VI

The Unvarnished Truth: The Debate on the Law of the Sea Convention

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Good afternoon. Distinguished guests, ladies and gentlemen, friends. Professor Mandsager, thank you for that kind introduction. It’s nice to be introduced by someone you truly respect. It is an honor to be your speaker today. I am grateful for your gracious hospitality.

Background

The Senate’s consideration of US accession to the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention) this year, as it did when the Senate last considered the Convention in 2004, has produced an amazing array of opposition arguments. Well, this is America and protecting our rights, such as freedom of speech—which of course includes the right to speak out on or participate in debates on major issues—is why many Americans have chosen to be members of our armed forces. However, when examined, the opposition arguments are basically intellectually bankrupt. Reminds me of the fellow down South who used to lament, “Broke? Man I’m so broke I can’t even pay attention.”

In fact, I couldn’t resist the opportunity to express my true feelings at a forum sponsored by the Brookings Institution in September 2004. After Senator Lugar’s

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opening remarks, we five panelists were given five to seven minutes each and then the floor was open for questions. Frank Gaffney asked for and was given the opportunity to speak first. I followed. I took the full five minutes and these were my opening comments:

There has been a constant drumbeat of ill-founded criticism predicting near-apocalyptic doom for the United States if it accedes to the Law of the Sea Convention. The opponents constantly argue that the Law of the Sea (LOS) Convention will cripple the U.S. Navy’s ability to perform maritime missions necessary for national security, including collecting intelligence, conducting submerged transits with submarines, and preventing actions by terrorists. I am compelled to speak out against these misguided and incorrect beliefs to set the record straight. I certainly respect honest, deliberate scrutiny of this complex Convention. But, given the repeated misstatements of fact, it is hard not to conclude that there are some who are engaged in a deliberate, concerted effort to mislead the public and our government leaders on this important issue for our nation. It is bad enough to be wrong, but there is something more serious going on when people ignore facts and are consciously and purposefully wrong. Bottom line: nothing in the LOS Convention hampers, impedes, trumps or otherwise interferes with traditional naval activities we currently conduct or will conduct in the future. I sincerely want to thank the Brookings Institute [sic] for providing this opportunity to communicate the truth about the LOS Convention.2

You will recall that the Convention’s opponents were successful in preventing a floor vote during the second session of the One Hundred Eighth Congress. It was almost unprecedented to have a treaty unanimously reported out of committee, yet fail to go to the full Senate for a vote.

As the One Hundred Tenth Senate considers the 1982 LOS Convention, a number of items have appeared in the press and online asserting the Convention is contrary to US interests.3 The opponents’ arguments have been aggressively countered by the Convention’s supporters.4

On October 31, 2007, the Senate Foreign Relations Committee voted seventeen to four in favor of acceding to the treaty.5 Its report has been sent to the full Senate for consideration.

The strongest supporters of the 1982 LOS Convention are those directly affected by it.6 The arguments made by Convention opponents and the Bush administration’s rebuttals from the One Hundred Eighth Senate’s consideration of the Convention appear in the written statements of Department of State Legal Adviser William H. Taft before the Senate Committee on Armed Services on April 8, 2004,7 before the House Committee on International Relations on May 12, 2004,8 and before the Senate Select Committee on Intelligence on June 8, 2004;9 and in testimony by Assistant Secretary of State John Turner before the Senate Committee of
Foreign Relations on October 21, 2003, and before the Senate Committee on Environment and Public Works on March 23, 2004. This year, testimony in support of the Convention was provided to the Senate Foreign Relations Committee by Deputy Secretary of State John Negroponte, Deputy Secretary of Defense Gordon England and Admiral Patrick Walsh, Vice Chief of Naval Operations, on September 27, 2007. The Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, stated unequivocally that the Convention advances US interests during his confirmation hearings before the Senate Committee on Armed Services on July 31, 2007.

Opposition Myths

The following is a sampling of the myths regarding the Convention that opponents continue to trumpet.

President Reagan thought the treaty was irremediably defective. This is absolutely false. President Reagan expressed concerns only about Part XI’s deep seabed mining regime. In fact, he believed that Part XI could be fixed and specifically identified the elements in need of revision. In response to those concerns, the regime has been fixed in a legally binding manner that addresses each of the US objections to the earlier regime. The rest of the treaty was considered so favorable to US interests that, in his 1983 Ocean Policy Statement, President Reagan ordered the government to abide by and exercise the rights accorded by the non-deep-seabed provisions of the Convention.

US adherence to the Convention is not necessary because navigational freedoms are not threatened (and the only guarantee of free passage on the seas is the power of the US Navy). Wrong! It is not true that our navigational freedoms are not threatened. There are more than one hundred illegal, excessive claims affecting vital navigational and overflight rights and freedoms. The United States has utilized diplomatic and operational challenges to resist the excessive maritime claims of other nations that interfere with US navigational rights as reflected in the Convention. But these operations entail a certain amount of risk, e.g., the Black Sea bumping incident with the former Soviet Union in 1988. Being a party to the Convention would significantly enhance our efforts to roll back these claims by, among other things, putting the United States in a far stronger position to assert our rights and affording us additional methods of resolving conflict.
The Unvarnished Truth: The Debate on the Law of the Sea Convention

The Convention was drafted before—and without regard to—the war on terror and what the United States must do to wage it successfully. An irrelevant canard. It is true that the Convention was drafted before the war on terror; however, the Convention enhances, rather than undermines, our ability to successfully wage the war on terror. The maximum maritime naval and air mobility that is assured by the Convention is essential for our military forces to operate effectively. The Convention provides the necessary stability and framework for our forces, weapons and materiel to get to the fight without hindrance—and ensures that our forces will not be hindered in the future. Accordingly, the Convention supports our war on terrorism by providing important stability for navigational freedoms and overflight. It preserves the right of the US military to use the world’s oceans to meet national security requirements. It is essential that key sea and air lanes remain open as an international legal right and not be contingent upon approval from nations along the routes. A stable legal regime for the world’s oceans will support global mobility for our armed forces.

Obligatory technology transfers will equip actual or potential adversaries with sensitive and militarily useful equipment and know-how such as anti-submarine warfare technology. Total bunk. No technology transfers are required by the Convention. Mandatory technology transfers were eliminated by Section 5 of the Annex to the Agreement amending Part XI of the Convention. Further, Article 302 of the Convention explicitly provides that nothing in the Convention requires a party to disclose information the disclosure of which is contrary to the essential interests of its security.

As a non-party, the United States is allowed to search any ship that enters our exclusive economic zone (EEZ) to determine whether it could harm the United States or pollute the marine environment. Under the Convention, the US Coast Guard or others would not be able to search any ship until the United Nations is notified and approves the right to search the ship. Absurdly false. Under applicable treaty law—the 1958 law of the sea conventions—as well as customary international law, no nation has the right to arbitrarily search any ship that enters its EEZ to determine whether it could harm that nation or pollute its marine environment. Nor would we want countries to have such a blanket “right,” because it would fundamentally undermine the freedom of navigation that benefits the United States more than any other nation. Thus, the description of both the status quo and the Convention’s provisions is incorrect. The Convention makes no change in our existing ability or authority to search ships entering our EEZ with regard to security or protection of the environment. One final and very
important point: under the Convention, the UN has absolutely no role in US military operations, such as in deciding when and where a foreign ship may be boarded.

Other parties will reject the US “military activities” declaration as a reservation.23 A ridiculously false assertion. The US declaration is consistent with the Convention and is not a reservation. It is an option explicitly provided by Article 298 of the Convention. Other parties to the Convention that have already made such declarations exercising this option include the United Kingdom, Russia, France, Canada, Mexico, Argentina, Portugal, Denmark, Ukraine, Norway and China.

The 1994 Agreement doesn’t even pretend to amend the Convention; it merely establishes controlling interpretive provisions.24 Nonsense. The Convention could only have been formally “amended” if it had already entered into force. The 1994 Agreement25 was negotiated as a separate agreement in order to ensure that the Convention did not enter into force with Part XI in its flawed state. The 1994 Agreement made explicit, legally binding changes to the Convention and has the same legal effect as if it were an amendment to the Convention itself.26

A letter signed by all living former Legal Advisers to the US Department of State, representing both Republican and Democrat administrations, confirms the legally binding nature of the changes to the Convention effected by the 1994 Agreement. Their letter states, “[T]he Reagan Administration’s objection to the LOS Convention, as expressed in 1982 and 1983, was limited to the deep seabed mining regime. The 1994 Implementing Agreement that revised this regime, in our opinion, satisfactorily resolved that objection and has binding legal effect in its modification of the LOS Convention.”27

The problems identified by President Reagan in 1983 were not remedied by the 1994 Agreement relating to deep seabed mining.28 Wrong. Each objection has been addressed. Among other things, the 1994 Agreement

- Provides for access by US industry to deep seabed minerals on the basis of non-discriminatory and reasonable terms and conditions;29

- Overhauls the decision-making rules to accord the United States critical influence, including veto power over the most important future decisions that would affect US interests and, in other cases, requires two-thirds majorities that will enable us to protect our interests by putting together small blocking minorities;30

and
The Unvarnished Truth: The Debate on the Law of the Sea Convention

- Restructures the regime to comport with free-market principles, including the elimination of the earlier mandatory technology transfer provisions and all production controls.31

The Convention gives the United Nations its first opportunity to levy taxes.32
A ludicrously false assertion. The Convention does not provide for or authorize taxation of individuals or corporations. It does include revenue sharing provisions for oil/gas activities on the continental shelf beyond 200 miles33 and administrative fees for deep seabed mining operations.34 The costs are less than the royalties paid to foreign countries for drilling off their coasts and none of the revenues go to the United Nations. These minimal costs are worth it according to reliable industry representatives. (US companies applying for deep seabed mining licenses would pay the application fee directly to the Seabed Authority; no implementing legislation would be necessary.) US consent would be required for any expenditure of such revenues. With respect to deep seabed mining, because the United States is a non-party to the 1982 LOS Convention, US companies currently lack the ability to engage in such mining under US authority. Becoming a party will give our firms such ability and will open up new revenue opportunities for them when deep seabed mining becomes economically viable. The alternative is no deep seabed mining for US firms, except through other nations that are parties to the Convention.

The Convention mandates another tribunal to adjudicate disputes.35
The asserted authority of the tribunal is wildly inaccurate. The Convention established the International Tribunal for the Law of the Sea. However, parties are free to choose other methods of dispute settlement. The United States would choose two forms of arbitration rather than the Tribunal.

The United States would be subject to the Seabed Disputes Chamber if deep seabed mining ever takes place. The proposed Resolution of Advice and Consent makes clear that the Seabed Disputes Chamber’s decisions “shall be enforceable in the territory of the United States only in accordance with procedures established by implementing legislation and that such procedures shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States.”36 The Chamber’s authority extends only to disputes involving the mining of minerals from the deep seabed; no other activities, including operations in the water column or on the surface of the oceans, are subject to it.
US adherence will entail history’s biggest voluntary transfer of wealth and surrender of sovereignty.\(^{37}\)

To the contrary, the Convention enhances not only sovereignty of military ships and aircraft, but also bolsters our resource jurisdiction over a vast area off the coasts of the United States. Furthermore, under the Convention, as superseded by the 1994 Agreement, there is absolutely no transfer of wealth and no surrender of sovereignty. In fact, the Convention supports the sovereignty and sovereign rights of the United States over extensive maritime territory and natural resources off its coast, including a broad continental shelf that in many areas extends well beyond the 200 nautical mile limit, and would give us additional capacity to defend those claims against others. The mandatory technology transfer provisions of the original Convention, an element of the Convention that the United States objected to, were eliminated in the 1994 Agreement.

The International Seabed Authority (ISA) has the power to regulate seven-tenths of the earth’s surface, impose international taxes, etc.\(^{38}\)

Nothing could be further from the truth. The Convention addresses seven-tenths of the earth’s surface; however, the ISA does not. The authority of the ISA is strictly limited to administering mining of minerals in areas of the deep seabed beyond national jurisdiction, generally more than 200 miles from the shore of any nation. At present, and in the foreseeable future, such deep seabed mining is economically unfeasible. The ISA has no other role and has no general regulatory authority over the uses of the oceans, including freedom of navigation and overflight. The ISA has no authority or ability to levy taxes.

The United States might end up without a vote in the ISA.\(^{39}\)

Not possible. The Council is the main decision-making body of the ISA. The United States would have a permanent seat on the Council, by virtue of its being the State with the largest economy in terms of gross domestic product on the date of entry into force of the Convention, November 16, 1994.\(^{40}\) This would give us a uniquely influential role on the Council, the body that matters most.

The People’s Republic of China asserts that the Convention entitles it to exclusive economic control of the waters within a 200 nautical mile radius of its artificial islands—including waters transited by the vast majority of Japanese and American oil tankers en route to and from the Persian Gulf.\(^{41}\)

Wrong again on both facts and law. The US government is not aware of any claims by China to a 200 mile economic zone around its artificial islands. Any claim that artificial islands generate a territorial sea or EEZ would be illegal under the
The Unvarnished Truth: The Debate on the Law of the Sea Convention

Convention. The Convention specifically provides that artificial islands do not have the status of islands and have no territorial sea or EEZ of their own.42

Participation in the Law of the Sea Convention would render the Proliferation Security Initiative (PSI) invalid.43 Wrong and an insult to our military leadership, all of whom strongly support the Convention. US accession to the Convention would in no way hinder our efforts under the PSI to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction. The PSI Statement of Interdiction Principles requires participating countries to act consistently with national legal authorities and “relevant international law and frameworks,” which includes the law reflected in the 1982 LOS Convention.

Concluding Remarks

Those are the basic arguments. Before going to my predictions, I would like to stress one point; whether a party or non-party, a robust Freedom of Navigation Program must be an essential part of US oceans policy. This treaty, or any treaty, is only effective if it is implemented by action.

Predictions: I’m going to be an optimist here. Considering the favorable vote of the Senate Foreign Relations Committee, the direct support “in writing” from the President, the support of the Democratic side of the aisle, as well as support from Senators Lugar, Stevens, Warner and others, I predict the Convention will get to the floor and receive the necessary votes for advice and consent. The United States will finally join the current 155 parties to the Convention.

Having said that, and after observing the Senate maneuvering over the Immigration Bill that is now pending, something “unforeseen” from the far right might still be possible. But I’m relying on the wisdom of Winston Churchill and his statement: “You can always count on the Americans to do the right thing. Yes, you can always count on the Americans to do the right thing—after they’ve exhausted every other possibility.”

Thank you very much again.

Notes

2. Author’s notes.
William L. Schachte Jr.


8. Available at http://commdocs.house.gov/committees/intrel/hfa93660.000/hfa93660_0.HTM.

The Unvarnished Truth: The Debate on the Law of the Sea Convention


17. Professor Oxman cataloged President Reagan's objections and the ways they were addressed in the 1994 Agreement in Bernard H. Oxman, The 1994 Agreement and the Convention, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 687 (1994).


William L. Schachte Jr.


29. Id., Annex, sec. 1, para. 6(a)(iii).

30. Id., Annex, sec. 3.


33. 1982 LOS Convention, supra note 1, art. 82.

34. 1994 Agreement, supra note 25, Annex, sec. 1, para. 6(a)(iii).


37. Gaffney, supra note 24; Smith, supra note 24; Gaffney, The U.N.’s big power grab, supra note 3; Gaffney, LOST Runs Silent, Runs Deep, supra note 3; Rabkin, supra note 3; U.N. Law of Sea Treaty on Senate fast-track, supra note 3; Schlafly, supra note 3; Bandow, supra note 3.

38. Bandow, supra note 32, at 1 (“This may be the first global tax imposed on Americans without congressional approval”); Bowden, supra note 32; Gaffney, The U.N.’s big power grab, supra note 3 (“So why on earth would the United States Senate possibly consider putting the U.N. on steroids by assenting to its control of seven-tenths of the world’s surface?”).

39. Gaffney, supra note 22, at 1 (“Conceivably, due to membership rotation, there could be times when [the United States] might not even have a vote—to say nothing of a veto—over decisions taken by [the Seabed Authority]”)


42. 1982 LOS Convention, \textit{supra} note 1, art. 60(8).
43. Gaffney, \textit{supra} note 24, at 14 ("LOST Can be Used to Limit the Proliferation Security Initiative").