TESTIMONY OF

BERNARD H. OXMAN[1]

BEFORE THE
SENATE COMMITTEE ON FOREIGN RELATIONS

ON ACCESSION TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND RATIFICATION OF THE 1994 AGREEMENT REGARDING PART XI OF THE CONVENTION

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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.

I must begin by begging your indulgence. I returned to the United States from Hamburg only last Friday after serving for several weeks on the International Tribunal for the Law of the Sea as a judge *ad hoc* appointed by one of the states party to the case. One unfortunate consequence is that my statement today is less polished and thorough than I would have liked. In this respect I fortunately had the luxury of relying on what I anticipated to be the comprehensive statements of others here today.

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.

Mr. Chairman, it is my strongly held opinion that it is in the interests of the United States to become party to the Convention 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. Our security is dependent upon the unchallenged 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.

Ambassador Stevenson and I put it this way:

> 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 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.
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> 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]

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.

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; in opposing those claims, the United States and other maritime nations were regarded as hypocritical because they too claimed what they wished off their own coasts. If the United States could unilaterally try to strike the right balance between its coastal interests in control of foreign uses of the sea off its own coast, and its maritime interests in the free use of the sea off foreign coasts, why couldn't others strike a balance that suited them better? That very process ironically made it harder for the United States to protect its interests off its own coast, for fear that new assertions of right would abet a process that would further degrade what remained of the platform of principle upon which the U.S. operated off foreign shores. In short, the interests of the United States in both global mobility and in protection of its interests off its own shores were caught in a stultifying conundrum.

Needless to say, the United States had the ability to challenge foreign states that interfered with its perceived rights. But to physically challenge every coastal state that made a claim contrary to our view of our rights would have required far greater resources than we were prepared to divert to such a project, and would have come at a significant cost to other U.S. interests in the various countries concerned. Moreover, both domestic and international public opinion demanded a platform of principle for such overt assertions of right off foreign shores that was substantially more legitimate than nostalgic invocation of what once may have been the law.

As stated in a study by the Panel on the Law of Ocean Uses, of which I was rapporteur at the time,[3] 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;
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> 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
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> 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."

The fundamental truth is that the most difficult and potentially costly policy decisions made by the President and the Congress regarding activities at sea turn not on what our own lawyers say our rights are under the law of the sea, but what foreign states perceive our rights to be. And what we saw in the 1960's was an accelerating collapse of any semblance of consensus on the fundamental question: Where is there freedom and where is there sovereignty?

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 within states, stabilized the law of the sea over the long term and protected our fundamental interests in global mobility. This is turn would provide us 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 thirteen 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."

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. What then are the advantages of becoming a party?

President Reagan expressly recognized that the rules set forth in the Convention constitute the platform of principle on which we operate. There is indeed no plausible alternative for the foreseeable future. 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;
- we gain the enhancement of our credibility when we insist that other states respect the Convention; 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;
- we gain 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, the 1994 Study of the Panel on the Law of Ocean Uses suggests four main advantages of widespread, including U.S., ratification:

> 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.

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 the 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.[5]

To these I might add that other coastal states that have yet to become party to the Convention are more likely to follow suit once we do, beginning with our Canadian friends. This may even include states with whose governments we are not on intimate terms, but whose experts have a sophisticated understanding of the law of the sea, and whose decision-makers might regard the subtle reciprocal gesture of becoming party to the Convention as providing a rational basis for avoiding unnecessary conflict with the United States over navigation and overflight as well as offering other benefits.

Senate approval of the Convention at this time may also be roughly contemporaneous with the anticipated approval by the European Union of 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 the United States 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, there is insufficient time for me to even begin to outline all of the specific benefits to the United States of ratification of the Convention. With your permission, I would like to submit for the record a copy of Ambassador Stevenson's and my published observations on The Future of the United Nations Convention on the Law of the Sea from which I have already quoted;[6] these observations were prepared at the time 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.

That said, I must make special note that Ambassador Stevenson and I specifically observed that, "The Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time." [7] I am delighted to see that former Secretary of State Warren Christopher agreed with this appraisal in his Letter of Submittal of the Convention. 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.

Mr. Chairman, this Committee has before it a Convention that reflects a conscious decision by the United States that multilateralism was and is in its best interests with respect to the law of the sea. It has before it the most comprehensive and ambitious lawmaking convention ever negotiated, a Convention that makes a significant contribution to the rule of law in international affairs because strengthening the rule of law at sea was and remains important to American interests. It has before it a powerful Convention on protection and preservation of the marine environment precisely because this Convention seeks to achieve a reasonable balance between environmental protection and other interests.

Senate approval of the Convention and the 1995 Implementing Agreement would suggest that there is every reason to ensure that the international 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 protection of the environment.

Mr. Chairman, it is of particular importance that many of the 143 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 additional 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 revision of Part XI of the Convention in the 1994 Implementing Agreement to accommodate the objectives articulated by President Reagan.[8]

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.

[1] Professor of Law, University of Miami School of Law. Formerly United States Representative and Vice-Chairman of the U.S. Delegation to the Third U.N. Conference on the Law of the Sea, and Chairman of the English Language Group of the Conference Drafting Committee.

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

[3] Panel 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).

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

[5] Panel Study, *supra* note 3, at 172.

[6] See *supra* note 2.

[7] *Id.* at 496.

[8] A comparison of the changes effected by the Implementing Agreement with the objectives identified by President Reagan may be found in Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AJIL 687 (1994).