

THE LAW OF THE SEA CONVENTION (TREATY DOC. 103 39)

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STATEMENT OF HON. LEON E. PANETTA, SECRETARY OF DEFENSE, U.S.
DEPARTMENT OF DEFENSE, WASHINGTON, DC

Secretary Panetta, Chairman Kerry, Senator Lugar, distinguished members, I want to thank you for the opportunity to appear here as the first Secretary of Defense to testify in support of the United States accession to the Law of the Sea Convention.

I have been involved with ocean issues most of my career, and I strongly believe that accession to this treaty is absolutely essential not only to our economic interests, our diplomatic interests, but I am here to say that it is extremely important to our national security interests as well.

I join a lot of the military voices of the past and present that have spoken so strongly in support of this treaty. The fundamental point is clear. If the United States is to assert its historical role as a global maritime power--and we have without question the strongest navy in the world. But if we are going to continue to assert our role as a maritime power, it is essential that we accede to this important Convention.

Being here with Secretary Clinton, Chairman Dempsey, their presence alone is a testament to the conviction of our diplomatic and military leadership that this Convention is absolutely essential to strengthening our position in the world. Let me outline some of the critical arguments with regards to U.S. national security and why it is time to move forward with this issue.

First of all, as has been pointed out, as the world's strongest preeminent maritime power, we are a country that has one of the longest coastlines and one of the largest Extended Continental Shelves in the world. We have more to gain by approving this Convention than almost any other country.

There are 161 countries that have approved. We are the only industrial power that has failed to do that, and as a result, we don't have a seat at the table.

If we are sitting at this international table of nations, we can defend our interests. We can defend our claims. We can lead the discussion in trying to influence treaty bodies that develop and interpret the Law of the Sea. We are not there. And as a result, they are the ones that are developing the interpretation of this very important treaty.

In that way, we would ensure that our rights are not whittled away by the excessive claims and erroneous interpretations of others who would give us the power and authority to support and promote the peaceful resolution of disputes within a rules-based order.

Second, we would secure our navigational freedoms and global access for military and commercial ships, aircraft, and undersea fiber optic cables. Treaty law remains the firmest legal foundation upon which to base our global presence, as the Secretary has pointed out. And it is true on, above, and below the seas. By joining the Convention, we would help lock in rules that are favorable to our freedom of navigation in our global mobility.

Third, accession would help secure a truly massive increase in our country's resource and economic jurisdiction. Not only to 200 nautical miles off our coast, but to a broad, Extended Continental Shelf beyond that zone, adding almost another third to our Nation in terms of jurisdiction.

Fourth, accession would ensure our ability to reap the benefits, again as the Secretary has pointed out, of the opening of the Arctic. Joining the Convention would maximize international recognition and acceptance of our substantial Extended Continental Shelf claims in the Arctic. And, as again pointed out, we are the only Arctic nation that is not a party to this Convention.

More importantly, from our navigation and military point of view, accession would secure our freedom of navigation, our freedom of overflight rights throughout the Arctic. And it would strengthen the freedom of navigation arguments with respect to the northern sea route in the Northwest Passage.

And finally, let me say that we at the Defense Department have gone through an effort to develop a defense strategy for the future. A defense strategy not only for now, but into the future as well. And it emphasizes the strategically vital arc that extends from the Western Pacific and Eastern Asia into the Indian Ocean region and South Asia on to the Middle East.

By not acceding, we undercut our credibility in a number of focused multilateral venues that involve that arc I just defined. We are pushing, for example, for a rules-based order in the region and the peaceful resolution of maritime and territorial disputes in the South China Sea, in the Strait of Hormuz and elsewhere. How can we argue--how can we argue that other nations must abide by international rules when we haven't joined the very treaty that codifies those rules?

We would also help strengthen worldwide transit passage rights under international law, and we would further isolate Iran as one of the few remaining nonparties to the Convention. These are the key reasons from a national security point of view for accession, reasons that are critical to our sovereignty, critical to our national security.

Again, as the Secretary pointed out, I understand the arguments that have been made on the other side. But at the same time, I don't understand the logic of those arguments. The myth that somehow this would surrender U.S. sovereignty, nothing could be further from the truth.

Not since we acquired the lands of the American West and Alaska have we had such an opportunity to expand U.S. sovereignty. The estimated Extended Continental Shelf is said to encompass at least 385,000 square miles, 385,000 square miles of seabed. As the Secretary pointed out, it is 1.5 times the size of Texas that would be added to our sovereignty, that would be added to our jurisdiction.

Some claim that joining the Convention would restrict our military operations and activities or limit our ability to collect intelligence in territorial seas. Nothing could be further from the truth.

The Convention in no way harms our intelligence collection activities. In no way does it constrain our military operations. On the contrary, U.S. accession to the Convention secures our freedom of navigation and overflight rights as bedrock treaty law.

Some allege that the Convention would subject us to the jurisdiction of international courts and that this represents a surrendering of our sovereignty. Once again, this is not the case. The Convention provides that a party may declare it does not accept any dispute resolution procedures for disputes concerning military activities, and we would do the same, as so many other nations have chosen likewise to do. Moreover, it would be up to the United States to decide precisely what constitutes a military activity, not others.

Others argue that our maritime interdiction operations would be constrained, and again, this is simply not the case. The United States and our partners routinely conduct a range of interdiction operations based on U.N. Security Council resolutions.

On treaties, on port state control measures, and on the inherent right of self-defense, the United States would be able to continue conducting the full range of maritime interdiction operations. In short, the Law of the Sea Convention provides a stable, recognized legal regime that we need in order to conduct our global operations today and in the future. Frankly, I don't think this is a close call.

Letters and Additional Material Submitted for the Record

Responses of Secretary of State Hillary Rodham Clinton to Questions

<https://www.govinfo.gov/content/pkg/CHRG-112shrg77375/html/CHRG-112shrg77375.htm>

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Submitted by Senator John F. Kerry

Questions 1a-1g. Some have expressed concerns that the Law of the Sea Convention would require the United States to accede to, or otherwise comply, with international climate change agreements, such as the Kyoto protocol. Among other things, they point to article 212 of the Convention, which provides, *inter alia*, that states parties shall ``adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.' ' They also point to article 222 of the Convention, which provides, *inter alia*, that states parties to the Convention ``shall adopt laws and regulations and take measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conferences to prevent, reduce, and control pollution of the marine environment from or through the atmosphere, in conformity with all relevant international rules and standards concerning the safety of air navigation.' '

- (1a). Would United States accession to the Law of the Sea Convention require the United States to sign or accede to the Kyoto protocol or to sign, ratify, or accede to any other international agreement, legally binding or otherwise, concerning climate change?

Answer. No. The Law of the Sea Convention is an oceans treaty, not a climate treaty. Joining the Convention would not require the United States to implement the Kyoto Protocol or any other particular climate change laws or policies, and the Convention's provisions could not legitimately be argued to create such a requirement.

- (1b). Would United States accession to the Law of the Sea Convention require the United States to adopt any new laws or regulations to implement rules or standards related to climate change established by international organizations or at diplomatic conferences?

Answer. No. The Convention would not obligate the United States to adopt any such laws or regulations.

- (1c). If your response to questions 1(a) and/or 1(b) is ``no,' ' please explain in detail why the Convention, including Articles 207, 212 or 222, would not require such action by the United States.

Answer. These articles appear in Part XII of the Convention, which addresses the marine environment. ``Pollution of the marine environment' ' is defined in Article 1, paragraph 4. Even if one assumed, for the sake of argument, that (1) Part XII applied to the issue of climate change; (2) ``pollution of the marine environment' ' existed within the meaning of Article 1(4); (3) there was a causal link between a Party's GHG emissions and such pollution; and (4) other requirements were satisfied, Part XII would still not require a Party to adopt particular climate laws or policies.

Part XII's arguably relevant provisions are either extremely general (e.g., Article 194) or expressly do not require a Party to implement any particular standards.

Articles 207 and 212 call on Parties merely to ``tak[e] into account internationally agreed rules, standards and recommended practices and procedures.''

Articles 213 and 222, which are the ``enforcement'' analogues to Articles 207 and 212, would likewise not require the United States to adopt or enforce particular standards related to climate change. The ``enforcement'' section of Part XII allocates responsibilities among flag States, coastal States, and port States, depending upon the source/type of marine pollution in question. Adoption and enforcement of laws in relation to Articles 207 and 212 fall within the domain of the State concerned. However, even if these articles applied to climate change, they would not require adoption or enforcement of Kyoto or other climate rules or standards. There are simply no such international rules and standards relating to climate change applicable to the United States.

(1d) Has any dispute resolution proceeding been instituted under the Convention against a country alleging failure to adopt or implement the Kyoto protocol or another international climate change agreement or climate change rules and standards established by international organizations or at diplomatic conferences?

Answer. No. In the 18 years since the Convention has been in force, climate change has not been the subject of any dispute settlement proceedings.

(1e). Would United States accession to the Law of the Sea Convention require the United States to adopt ``cap and trade'' legislation or regulations?

Answer. No. The Convention would not require the United States to adopt ``cap and trade ' legislation or regulations or any other particular climate laws or policies.

(1f). If your response to question 1(f) is ``no,' ' please describe in detail why the Convention, including Articles 207, 212 or 222, would not require the United States to adopt ``cap and trade'' legislation or regulations.

Answer. See Answer (1c) above.

(1g). Has any dispute resolution proceeding been instituted under the Convention against a country alleging failure to adopt or enforce ``cap and trade'' legislation or regulations?

Answer. No. Climate change has not been the subject of any dispute settlement proceedings.

Questions 2a-2c. Some have expressed concerns that United States accession to the Law of the Sea Convention will expose the United States to baseless environmental lawsuits, including lawsuits relating to land-based sources of pollution of the marine environment.

- (2a). Are there any environmental provisions of the Law of the Sea Convention that the United States does not already follow as a matter of domestic law and regulation?

Answer. No. U.S. agencies, including the Coast Guard, EPA, and the Justice Department, have been acting in accordance with the Convention since President Reagan directed the U.S. Government to abide by the bulk of the Convention's provisions in 1983. Were the United States to become a Party to the Convention, U.S. agencies would implement its ``marine environment'' provisions under existing laws, regulations, and practices. This was confirmed in a March 1, 2004, letter to Chairman Lugar from William H. Taft IV, the State Department's Legal Adviser during the Bush administration. The letter provided, in pertinent part: ``The United States, as a Party, would be able to implement the Convention through existing laws, regulations, and practices (including enforcement practices), which are consistent with the Convention and which would not need to change in order for the United States to meet its Convention obligations.'' We stand by the Taft letter.

- (2b). Would United States accession to the Convention require the United States to adopt new or different environmental laws or regulations?

Answer. No. As discussed in Answer (2a), the United States would be able to implement the Convention through existing laws and regulations, including those related to the marine environment.

- (2c). Has any dispute resolution proceeding been instituted under the Convention against a country for failing to adopt or enforce environmental standards or rules contained in international agreements to which that country was not a Party, or that were adopted by international organizations or diplomatic conferences over that country's objection?

Answer. No. In the 18 years since the Convention has been in force, no such proceeding has been instituted.

Question 3. Article 309 of the Convention states that no reservations or exceptions are permitted unless they are expressly permitted by other articles of the Convention. Article 310 of the Convention states that a State acceding to the Convention may make declarations or statements concerning the Convention ``provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.'' In 2007 the Senate Foreign Relations Committee recommended that the following declaration be included in a resolution of advice and consent for the Convention: ``The United States further declares that its consent to accession to the Convention is conditioned upon the understanding that, under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were `military activities' and that such determinations are not subject to review.''

Has any court or arbitration tribunal established under the Convention contradicted a State Party's exclusive right to determine whether its activities are or were ``military activities''?

Answer. No State Party has challenged and no court or arbitration established under the Convention has contradicted a State Party's exclusive right to determine whether its activities are or were ``military activities.''

The exemption of U.S. ``military activities'' from dispute settlement procedures is consistent with the terms of the Convention. If a tribunal were nevertheless to second-guess a U.S. judgment as to what constitutes a U.S. ``military activity,'' the United States would view that judgment as lacking a legal basis and invalid, and it would therefore have no legal effect on the United States.