, committed to working together to reverse the troubling trends that are damaging our space environment and to preserve the limitless benefits and promise of space for future generations.

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2. UN Group of Government Experts on Outer Space

Deputy Assistant Secretary Rose also delivered remarks about developing TCBMs on February 16, 2012 at the 15th Annual Federal Aviation Administration (“FAA”) Commercial Space Transportation Conference. His February 16 remarks are available at www.state.gov/t/avc/rls/184066.htm. In addition to describing the U.S. efforts relating to the International Code of Conduct and UNCOPOUS, Mr. Rose mentioned U.S. participation in the Group of Government Experts (“GGE”) on Outer Space TCBMs established by UN General Assembly Resolution 65/68 and set to begin work in 2012. Mr. Rose remarked:

We support the full consideration of all helpful proposals for bilateral and multilateral TCBMs. Such proposals could include measures aimed at enhancing the transparency of national security space policies, strategies, activities and experiments or notifications regarding environmental or unintentional hazards to spaceflight safety. International consultations to prevent incidents in outer space and to prevent or minimize the risks of potentially harmful interference could also be a helpful TCBM to consider. We look forward to working with our international colleagues in a GGE that serves as a constructive mechanism to examine voluntary and pragmatic TCBMs that enhance stability and safety, and promote responsible operations in space.

In his October 23, 2012 remarks to the UN General Assembly, discussed above and available at www.state.gov/t/avc/rls/199713.htm, Mr. Reid also provided an update on the work of the GGE:

This year has also seen the first meeting of the U.N.-established Group of Government Experts (GGE) on Space TCBMs. We congratulate Victor Vasiliev of the Russian Federation on his election as Chair of the study, and we welcome the progress made by the GGE at its first session in New York. The indicative program of work adopted provides a solid framework for experts to conduct a comprehensive review of the role of unilateral, bilateral, and multilateral mechanisms to strengthen stability in space. This GGE study provides a significant opportunity to explore international cooperation on pragmatic, voluntary, effective, and timely TCBMs. By maintaining a focus on voluntary and non-legally binding measures, a consensus report can contribute to a substantive discussion on space security here at the UN General Assembly First Committee.

Cross References

U.S. efforts to counter piracy, **Chapter 3.B.8.**
Proliferation Security Initiative, **Chapter 18.B.5**