

**UNITED NATIONS CONVENTION ON THE LAW
OF THE SEA**

HEARING
BEFORE THE
COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
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SECOND SESSION

ON

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the oceans. The jurisdiction of this organization is not limited to the Seabed. In fact, its self-defining charter is unconstrained by the Treaty. The jurisdiction International Seabed Authority is likewise not limited to the deep seabed. It has authority over the vast areas Continental Shelf that lie beyond the 200 nm zone as well.

STATEMENT OF BERNARD H. OXMAN,¹ PROFESSOR OF LAW, UNIVERSITY OF MIAMI

Mr. Chairman and Members of the Committee, it is an honor to appear before you today to testify on the United Nations Convention on the Law of the Sea and the Implementing Agreement Regarding Part XI of the Convention.

It was my privilege to submit testimony on this matter before the Senate Committee on Foreign Relations on October 14, 2003. While that testimony is included in the Report of that Committee, I thought it would be useful to include much of it in this statement for the benefit of this Committee, but to add additional comments that may be of particular interest to this Committee.

Whatever the utility of my remarks, I hope the Committee will bear in mind the authority, insight and conviction with which the case for the Convention would have been presented by two extraordinary individuals with whom it was my great honor to work most closely, the late Ambassador John R. Stevenson and the late Ambassador Elliot L. Richardson. Both served at critical formative periods as Special Representative of the President for the Law of the Sea and are unquestionably regarded throughout the world as among the small handful of individuals singularly responsible for the ultimate shape of the Convention.

I hope the Committee will also bear in mind that the Law of the Sea negotiations were a long-term bipartisan effort to further American interests that engaged high level attention in successive Administrations and distinguished members of both Houses of Congress. President Nixon had the vision to launch the negotiations and establish our basic long-term strategy and objectives. President Ford solidified important trends in the negotiations by endorsing fisheries legislation modeled on the emerging texts of the Convention. President Carter attempted to induce the developing countries to take a more realistic approach to deep seabed mining by endorsing unilateral legislation on the subject. President Reagan determined both to insist that our problems with the deep seabed mining regime be resolved and to embrace the provisions of the Convention regarding traditional uses of the oceans as the basis of U.S. policy. President George H.W. Bush seized the right moment to launch informal negotiations designed to resolve the problems identified by President Reagan. President Clinton's Administration carried that effort through to a successful conclusion. And now the Administration of President George W. Bush has expressed its support for Senate approval of the Convention and the 1994 Implementing Agreement.

Mr. Chairman, I agree with the Administration. I urge the Senate to accept the recommendation of the Committee on Foreign Relations, adopted by a vote of 19-0, and approve the Resolution of Advice and Consent contained in its Report. They have taken the right action at the right time. It is in the interests of the United States to become party to the Convention and the Implementing Agreement as soon as possible.

We are, and have been since the founding of the Republic, a seafaring Nation that relies on the right to move off distant shores. The challenges may change, but our basic interests in using the sea to meet those challenges have never been more important. Our security is dependent upon the unimpeded global mobility of our armed forces to respond to any threat, whatever its nature, emanating from any part of the world; our prosperity is dependent upon the unimpeded global movement of goods and persons to and from our shores; and our future well-being may increasingly depend on the uninterrupted global carriage of telecommunications by submarine cable.

From the perspective of international security, the basic question is whether forces may be moved from one place to another without the consent or interference of states past whose coasts they proceed. Global mobility is important not only to naval powers but to other states that rely on those powers to maintain stability and deter aggression, directly or through the United Nations. As the size of major navies is reduced after the cold war, the adverse impact on

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their ability to perform their primary missions will increase if they must divert scarce resources to challenging coastal state claims that prejudice global lines of communication or set adverse precedents. Enhancing the legal security of navigation and defense activities at sea maximizes the efficient use of defense resources.

From the perspective of trade and communications, the basic question is whether two states may communicate with each other by sea without interference by a third state past whose coast they proceed. Restrictions imposed by a coastal state along the route may well result in increased costs for industries dependent upon trade and communications and for countries whose exports or imports are affected.²

HISTORICAL SETTING

The historic tension in the law of the sea has been a struggle between the freedom of the seas and coastal state sovereignty over the seas. The two are, in their purest forms, directly contradictory. The duty of all states to respect the freedoms of the seas is in principle equal. If one coastal state can impose a limitation, all can.

Thus, when in 1945 President Truman claimed the natural resources of the continental shelf beyond the territorial sea of the United States, we willingly ceded the same exclusive control to other coastal states that we claimed for ourselves. The difficulty is that we were unable to control the process. We were emulated, so to speak, beyond our wildest expectations. It was plausibly argued that since, as the uncontested global maritime power at the time, we had the greatest interest in preventing coastal state incursions on freedom of the seas, any claims of exclusive coastal state control that we made were the minimum, not the maximum, that might be regarded as reasonable. Where we limited our claim to the seabeds, others claimed the waters and even the airspace over vast areas as well. Where we limited our claim to natural resources, others claimed sovereignty and with it control over all activities, including navigation and overflight.

There was an accelerating collapse of any semblance of consensus on the fundamental question: Where is there freedom and where is there sovereignty? Our official position that coastal state sovereignty ended at the three-mile limit, and therefore that the free high seas began at that limit, became increasingly untenable. What was emerging was a sense that any coastal state could claim what it wished and might well get away with it.

The United States was faced with "three expensive choices when confronted with a foreign state's claim of control over our navigation or military activities off its coast in a manner inconsistent with our view of the law:

1. resistance, with the potential for prejudice to other U.S. interests in that coastal state, for confrontation or violence, or for domestic discord;
2. acquiescence, leading inevitably to a weakening of our position of principle with respect to other coastal states (verbal protests to the contrary notwithstanding) and domestic pressures to emulate the contested claims; or
3. bilateral negotiation, in which we would be expected to offer a political, economic or military quid pro quo in proportion to our interest in navigation and military activities that, under the Convention's rules, can be conducted free of such bilateral concessions.³

This is the setting in which President Nixon made his historic decision in 1970 to launch a new oceans policy. The challenge was to devise a political strategy for stabilizing and enhancing our ability to influence the perceptions of foreign coastal states as to their rights and duties, and hence their perceptions as to our rights and duties off their coasts. The key to that policy was a new multilateral elaboration of the law of the sea. The object was a widely ratified convention of highly legitimate pedigree that, by balancing the conflicting interests not only between but with-

²John R. Stevenson and Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AJIL 488, 493 (1994) (appended to this statement).

³Panel on the Law of Ocean Uses, *United States Interests in the Law of the Sea Convention*, 88 AJIL 167, 171 (1994) (hereinafter Panel Study). The panel was chaired by Louis Henkin and included James M. Broadus, Jonathan I. Charney, Thomas A. Clingan, Jr., John L. Hargrove, Jon L. Jacobson, Terry L. Leitzell, Edward L. Miles, J. Daniel Nyhart, Bernard H. Oxman, Giulio Pontecorvo, Horace B. Robertson, Jr., Louis B. Sohn and James Storer. Other contributions of the Panel include *U.S. Interests and the United Nations Convention on the Law of the Sea*, 21 Ocean Dev. & Int'l L. 373 (1990); *Deep Seabed Mining and the 1982 Convention on the Law of the Sea*, 82 AJIL 363 (1988); *U.S. Policy on the Settlement of Disputes in the Law of the Sea*, 81 AJIL 438 (1987); and *Exchange Between Expert Panel and Reagan Administration Officials on Non-Seabed Mining Provisions of LOS Treaty*, 79 AJIL 151 (1985).

in states, stabilized the law of the sea over the long term and protected our fundamental interests in global mobility. This in turn would provide us with a common platform of principle to influence foreign perceptions of their rights and duties as well as our rights to operate off foreign coasts and to regulate activities off our own coast.

Ambassador Richardson put the objective in the following way:

A Law of the Sea treaty creating a widely accepted system of international law for the oceans would—if the rules it contains adequately meet U.S. needs—be the most effective means of creating a legal environment in which our own perception of our rights is essentially unchallenged. We would then, for the first time since the Grotian system began to disintegrate, be assured rights of navigation and overflight free of foreign control, free of substantial military risk, and free of economic or political cost.⁴

It took another 13 years of hard, continuous negotiations among the nations of the world before President Reagan was finally able to declare the underlying substantive effort launched by President Nixon a success: President Reagan concluded that the provisions of the Convention with respect to traditional uses of the sea “fairly balance the interests of all states” and expressly stated that “the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.”⁵

President Reagan expressly recognized that the rules set forth in the Convention constitute the platform of principle on which we operate. The policy declared by President Reagan aligns our position regarding customary international law with the substantive provisions of the Convention dealing with all the traditional uses of the sea. There is indeed no plausible alternative for the foreseeable future. What then are the advantages of becoming a party?

The interpretation and application of these rules, like all rules, is a dynamic process that evolves with time. It is going on in countless venues even as we speak. As a practical matter, our rights and duties will be affected by that process whether or not we are party. What we gain by becoming party is increased influence over that process.

In particular we gain:

- the ability to speak authoritatively as a party to the Convention in setting forth our views regarding its interpretation and application;
- the enhancement of our credibility and effectiveness when we invoke the provisions of the Convention as binding treaty obligations and insist that other states respect our rights and freedoms under those provisions; as the world’s principal maritime power, we are already the most active in noting and protesting foreign legislation and other measures that we believe may not be fully consistent with the Convention;
- the right to participate in the organs established by the Convention and the meetings of states parties; one example is the review by the Commission on the Limits of the Continental Shelf of Russian continental shelf claims that immediately abut our own and implicate our own interests in the Arctic; another is the permanent seat on the Council of the Seabed Authority accorded the United States by the 1994 Implementing Agreement.

With respect to the underlying objective of promoting stability in the law of the sea, four main advantages of widespread, including U.S., ratification have been identified:

- 1. *Treaties are perceived as binding.* Legislators, administrators, and judges are more likely to feel bound to respect treaty obligations. Even nonparties are more likely to be cautious about acting a manner contrary to a widely ratified Convention; if they do, they are more likely to be isolated when their claims are challenged.
- 2. *Treaty rules are written.* Treaty rules are easier to identify and are often more determinate than customary law rules. Even if one argues that a customary law rule is identical to a treaty rule, that argument in and of itself is elusive and hard to prove. Even a nonlawyer reading the text of a binding treaty knows he or she is reading a binding legal rule, and can often form some appreciation of what the rule may require.

⁴ Elliot L. Richardson, *Power, Mobility and the Law of the Sea*, 58 Foreign Affairs 902 (1980).

⁵ Statement by the President, United States Oceans Policy, Mar. 10, 1983, 19 Weekly Comp. Pres. Docs. 383 (1983).

- 3. *Compulsory arbitration.* Parties to the Law of the Sea Convention are bound to arbitrate or adjudicate most types of unresolved disputes regarding the interpretation or application of the Convention. This can help forestall questionable claims in the first place. Perhaps more importantly, it provides an option for responding to unilateral claims that may well be less costly than either acquiescence or confrontation. Because states are not bound to arbitrate or adjudicate disputes absent express agreement to do so, this benefit of the Convention . . . is dependent upon ratification.
- 4. *Long-term stability.* Experience in [the twentieth] century has shown that the rules of the customary law of the sea are too easily undermined and changed by unilateral claims of coastal states. Treaty rules are hard to change unilaterally. At the same time, the Law of the Sea Convention establishes international mechanisms for ordered change that promote rather than threaten the long-term stability of the system as a whole.⁶

To these I might add that other coastal states that have yet to become party to the Convention and its implementing agreements are more likely to follow suit once we are party to all of them. Canada ratified the Convention within weeks after the Bush Administration testified in support of the Convention last fall. Several weeks after that, the European Union and its 15 member states became party to the 1995 Agreement on the Implementation of the Provisions of the Law of the Sea Convention regarding Straddling Fish Stocks and Highly Migratory Fish Stocks, to which the United States is already party but which is not as widely ratified as the Convention. With both Europe and North America firmly aligned on the essential elements of the superstructure of the modern law of the sea, it is more likely that others can be encouraged to come along soon.

Mr. Chairman, Ambassador Stevenson's and my published observations on the specific benefits to the United States of ratification of the Convention are appended to this statement.⁷ These observations were prepared at a time when the future of the Convention was still very much in doubt and new arrangements were beginning to emerge that ultimately became the 1994 Implementing Agreement regarding Part XI of the Convention. Let me therefore elaborate a bit more.

PART XI AND THE 1994 IMPLEMENTING AGREEMENT

I once heard an informed observer say that the problem with the Law of the Sea Convention is that in life you get only one chance to make a first impression. This was doubtless a reference to the problem of deep seabed mining that bedeviled the law of the sea negotiations in the 1970's and early 1980's. Much has changed since then.

The question concerns the mining of the deep seabeds beyond the limits of the continental shelf. The Law of the Sea Convention substantially expands the definition of the continental shelf to include the entire continental margin (which embraces the geographic continental shelf, continental slope, and continental rise) as well as all areas within 200 miles of the coast even if they lie beyond the continental margin. Because the existence of oil and gas deposits is closely associated with the geology of the continental margin, the purpose and effect of this definition of the continental shelf is to place seabed oil and gas deposits under coastal state control.

What remains are the hard minerals of the deep seabeds beyond the continental shelf as defined in the Convention, including manganese nodules found at or near the surface of deep seabeds. Even at the time the Convention was first negotiated, some promising hard mineral deposits had been identified, but to this day commercial production of deep seabed hard minerals has yet to begin. In my view, this fact contributed to an important anomaly in the law of the sea negotiations. The Conference was able to deal with the significant established interests of states in national defense and international security, oil and gas, navigation and overflight, fisheries, protection of the environment, smuggling, and virtually all other matters without serious intrusion of underlying philosophical differences and without so-called North-South confrontations.

The exception was deep seabed mining. The early draft texts issued by the chairman of the committee responsible for the deep seabed mining negotiations tended, in one degree or another, to reflect attitudes fashionable among developing countries at the time. These texts were not well received in the United States and other Western countries. Even the Soviets complained.

While painstaking progress was made in narrowing differences over the years, at the time President Reagan took office there were three basic choices: (1) continue

⁶Panel Study, note 3 *supra*, at 172.

⁷Note 2, *supra*.

to attempt to whittle away at the details, (2) withdraw from the Conference, or (3) identify and confront the most significant flaws frontally and seek basic changes. President Reagan chose the last of these. He identified certain key objectives with respect to the deep seabed mining regime, and stated: "The United States remains committed to the multilateral treaty process for reaching agreement on Law of the Sea. If working together at the Conference we can find ways to fulfill these key objectives, my administration will support ratification."⁸

Some further progress was made in the negotiations, but unfortunately there was insufficient will to rethink certain provisions, and the text adopted in 1982 did not adequately accommodate the points made by President Reagan.

On March 10, 1983 President Reagan made a major statement on United States Oceans Policy. He said:⁹

- The United States will not sign the Convention "because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries."
- The Convention's provisions with respect to traditional uses of the oceans "fairly balance the interests of all states."
- The "United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states."
- The "United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention" and "will not acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."
- "I am proclaiming today an Exclusive Economic Zone."¹⁰
- The "United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction."

The text of the Statement itself rebuts the misleading characterizations that have been revived in recent weeks. It is evident that President Reagan rejected the deep seabed mining provisions, not the remainder of the Convention. Indeed, he made clear our determination to implement, abide by and ensure respect for the important rights and freedoms the Convention elaborates. It is also evident that even in rejecting the deep seabed mining provisions of the Convention, he did not abandon our interest in working with other countries to develop a satisfactory regime.

The truth, Mr. Chairman, is that just as President Nixon determined the basic and ultimately successful strategy for achieving an acceptable convention with respect to most issues, so President Reagan determined the basic and ultimately successful strategy for producing a widely ratified Convention by resolving the deep seabed mining issue: identify the flaws, refuse to accept a text that does not reasonably address those problems, and leave the door open.

It took some time before the developing countries were ready to talk again. In the interim, communism collapsed, more market-oriented economic policies took hold throughout the world, and it became evident that a universal convention could not be achieved without resolving the deep seabed mining problem. The Administration of President George H.W. Bush determined that these developments created an opportunity to resolve the problem, and undertook to explore the possibilities with a representative group of interested countries assembled by the U.N. Secretary General. The result is the 1994 Implementing Agreement, which makes major changes in the deep seabed mining regime.

Mr. Chairman, the 1994 Implementing Agreement reasonably resolves the problems identified by President Reagan. Appended to this statement is a copy of my

⁸Statement by the President, U.S. Policy and the Law of the Sea, Jan. 29, 1982, 18 Weekly Comp. Pres. Docs. 94 (1982).

⁹Note 5, *supra*.

¹⁰See Proclamation 5030, Mar. 10, 1983, 19 Weekly Comp. Pres. Docs. 384 (1983) (footnote added). This Proclamation implements the rights of the United States as a coastal state as set forth in some of the most important provisions of the Law of the Sea Convention.

detailed analysis of the ways in which the 1994 Agreement accommodates the points raised by President Reagan.¹¹

Many of the critical comments made about the effect of the deep seabed mining provisions are influenced primarily by decades-old impressions, not by the 1994 Implementing Agreement, which expressly provides that it prevails over any conflicting provisions in the Convention. It is claimed, for example, that the Seabed Authority can impose production quotas and mandate transfer of technology. That is not so. The 1994 Implementing Agreement removed the offensive provisions on those subjects.

Many other claims are simply misplaced. There is no transfer of sovereignty or wealth to the International Seabed Authority.

We have never claimed sovereignty over the seabeds beyond the continental shelf, and have consistently taken the position that any such claim would be unlawful. This is made abundantly clear by our own Deep Seabed Hard Minerals Act. We neither have nor assert jurisdiction over the activities of foreign states and their nationals on the deep seabeds.

Nothing that could rationally be called sovereignty was conferred on the Seabed Authority. The powers of the Seabed Authority are very carefully defined and circumscribed, and are controlled by a Council on which we will have a permanent seat and a veto over regulations. Private companies have the right to apply for and receive long-term exclusive rights to mine sites on a first-come, first-served basis and have legal title to the minerals they extract. All parties to the Convention are obliged to respect those mining rights and recognize that legal title.

It was we, over the opposition of many developing countries, who successfully sought judicial review to make sure that the Seabed Authority respects the limits on its powers and the rights of miners, and who in addition successfully sought commercial arbitration to protect miners' contract rights.

It was President Nixon who proposed that miners should pay a reasonable sum in respect of the minerals they remove from the deep seabeds, as they now do on land and in offshore areas subject to coastal state jurisdiction. No American administration, and to my knowledge no mining company, ever objected to that idea. The question is the formula. We were successful in the Implementing Agreement in removing the complex details of the Convention on this matter, so that the Council is in a position to adopt reasonable regulations regarding the payment formula that do not impede investment or distort the market. We also ensured that these sums would go first to defray the administrative costs of the Seabed Authority, and that the distribution of any surplus is subject to regulations approved by the Council. Regulations regarding both the payment formula and the distribution of these funds will be subject to an American veto on the Council, whether or not American companies are the source of the funds.

Mr. Chairman, no major industrial state ratified the Law of the Sea Convention prior to the adoption of the 1994 Agreement. Following its adoption their governments initiated the steps necessary to become party. Today every neighbor of the United States, every other permanent member of the U.N. Security Council, and every other major industrial state in the world is among the 145 parties to the Convention. The issue is no longer whether there will be a Seabed Authority in which the overwhelming majority of countries from all regions are members. That exists. The issue is whether the United States will assume the privileged seat expressly reserved for it.

This has three important implications.

- The system is regarded as workable by other industrial states that share many of our interests as consumers and potential seabed producers of hard minerals.
- We need to assume our guaranteed seat on the governing Council of the Seabed Authority, and the decisive voting power that goes with it, as soon as possible to ensure that the system evolves in ways satisfactory to the United States. This includes the use of our voting power and our special rights under Article 142 to protect our environmental and economic interests as a coastal state whose continental shelf abuts the international seabed area in three oceans.
- It is unlikely that major sources of private capital with interests in many different parts of the world would be particularly comfortable making substantial new investments in deep seabed mining carried out in defiance of the Convention. A variety of factors may influence any business judgment in this re-

¹¹ Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AJIL 687 (1994) (appended to this statement).

gard; one is that Article 137 prohibits the parties to the Convention from recognizing any rights to deep seabed minerals not in accordance with Convention and the 1994 Implementing Agreement.

In other words, the critics are largely either addressing texts that no longer exist or assuming a political, economic and legal context that no longer exists. That said, I should note that I do agree with their claim that the Law of the Sea Convention entails history's biggest voluntary transfer of wealth. But not in the sense that the critics mean. That transfer of wealth is to coastal states, and the United States is first among them. When the Law of the Sea negotiations began, we had a 3-mile territorial sea, a 12-mile fishing zone, and a continental shelf of uncertain extent beyond the point where the waters reach a depth of 200-meters. By the time those negotiations ended, the Convention accorded us:

- a territorial sea of up to 12 miles,
- the largest 200-mile exclusive economic zone in the world in which we control all living and nonliving resources and have important rights to control pollution,
- an oil-rich continental shelf extending at least to 200-miles and beyond that to the outer edge of the continental margin,
- a ban on high seas fishing for salmon of American origin, and much more.

Few coastal states in the world enjoy rights as rich and extensive as we acquire just off the coast of Alaska.

NAVIGATION AND NATIONAL SECURITY

One of the major achievements of the Law of the Sea Convention is that many of its provisions regarding navigation are copied from the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1958 Convention on the High Seas. The United States ratified the 1958 conventions many years ago, although many other states did not.

For example, the following rules in the Law of the Sea Convention are all copied from the 1958 Territorial Sea Convention: the sovereignty of the coastal state extends to the territorial sea; there is a right of innocent passage in the territorial sea; passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state; submarines are required to navigate on the surface in order to enjoy the right of innocent passage.¹²

For many years, there was a serious difference of opinion as to what "innocence" meant under the 1958 formulation. This cast a shadow over our ability to rely on the right of innocent passage in foreign territorial seas. Paragraph 2 of Article 19 specifically responds to our concerns about this ambiguity by making clear that the question of innocence relates only to the exhaustive list of acts set forth in that paragraph and only if those acts are committed while the ship is in the territorial sea. The list benefits us by providing clarity and eliminating broader interpretations of what is not innocent. It strains credulity for critics to imply that an "act aimed at collecting information to the prejudice of the defence or security of the coastal State" or any other act listed in paragraph 2 of Article 19 would be regarded as innocent by coastal states in the absence of such a list.

President Reagan twice declared that the United States respects the rules regarding innocent passage contained in the Law of the Sea Convention, once in his 1983 oceans policy statement,¹³ again in 1988 when he implemented the right set forth in the Convention to extend the territorial sea to 12 miles.¹⁴ All of President Reagan's successors have respected these declarations.

Critics seem to overlook the fact that Articles 17 to 32 of the Convention address only the right of innocent passage.¹⁵ The preamble makes clear what would be true in any event: "matters not regulated by this Convention continue to be governed by the rules and principles of general international law." Suffice it to say that the matters not regulated by the Convention include the right of self-defense, the international law of armed conflict, and the complex (and for understandable reasons,

¹²Articles 2, 17, 19(1), and 20 of the Law of the Sea Convention correspond respectively to Articles 1, 14(1), 14(4), and 14(6) of the Territorial Sea Convention.

¹³See Note 5, *supra*, and accompanying text.

¹⁴President Reagan declared that "the ships of all countries enjoy the right of innocent passage" in the U.S. territorial sea "[i]n accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea." Proclamation on the Territorial Sea of the United States, Dec. 27, 1988, 24 Weekly Comp Pres. Docs. 1661 (1988). The Proclamation also specifically recognizes the right of transit passage in straits. *Id.*

¹⁵Those articles do not, for example, affect the more liberal rights of transit passage of straits and archipelagic sea lanes passage under Parts III & IV. Unlike innocent passage, transit passage of straits and archipelagic sea lanes passage include both overflight and submerged navigation.

rarely discussed) questions regarding the practice of states with regard to covert intelligence activities in each others' territory.

Mr. Chairman, becoming party to the Convention will facilitate the prosecution of the war on terrorism in general, and the implementation of the President's proliferation security initiative in particular. President Bush has emphasized that we cannot wait for the terrorists and their weapons to reach us. What is, or should be, clear from this is that we must exercise our global navigation and overflight rights and freedoms at sea anywhere in the world in order to reach our operational destinations. Not every government of the numerous countries past whose coasts our forces must travel to reach their destinations would necessarily wish to associate itself with every one of our operations. When we become party to the Convention, those governments will have an easier time explaining their acquiescence in our activities to domestic or foreign critics on the grounds of their treaty obligations to the United States, and we will have an easier time persuading them to do so without the need to expend our political or economic capital.

Those who have expressed concerns in this respect seem to overlook the fact that the rules of high seas law set forth in the Law of the Sea Convention are copied from the 1958 High Seas Convention. Similarly, they overlook the fact that the rules of the Law of the Sea Convention regarding navigation and overflight and other high seas freedoms were expressly embraced by President Reagan in his 1983 statement on oceans policy, and constitute the bedrock of the legal foundation for our operations at sea around the world. The Administration has made it clear that it is able to and intends to carry out the proliferation security initiative in a manner consistent with high seas law as set forth in the Law of the Sea Convention, and that doing so is in our interests.

Mr. Chairman, the 200-mile limit of the exclusive economic zone embraces virtually all of the semi-enclosed seas of the world, including the Caribbean Sea, the Mediterranean Sea, the Red Sea, the Persian Gulf, the South China Sea, and the East China Sea. It is evident that our high seas navigation and other rights in those seas are critical if our forces are to be able to reach their destinations and perform their missions. Perhaps most importantly for the successful prosecution of the war on terrorism and implementation of the proliferation security initiative, the Law of the Sea Convention provides that high seas law and high seas freedoms with respect to navigation, overflight, and related military activities apply within the 200-mile exclusive economic zone.

A crucial point that some critics miss is that coastal states are tempted to think of their exclusive economic zones as belonging to them. It is unrealistic to assume that the application of high seas law and high seas freedoms within the 200-mile exclusive economic zone, in the hard-won terms set forth in the Law of the Sea Convention, would commend itself to coastal states around the world outside the context of a comprehensive and universal Law of the Sea Convention designed to include the United States.

One of our most important objectives in seeking a universally ratified Law of the Sea Convention is to put a stop to the erosion of high seas freedoms in coastal areas that characterized the development of customary international law in the twentieth century. There is no reason to believe this erosion will not continue in the absence of a treaty restraint. In my opinion, the most plausible way to block the gradual erosion of high seas freedoms in the exclusive economic zone, and its eventual transformation into something much more like a territorial sea, is a widely ratified Law of the Sea Convention to which the United States is party, and with respect to which the voice and practice of the United States are prominent authoritative evidence of what the Convention means.

For operational planners, the essential question is not what we think our rights are, but what foreign governments think. We need the greatest possible influence over the perception of foreign governments regarding the source, legitimacy, and content of their obligations to respect our high seas freedoms, especially in their exclusive economic zones. We achieve that best by becoming party to the Convention. The alternatives are likely to be both less effective and more costly.

PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

Mr. Chairman, I must reiterate before this Committee in particular: "The Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."¹⁶ Former Secretary of State Warren Christopher

¹⁶Note 2, *supra*, at 496.

made the same appraisal in his Letter of Submittal of the Convention.¹⁷ I would only add that the statement remains true today.

The protection and preservation of the marine environment is of fundamental importance to the American people and to people throughout the world. No one country can achieve this on its own. Both environmental and economic objectives point in the same direction, namely international standards that states have the right and duty to implement, supplemented by measures taken by states individually and jointly to control access to their own ports and to regulate seabed activities, offshore installations, and similar matters. One of the greatest contributions made by the Convention is to be found in its extensive provisions mandating this approach.

Thanks in no small measure to the work of this Committee, our environmental laws are among the strongest in the world. They are fully consistent with our rights and obligations under the Convention. The Legal Adviser of the Department of State, William H. Taft, IV, in a letter of March 1, 2004 to the Chairman of the Senate Foreign Relations Committee, expressly stated that "the United States does not need to enact new legislation to supplement or modify existing U.S. law . . . related to protection of the marine environment 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."

It has nevertheless been suggested that the Convention may require a revision of the Endangered Species Act. That is not so. Article 194 of the Convention requires the parties to take measures to control pollution of the marine environment. We have done so. Paragraph 5 of Article 194 is a statement of the obvious: it specifies that among the objects of such pollution control measures is the protection and preservation of rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. Our existing laws satisfy this obligation. I need only add that Article 194 does not specify any particular pollution control standards.

Mr. Chairman, you and your colleagues on the Committee are well aware of the complexities involved in arriving at an effective, efficient and balanced approach to environmental protection that reasonably accommodates and furthers both our environmental and other interests. When it comes to the oceans, these complexities are multiplied many times because they implicate the interests and priorities of many different countries. Permit me to cite an example.

The Law of the Sea Convention accords every coastal country, including the United States, exclusive sovereign rights with respect to the exploration and exploitation of the continental shelf in an area vastly expanded beyond the limits specified in the 1958 Convention on the Continental Shelf, to which the United States is party. The Law of the Sea Convention specifies that the rights of the coastal state with respect to the continental shelf include the power to set environmental conditions for oil and gas development, for oil rigs and all other economic installations and structures, for pipelines, and for dumping.

While these powers give us a great deal of control over our interests in both environmental protection and the productive use of our continental shelf, in themselves they are insufficient to protect the full range of either our environmental interests or our energy and other interests. To protect those interests, we need to influence the laws and practices of foreign countries. It is for this reason that the Convention establishes a floor of generally accepted international standards that every coastal state must apply. Among the American interests that this protects are the following:

- Our neighbors have the same exclusive rights over the continental shelf off their coasts as we have off ours. Pollution from their activities can easily affect our waters, our resources, and our shores. This became abundantly clear a number of years ago when a pollution incident on the Mexican continental shelf gave rise to extensive public concerns in Texas and other Gulf states that our waters and coastline would be polluted. As a party to the Convention, we will have increased credibility and leverage to protect ourselves from such incidents in a way that avoids any appearance that we are bullying our neighbors.

- While every coastal state has the right to impose higher standards on its continental shelf activities, and ours are among the strongest in the world, the oil and gas industry is a global enterprise that can achieve economic efficiencies from uniform global standards regarding equipment and operations. Those efficiencies can of course help to keep down the cost of energy and free up additional capital for investment. As a party to the Convention, we will have increased credibility and le-

¹⁷ See Senate Treaty Doc. 103-39, p. V, VII-VII (1994).

verage to promote stronger and more efficient international standards and their general acceptance.

- We live in an era of instant global news. A serious pollution catastrophe on the continental shelf anywhere in the world is likely to be reported, and its consequences televised, throughout the globe. This can stimulate public demands in many countries for new restrictions on continental shelf development. To the extent that this means that we all continue to learn from each others' mistakes, this is of course a good thing. But to the extent that public excitement can lead to hasty and ill-considered actions either in the United States or in other countries, the economic consequences can be adverse, and the result may be an unnecessary increase in the price of energy. As a party to the Convention, we will have increased credibility and leverage to ensure the emergence and enforcement of international standards that reduce the likelihood of such events.

- Our interest in the health of the oceans throughout the world is no mere abstraction. They comprise over two-thirds of our world, and are essential to our well-being and the overall ecological balance of the planet. Marine living resources from the far reaches of the globe supply us and the rest of the world with food, with sources of recreation, with valuable scientific knowledge, and with the promise of new and more effective medicines. We have neither an environmental nor an economic interest in a race to the bottom in pollution regulation in other parts of the world that destroys marine life. As a party to the Convention, we will have increased credibility and leverage to exercise the kind of balanced global leadership in protecting the oceans that is incumbent upon the leading maritime power in the world and that the American people expect.

This is but one example of the benefits of the approach taken by the Convention to environmental protection. There are many others. The provisions that successfully accommodate the interests of states with respect to freedoms and rights of navigation and their interests with respect to prevention of pollution are obviously of great importance. The maintenance over time of a reasonable balance responsive to both navigation and environmental interests would unquestionably be advanced by U.S. participation in the Convention.

Mr. Chairman, the Law of the Sea Convention is a powerful and successful environmental treaty precisely because it seeks to achieve a reasonable balance between environmental and other interests. For many years, in the law of the sea negotiations and in other fora, the United States has tried to make clear that environmental treaties must be carefully framed to produce a reasonable accommodation of diverse interests. Some people have characterized this as opposition to environmental protection. Some of the extreme rhetoric used abroad has been particularly damaging to our reputation in important allied countries. The Senate now has a signal opportunity to set the record straight. Its approval of the Convention and the Implementing Agreement would suggest that there is every reason to ensure that the multilateral agenda is pursued carefully and that, as long as it may take, at the end of the day relevant interests are reasonably accommodated. It would announce that when that is done, America will stand second to none in joining to strengthen multilateralism, to strengthen the rule of law in international affairs, and to strengthen international protection of the environment.

CONCLUSION

Mr. Chairman, it is of particular importance that many of the 145 parties to the Convention worked painstakingly with us over many years to produce a Convention that we, as well as they, could ratify. From the perspective of much of the rest of the world, a great deal of the negotiation of the Law of the Sea Convention revolved around accommodating the interests and views of the United States regarding:

- the 12-mile maximum limit for the breadth of the territorial sea;
- the retention of many provisions drawn from the 1958 Conventions on the Territorial Sea and the Contiguous Zone, the Continental Shelf and the High Seas, to which the United States is party;
- the more detailed and objective provisions on innocent passage; the extension of the contiguous zone to 24 miles from the coastal baselines in order to strengthen enforcement of smuggling and immigration laws;
- the new regime of transit passage through, over and under straits;
- the new regime of archipelagic waters and archipelagic sea lanes passage;
- the detailed and careful balance of the provisions regarding the regime of the 200-mile exclusive economic zone and its status, including express enumeration of the rights of the coastal state and express preservation of the freedoms of navigation, overflight, laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms;

- the immunities of and exemptions for warships and military aircraft;
- the precision of the texts on artificial islands, installations and structures;
- the extension of the limit of the continental shelf to the outer edge of the continental margin;
- the inclusion, in addition to coastal state control over fisheries in the 200-mile exclusive economic zone, of a ban on salmon fishing beyond the zone, a reference to regional regulation of tuna fisheries, and a special provision protecting marine mammals;
- the avoidance of a separate legal regime for enclosed and semi-enclosed seas;
- the limitations on coastal state authority with respect to marine scientific research;
- the elaborate detail on environmental rights and obligations; • the inclusion of compulsory arbitration or adjudication with important exceptions (e.g. for military activities);
- the limitation of the regulatory functions of the Seabed Authority to mining activities; and
- most dramatically, the extensive modification of Part XI of the Convention in the 1994 Implementing Agreement to accommodate the objectives articulated by President Reagan.

These and many more provisions are widely regarded as having been designed to respond positively to U.S. requirements and interests.

Mr. Chairman, I respectfully recommend that the United States take "yes" for an answer and assume its rightful place as a party to the Convention and the Implementing Agreement.

Thank you.