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TO: Mario Aguilar

FROM: Jon Van Dyke

**SUBJECT: Preliminary Opinion of Philippe Sands on Fishing in the Waters
Surrounding Clipperton Atoll**

Thank you for letting me review the Preliminary Opinion of Professor Philippe Sands on "Potential Dispute Between Mexico and France Under UNCLOS Concerning the Claimed EEZ Around the Clipperton Islands," dated June 29, 2006. Professor Sands's Opinion contains a careful and useful analysis of the procedural avenues (and barriers) relevant to efforts to address and resolve the dispute between Mexico and France regarding fishing in the waters adjacent to Clipperton Atoll. The Opinion explains that Mexico may be able to invoke the compulsory dispute-resolution procedures (utilizing an Annex VII arbitral panel) if it frames its claim carefully, arguing that France's claim to an EEZ around Clipperton violates the language of Article 121 of the 1982 U.N. Law of the Sea Convention.

The Opinion also addresses the substantive issues, concluding that France's claim to an EEZ around Clipperton appears to be inconsistent with the language of Article 121, but also warning that if Mexico makes this assertion, it may have the effect of undercutting Mexico's claim to an EEZ around its Revillagigedo Islands. Professor Sands's opinion also presents the

concern that Mexico's failure to protest against France's 1978 claim to an EEZ around Clipperton may be viewed as "acquiescence" to this claim.

Professor Sands's views are presented clearly and carefully, with appropriate documentation, and are certainly designed to be helpful to Mexico in its efforts to analyze its options with regard to this controversy. My specific thoughts with regard to the points that he makes are as follows:

* I think the issue of "acquiescence" deserves further analysis. Although France announced a claim of an exclusive economic zone (EEZ) around Clipperton on February 12, 1978, it did not take any steps to patrol the area around the atoll or to interfere with the efforts of fishing vessels of other countries from fishing around it until very recently. Mexico and France are both members of the Inter-American Tropical Tuna Commission (IATTC) and France can thus be expected to have been familiar with the fishing practices of Mexican vessels. Any argument, therefore, that Mexico may have "acquiesced" to France's claim to an EEZ around Clipperton through its failure to issue a formal diplomatic protest can be countered by the argument that France "acquiesced" in Mexico's fishing practices in the waters around Clipperton by its failure to protest these activities and to patrol the waters around Clipperton effectively. Mexico's arguments in this regard are strengthened by France's failure to issue any formal map illustrating its EEZ claim, which would appear to be required by Article 75 of the Convention, as Professor Sands notes in his paragraph 29.

* Professor Sands is correct that if Mexico asserts vigorously that Clipperton is not entitled to generate an EEZ, then France may counter by challenging Mexico's claim to an EEZ around some of its offshore islands, including Clarion. In my view, however, it is possible to

distinguish the ability of Mexico's offshore islands to generate an EEZ from that of Clipperton. Mexico's position on Clipperton should not negatively affect Mexico's claim to extended maritime zones around Cayo Arenas and Arrecife Alacranes because the United States – the state most affected by such claims – has accepted these claims. Isla de Guadalupe arguably qualifies as an "island" simply by virtue of its size -- 254 square kilometers, which is close to the 373 square kilometers of Jan Mayen Island, which was deemed to be an "island" by the 1981 Conciliation Commission. Also, it does have a fishing community on it, it was taken into consideration during the U.S.-Mexican boundary delimitations, and it is within 200 nautical miles of Baja California. Isla Socorro does have a 250-member military village on it, including families, thus demonstrating habitability. The arguments regarding Isla Clarion are less clear cut, but Mexico can argue that Clarion is an integral part of Mexico, connected to the adjacent Mexican islands in the Revillagigedo Archipelago and to Mexico's continental territory, and is used regularly for commercial enterprises, such as scuba dive and fishing expeditions. Mexico would thus argue that Clarion's status is different from that of Clipperton, which is thousands of miles from both France and French Polynesia, was acquired during the imperialist period, and supports no active commercial activities.

* I agree with Professor Sands that Mexico can present a strong argument that it has an "acquired right" to fish in the waters around Clipperton based on its continuous and unchallenged (until recently) fishing in that region during previous decades.

* I agree with Professor Sands that it may be useful to bring pressure against France by bringing this controversy to the attention of the European Community. But I also believe it would be worth exploring with France the possibility of establishing a joint or shared fishery

zone in the waters around Clipperton, which would be utilized by French and Mexican vessels but would exclude those of other countries (unless they were properly licensed by a fishery management agency established by France and Mexico). Numerous examples of such shared fishery zones can be found, and the establishment of such a zone meets the requirement of Article 74(3) to establish “provisional arrangements of a practical nature” when agreement on a maritime boundary is elusive. It may well be that France would accept the logic of establishing such a zone, in light of the remoteness of Clipperton from France, the controversial sequence of events that led to France gaining sovereignty over the atoll, Mexico’s well-established historical fishing around it, and the obvious lack of habitability of the Clipperton Atoll.