Foreword

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The passage of time has not diminished the achievement represented by the United Nations Convention on the Law of the Sea. History knows of no other international agreement of similar scope and complexity in the development of which so many states and varying constituencies have been represented. As one who participated, although comparatively briefly and certainly in a minor way, in the negotiations which culminated in the Convention, I welcome this opportunity to add a few personal thoughts to the Law of the Sea Symposium of the *San Diego Law Review.*

Recent events have highlighted once more the importance of law of the sea and the role of the important maritime regimes prescribed by the Convention. Although perhaps controversial in certain other respects, the flight of United States aircraft on their mission to Libya has demonstrated vividly the existence and operability of the regime of transit passage through straits used for international navigation. The route of the aircraft was depicted repeatedly in the popular press and broadcast media. Overflight of land territory had been denied, and the aircraft passed over the Strait of Gibraltar. Spain, however, claims a twelve-mile territorial sea. Were the regime of innocent passage to have applied in the straits, no right of overflight would have been present and the international situation at the time would have become one of even greater complexity. Nevertheless, flight over the straits actually was accomplished through the exercise

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of the right of transit passage. Several observations may be made in this regard.

—Routine transits of the Strait of Gibraltar, of all types, obviously occur frequently and without comment. The unquestioned exercise of the transit passage right in this instance, subject as it was to far greater potential notoriety, serves therefore to underscore the overall legitimacy of these routine incidents of transit passage.

—The overflight of the Strait of Gibraltar drew no noticeable adverse international comment. This suggests recognition of the right in other straits subject to transit passage, wherever located, as a matter of customary law. Furthermore, acknowledgement of the viability of transit passage lends credence to the view that state practice is similarly recognizing other maritime uses compatible with the regimes established by the Convention, including exercise of the freedoms of navigation and overflight, and related and associated uses within exclusive economic zones.

—The availability of transit passage, while according substantially greater deference to legitimate coastal state interests than would be true in the case of a high seas corridor, in this instance also afforded certain political benefits. In a tense international situation, the United States was not required to seek Spanish permission to overfly the Strait. Of possibly greater importance, Spain was not obliged either to grant or deny such a request, and thereby was relieved of concerns over political ramifications.

In connection with these comments, a few more thoughts should be added regarding United States navigation and overflight exercises generally. The global economic and political commitments and interests of the United States require that we seek to preserve and maintain internationally recognized maritime rights and freedoms for ourselves, our allies and our trading partners. These rights and freedoms benefit many maritime interests of the international community at large. It is also important to reemphasize that there is nothing new in this situation and the policies directed toward it. For years the United States has protested, through diplomatic channels, those claims to ocean jurisdictions which have been at once excessive and incompatible with international law. At the same time, United States naval and air units have routinely exercised maritime rights and freedoms in a manner commensurate with international law. This policy has been implemented uniformly and without great fanfare among friends, neutrals, and other countries alike.

The rationale for this policy is based upon recognition that the validity of claims under international law depends upon the practice of states. If a claim is not honored by state practice, it is not likely to be pursued with much success. United States navigational and overflight exercises in furtherance of this policy in the Gulf of Sidra, of

course, have drawn considerable attention. Clearly, the Libyan claim that the Gulf of Sidra constitutes an historic bay has no support in history, state practice, or law. When so obviously excessive a claim is made with such notoriety, however, I believe a response is not only appropriate (and the amount of attention given the response probably inevitable), but necessary to avoid setting an undesirable precedent regarding similar claims which have been advanced rather more quietly in other geographic areas.

During the Third United Nations Conference on the Law of the Sea, a widely accepted legal regime for the world's oceans was generally perceived as the preferred vehicle to achieve stability and predictability, particularly in view of the number of conflicting claims then existing and continually being issued. The question, therefore, frequently arises why the United States, with a wide range of its maritime interests apparently resolved satisfactorily, did not sign the Convention. The most direct answer is contained in the President's statement of March 10, 1983: portions of the seabed mining provisions of the Convention were considered contrary to the interests and principles of industrialized nations, and would not help attain the aspirations of developing countries. In my own view, the matter is rather more complex, and involves not only deep seabed mining provisions, but certain aspects of the Conference itself and the dynamics of the interagency process within the United States government.

The Convention constitutes a remarkable series of compromises, both large and small, reached throughout the duration of the Conference and affecting the full panoply of subjects under consideration. Obviously, many of the 165 delegations represented a variety of views, sometimes conflicting. Under these circumstances, it is highly unlikely the work of the Conference could have been accomplished at all without the "Gentlemen's Agreement," which permitted all participants to seek, as far as possible, to reach agreement on matters of substance by consensus. As a result, however, much of the substantive work in laying the grounds for consensus was conducted informally by small groups of interested delegates. At the same time that this informal process produced agreements ratifiable by the cognizant committees and in plenary, it left behind comparatively little in the way of a negotiating history. Although delegations consequently were freed from the need to take firm positions in anticipation of votes on individual issues, there often is no record indicating what was intended by the participants in producing language to effect their compromises. Where the language of the Convention is un-

clear, therefore, interpretive guidance may be absent.

This occasional lack of clarity must be considered in combination with the variety of constituencies contained within the sizeable United States delegation. Among the agencies represented were the Departments of Defense, Energy, Interior, Transportation (the Coast Guard), Commerce (including the National Oceanographic and Atmospheric Administration), Treasury, and State. In addition, these agencies themselves often were comprised of several constituent and not always harmonious interests. For example, a strong voice in favor of the Convention because of its treatment of a given issue might be met by an opposing voice or less favorable proponent within the same agency or within another agency, depending upon the Convention's treatment, nontreatment, or ambiguity regarding other issues. Therefore, in my opinion, the United States did not refuse to sign the Convention because of the specific opposition of one constituent interest. Instead, unclear portions of the Convention itself and an incomplete negotiating record, although contributing and possibly essential to consensus at the Conference, could not command sufficiently strong proponents within the United States government to overcome a forcefully presented opposition.

An illustration that comes quickly to mind deals, once again, with transit passage. The Convention text fails to provide explicitly for submerged transit as part of the transit passage right. Whether submerged transit actually is comprehended by the grant in article 38 of freedom of navigation and overflight has been the subject of considerable debate. I personally believe this controversy was resolved conclusively in favor of submerged transit, by Professor John Norton Moore in an article appearing in the *American Journal of International Law* in 1980.[1] Nevertheless, existing support for the Convention within the Department of Defense at the time arguably might have been stronger had there been no controversy, and had a right of submerged transit appeared in the text in so many words. How many times this sort of situation arose among the various United States government agencies involved in the negotiations is difficult to estimate, but the impact upon the totality of the support for the Convention may well have been substantial.

What then is the likelihood that the United States ultimately will sign and ratify the Convention? The United States already has indicated that it will respect maritime claims consistent with international law as reflected in the Convention, provided that rights and freedoms of the United States under international law are similarly respected by coastal states. At this time, however, I believe the

1. Moore, *The Regime of Straits and the Third United Nations Conference of the Law of the Sea*, 74 AM. J. INT'L L. 77 (1980).

chances for signature and ratification are not great. The final answer may depend in part upon the extent to which Convention provisions are "fleshed out" by state practice consistent with the broad array of United States ocean interests. Another factor may be the extent to which a widely accepted international regime, although unsatisfactory in some respects, is perceived as essential for the orderly exploitation of the resources of the deep seabed. In any event, it is clear that the Convention at a minimum has provided an invaluable framework conducive to a stable and orderly customary legal environment for international maritime behavior.