

The United Nations Convention on the Law of the Sea and the Rule of Law

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Professor Weiss, Ambassador Richardson, ladies and gentlemen, it is a particular pleasure to be here and to have an opportunity to share a few thoughts on this subject. Let me just say at the outset that I have not written all of these volumes that Edith Brown Weiss and Ambassador Richardson have kindly attributed to me, but it is a good thing if you think I have.

Trying to cover all of the issues that one might talk about in fifteen minutes this morning also brings to mind the bumper sticker that I saw on my last visit to New York. Prominently displayed on the back of a cab it said, "So many pedestrians, so little time." Because Ambassador Richardson has gone through the history, I will discuss the rule of law, the importance of the rule of law, and the struggle for that rule of law in oceans policy. I will explain why I believe that prompt advice and consent by the Senate to this treaty is in the best interest of the United States.

Now we, as lawyers, remind ourselves that much of the world's history of human progress has been a struggle to control arbitrary power. This struggle, which began with the Magna Carta, is an effort to ensure that power takes its legitimacy from the people rather than from a vanguard party or the divine right of kings. We struggle to ensure that power is checked through separation of powers and checks and balances. We have a whole series of human rights protecting individuals, including restrictions on states' power to restrict human dignity and human freedom.

When we shift to the international side and, as the international relations theorists described it, we encounter an anarchic system — a system that does not have a centralized government. The history of struggle against arbitrary power is a struggle for the creation of binding and effective norms that control arbitrary power and enable efficient allocation of resources, from states and the international system as a whole, as well as from internal checks on government.

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A law of the oceans or elsewhere in international law is in the global common interest. Such law requires three things. One, it involves agreement on law. If you cannot agree or if there is anarchy in the other sense of the term, then you are not going to have stability of expectations. You are going to have high levels of conflict. Two, international law has to be good law. You would like to have law that will in fact serve community interests and be most useful in promoting efficiency, fair access and all of our other interests. And three, international law requires compliance. It is essential that we not simply agree on norms, but that we agree on a mechanism to enforce those norms and to establish a pattern of compliance. The international community must take them seriously and observe them in not only day-to-day activities but even in the activities where there is a crunch in terms of the national interest.

When we look historically at the struggle for law in relation to oceans law, we see a number of jurisprudential development periods. These are symbolized by the following: the League conference for codification of oceans law in 1930; the first Law of the Sea conference in 1958 that resulted in four Conventions; the 1960 conference seeking agreement on the breadth of the territorial sea and fisheries zone, and failing by one vote because of the Korean representative disregarding his governmental instructions; and from 1967 with the development of the seabeds committee; and through the conclusion of UNCLOS III. I would like to point out that much of the struggle for the development of oceans law was a struggle to separate out the different kinds of functional issues.

If we believed that there was only one paramount question — the breadth of the territorial sea rather than many issues, such as navigation or fishing or protection of the environment — then we would not be able to develop very effective law. Fortunately, the 1982 Convention functionally separated these issues. Now we address fisheries issues differently than we address navigation issues, marine scientific research issues, and environmental issues. Functionally addressing separate issues separately was the core message from the legal realists.

As part of the LOS Convention, we were able to put an outer boundary on the effort by coastal states to take more of the world's oceans. In the 12-mile territorial sea and the 200-mile economic zone, we now have an outer boundary that is likely not to shift through time. It is fixed and we can look forward to higher levels of compliance, if we take compliance seriously with those limits. The great future problems in Law of the Sea are going to relate precisely to ensuring compliance with those agreements, as well as with a variety of quite subtle compliance issues, such as protecting navigation. The problems will relate to such issues as the "character of the zone" that Ambassador Richardson just referred to as a tough negotiation issue.

In order to pursue our interests effectively, I believe that the United

States must be a member of the Law of the Sea Convention. Our Senate should give advice and consent to this Treaty in the interest of the rule of law and in the interest of the United States. There are three principal reasons for this. The first reason is simply that when you look at all of the issues together as you must, the balance strongly favors U.S. adherence to the Convention. One of the tasks that I had some years ago was chairing the National Security Council Task Force which had some twenty-two different agencies participating in the review of U.S. policy. This review was done in a very hard-nosed fashion. We had everyone from the Chairman of the Joint Chiefs, to the Council on Environmental Quality, to the Coast Guard and everyone else in the U.S. government interested in the oceans participating on that task force. One of the exercises I still remember is something called "the economic review" in which the Treasury Department insisted that we do a careful analysis of the overall U.S. interests in the Law of the Sea. Indeed, I remember unpleasant weekends having to draft some of the first drafts of that analysis and then to circulate them to get agreement from twenty-two different agencies and departments in the U.S. government. What we concluded at that time, I believe, is correct today. The single most important interest we have in the oceans is navigational freedom. It is an extraordinarily important use of the world's oceans, not only commercially, but also in terms of the national security interests of the United States.

We also have a great interest in rationally managing fisheries resources and resolving the common pool problem. Extending jurisdiction so that generally it aligns with the range of stocks would achieve both interests. An exclusive economic zone of 200 miles would yield a 95% to 98% coextensive with the range of stocks.

We had an interest in getting clarification of the outer edge of coastal state mineral resource jurisdiction and getting assured access to seabed minerals, protecting the marine environment and also protecting access to marine scientific research that was in the interest of the entire international community.

As you look at the Law of the Sea Convention, it is abundantly clear that the navigational and security provisions in this Convention are favorable to the United States. They are better than the law that appears in the older 1958 Conventions. It is better not only in the straits provision, but in many provisions including innocent passage in the territorial sea. It is also better in resolution of the problems with the archipelagic states.

The Convention provisions are also extremely good in the interest of environmental issues and environmental protection. Indeed, it was striking to me and gratifying to see at the Rio Conference an endorsement of the Law of the Sea as the structural framework for environmental protection of the world's oceans. That did not happen, to my knowledge, in any other area in international law in Rio. Marine scientific research knowledge is

probably slightly better than what we had under the 1958 Conventions, which was a very difficult and tough negotiation. Deep seabed mining is not great, but with the renegotiation, it seems to me, to be acceptable to the United States as part of this overall package.

I was one of those who felt strongly in 1982 that the provisions we had at that time were not adequate, that the United States should not accept the treaty at that time without renegotiation, and that indeed, it would not go through the U.S. Senate without renegotiation. I also believed we could renegotiate. Whether I was right or wrong, or simply lucky in the process, we will never know. I am certainly pleased that there was a renegotiation, that it was successful, and that the outcome of the renegotiation dealt effectively with every major issue we had identified in 1982. Indeed, I had written a letter to the President that identified a series of those issues. The issues were dealt with and I commend our negotiators on this. I would commend Wes Scholz and David Colson and the others that had worked so effectively on it. It is not perfect. It comes from a background of the new international economic order that happened to peak between 1967 and 1973, precisely when this convention was initially being negotiated. However, the world has moved on to understand that economic freedom, as other forms of human freedom, is far better and this renegotiation has moved very strongly in that direction. I believe the task force that I chaired wrote the U.S. instructions for the Law of the Sea negotiation. I think these instructions were the same ones that Ambassador Richardson and his task force and group of negotiators were following. I can tell you that in looking at that overall balance, while we might have had some differences on Part XI, with the changes in Part XI, I have no doubt that this is in the interest of the United States.

Now these reasons alone might not be enough for the U.S. Senate to give advice and consent. But, there are two other very important points. At this time, there are realistically no other options. It will not assist anyone in this process if the Senate was to turn down the Law of the Sea Treaty at this point. The options are gone. The option of renegotiation is gone. The convention has been renegotiated. Whether we like all of the provisions or not, that is no longer an option available to the United States. The option of trying to bring our allies together behind some other kind of approach is gone. We have accepted collectively the renegotiation. It will not help the seabed mining industry at this point. They have, I believe, no other realistic option except to try to work within the system or, if they cannot work within the system, which might be a possibility, then they probably would simply not have to work at all. But sadly, I think this is the reality and we should not kid ourselves any other way about that.

Now the third point is, I believe, the most important of all. The third point relates to compliance. If we look back to the question of law and good

law, we really do have a law in this Law of the Sea Treaty. The norms have been accepted, the treaty is in force, and it is already developing customary international law very, very strongly. So, that has been done. Secondly, I believe for the most part with some exceptions it is good law. It is in many respects very good law. For example, it treats navigation, the environment, and resource issues in a good way! However, it has some areas that are not great, as most trade-offs in the real world do. But, there is one other element that is not clearly established. That element is going to be the struggle for the future. We should have no illusion about it whatsoever. And that is compliance, getting the international community to adhere to this agreement.

There is now a robust body of human knowledge about something called government failure, for which the Nobel Prize in Economics was awarded some years ago. I can assure you that government failure will operate very strongly in the oceans in the years to come. In essence, coastal states will be tempted to extend their jurisdiction to that which is really the international community's. In essence, it is stealing. They will be tempted to steal because they can get things without taxing their constituents. It is a form of taxation without representation, another form of government failure that comes from the same mechanism. This temptation is strong and it will continue to grow. It has to be controlled because we will lose the good law if countries do not comply. I believe the United States will be much more effective working to protect its interests within that compliance process; if it is a world leader in seeking compliance as a member of the Convention as it was indeed the world leader in negotiating this treaty.

I believe that the difference in the effectiveness of U.S. participation in the compliance process is probably the single most important reason why we need to sign this Law of the Sea Treaty. Now I would like to simply leave you with historical information — food for thought concerning Senate advice and consent to the 1958 Conventions.

I had one of my student assistants do a brief memo on the 1958 hearings on the first Law of the Sea Conventions. Arthur Dean from the Department of State gave the primary testimony to the Senate as the Chairman of the U.S. delegation on the Law of the Sea Conference. The Department of State recognized that they knew of no opposition to the Conventions. Representatives from the National Shrimp Congress and the American Tuna Boat Association testified on behalf of the fishing industry in support of the Convention. Their statements were supplemented by numerous letters from other representatives echoing their support for a treaty that would codify existing international law and protect the living resources of the high seas. The Humane Society also testified in support because ratification would encourage the adoption of more humane methods of capturing and killing marine life. There was no testimony in opposition to

the ratification of the Conventions. The treaty was presented in the Senate on May 26, 1960, after a brief description of the provisions of the Convention. The executive statement was included in the record along with a concluding section on the benefits of the Conventions as presented during the committee hearing by the Department of State. The sponsor made a motion for the Senate to vote en banc. The first total was seventy-seven in favor, four opposed, and nineteen not voting. However, Lyndon Johnson then made a motion to reconsider the ratification and these were reconsidered to take a separate vote on the optional protocol. Although the vote on the four Conventions was sustained en banc, the optional dispute settlement protocol received less than the necessary two-thirds, with only forty-nine in favor, thirty opposed, and twenty-one not voting.

Discussion after this vote indicated that the Senators in opposition were only opposed to the extent that there had been no debate on the protocol and no explanation offered. Another Senator indicated that he opposed it because the Senate had failed to include a reservation protecting the domestic jurisdiction of the United States in the form of a Connolly Amendment. This reservation was later presented by the Senator, but it appears to have died because there was no further action on the optional protocol. In the end, the four Conventions were ratified on April 12, 1961, and the optional protocol was not ratified.

Let me suggest, there may be a few lessons for us as we go forward before the Senate on this ratification. One, keep in mind how difficult it is to get anything passed by the U.S. Senate if there is any dispute. We should not underestimate the difficulty of a two-thirds Senate vote. It also suggests the importance of laying the groundwork very, very carefully so that we do not have an optional protocol setting in which a number of Senators say we just did not know anything about it. This convention is one that I believe is going to be one of the most important public acts of the Senate of the United States over the coming years.

If I had to just summarize three Conventions that I believe are perhaps the most important in international law in the development of the rule of law among nations, one grouping would certainly be the United Nations Charter and the Statute of the International Court of Justice. The second would probably be the Vienna Convention on the Law of Treaties setting out the very basic framework about agreement among nations. And, the third in the public law area and the most important public law treaty really establishing a constitution for two-thirds of the surface of planet Earth is in fact the 1982 LOS Convention. I hope very much that this ratification will not get caught up in some kind of partisan debate because it is solidly in the interest of the United States at this time. Thank you.