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Introduction: Law of the Sea

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Introduction

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The Third United Nations Conference on the Law of the Sea is, in my view, the most ambitious and complex undertaking by the world community of nations since the creation of the United Nations itself in 1945. The conference engages the attention, and vitally affects the interests, of all nations, developed and developing, maritime and non-maritime, and coastal and landlocked. It is at once a political, economic and legal negotiation. It involves the diverse aspirations of more than 150 nations and reflects the advent of new technologies for utilizing the oceans and their resources. The conference also responds to the widely felt need for generally agreed rules of law to prevent chaos and reduce the potential for conflict on over 70% of the earth's surface covered by the oceans.

The current Law of the Sea conference is, of course, not the first attempt by the United Nations to write a charter for the oceans. The first United Nations Law of the Sea conference was held in 1958 and adopted four conventions that constituted important progress in advancing the rule of law over the oceans. But the failure of this conference, and a follow-up conference in 1960, to agree on the terms and conditions for expanding the territorial sea beyond the traditional three miles hastened the rash of extended maritime claims that occurred in the 1960's and 1970's. To a large extent, it was President Truman's proclamation in 1945\(^1\) unilaterally claiming sovereignty over the continental shelf that served as a precedent for other nations' claims.

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In addition to its failure to resolve important substantive issues, the 1958 conference suffered from a serious procedural flaw that limited the effectiveness of its achievements. By adopting four separate conventions instead of a comprehensive document addressing all issues, and by not prohibiting reservations, the conference irresistibly tempted the participating governments to ratify only those conventions that suited their narrow interests or to qualify their adherence by extensive reservations. One of the principal lessons of the 1958 conference is that if nations are permitted to pick and choose what they will and will not be bound by in such a complex negotiation, it will be impossible to prevent the chaos and conflict that a Law of the Sea is intended to prevent.

When I was first elected to the Senate in 1960, the second Law of the Sea conference had failed. Having worked on the staff of the secretariat at the 1945 San Francisco conference that created the United Nations, I was particularly concerned that the United Nations had not been successful in such an important endeavor. I was also concerned that the United States was devoting so much attention to exploring the frontiers of outer space while neglecting ocean space, one of the most important frontiers of inner space.

Accordingly, in 1967 I introduced Senate Resolution 1722 calling upon the Johnson Administration to take the lead in convening a third Law of the Sea conference to develop a comprehensive treaty governing all of the military and economic uses of ocean space. At about the same time, Arvid Pardo, Malta’s Ambassador to the United Nations, made his now famous proposal to set aside the resources of the world’s seabeds as the “common heritage of mankind.”3 While the United Nations was establishing a special seabeds committee in response to Pardo’s proposal, the Johnson Administration scoffed at my idea of a comprehensive Law of the Sea treaty.

When the Nixon Administration came into office in 1969, I renewed my effort by introducing Senate Resolution 924 which now included a draft treaty. This time, my proposal met with a more favorable response. The new Administration, recognizing the need to prevent an expansion of the arms race in the oceans, took the initiative to bring about the negotiation of the Seabed Arms Control Treaty of 1971,5 banning weapons of mass destruction from the seabeds. In addition, concerned about the difficulties

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2. 113 Cong. Rec. 27316 (1967).
that expanded maritime claims posed for our naval and air mobility, the Nixon Administration was instrumental in promoting the convening of the Third United Nations Law of the Sea Conference.

The first substantive meeting of that conference was held in 1974 in Caracas, Venezuela. I was present as a Congressional adviser and vividly recall the idealism and high hopes that accompanied the launching of this century's most ambitious maritime adventure. The participants were determined to profit from the mistakes of the 1958 and 1960 conferences by endorsing the concept of a comprehensive treaty. So strong was the commitment generated in Caracas that it has been sustained during seven years of difficult and often frustrating negotiations.

In attempting to produce a single comprehensive Law of the Sea treaty that would be universally accepted by a world that had expanded from 112 independent countries in 1960 to 146 in 1973, the governments represented in Caracas dedicated themselves to achieving the following awe-inspiring objectives:

- avoiding, or minimizing, the likelihood of unnecessary crises through the establishment of an agreed legal framework for the oceans in which disagreements can be resolved peacefully and in accordance with law;
- protecting freedom of navigation and related freedoms, which are essential to the maintenance of international peace and security and international trade upon which the well being of all nations depend;
- conserving and managing the living resources of the oceans so as to ensure the full utilization of this source of food for this and future generations;
- encouraging the exploitation of the hydrocarbon resources of the continental margin to help ensure that energy needs are satisfied in the years ahead;
- ensuring that the mineral resources of the deep seabed—the common heritage of mankind—benefit all nations of the world, both developed and developing;
- obtaining global recognition of the rules and regulations essential to protect the marine environment from pollution; and
- encouraging the conduct of marine scientific research.  

These objectives have not changed since the negotiations began, although international appreciation of their importance and the consequences of failing to achieve them has increased as the negotiations have proceeded. Virtually universal agreement has been reached that a regime of generally recognized rights and obligations in the oceans is clearly preferable to the uncertain process of claim and counterclaim and the endless arguments over how, in a given situation, state practice becomes accepted as customary law.

At the same time, however, the specific and often narrow national interests of all nations must be perceived to be better protected with a treaty than without one. Lofty principles and legal tidiness will not be enough to inspire broad support for a comprehensive treaty.

For maritime nations, the freedoms of navigation and overflight through straits, archipelagoes and all areas of the seas beyond a narrow territorial sea are vital.

For coastal nations, sovereign rights over the living and non-living resources in a 200-mile zone and in the continental margin beyond the zone are critical.

For land locked and geographically disadvantaged nations, amelioration of other nations' offshore claims through the possibility of access to the living resources of neighboring economic zones and revenue sharing from resource exploitation of the continental margin is essential.

For certain island nations, recognition of their archipelagic aspirations, including national unity, is compelling.

For all nations, a regime for the exploration and exploitation of the deep seabed beyond the limits of the continental shelf is essential, although perceptions may differ on the essential elements. All nations also have an important stake in a system of peaceful third-party settlement of disputes and arrangements to protect the maritime environment.

In my view, the draft treaty that is emerging would accommodate these and other national interests better than would going it alone without a treaty or attempting to negotiate mini-treaties on separate subjects with a limited number of other nations. A comprehensive treaty that results from negotiations involving more than 150 governments cannot and should not be expected to be an ideal document as viewed from the perspective of any single nation—for it is the nature of multilateral treaties that they are compromises involving many different, oftentimes conflicting, interests.

In the case of a package deal such as the Law of the Sea treaty
that is intended to deal with all issues relating to the oceans, the only way that any one nation can ensure that provisions protecting its particular interests are widely supported is to reciprocate by agreeing to provisions that serve other nations' interests. Sometimes the balance of pluses and minuses in such trade-offs is very close; but as long as the balance is positive, it is preferable to pursuing an unrealistic goal involving only pluses and no minuses.

The beauty of a comprehensive treaty without reservations is that it locks everyone into adhering to provisions that protect everyone's interests. Without a comprehensive treaty, no nation can be sure that its interests will be respected by others.

In the absence of a treaty, nations will try to protect their interests in incoherent and conflicting ways. No consensus will evolve to accommodate all interests; for there will be no web of quids pro quos. For example, in the absence of a treaty, it is likely that the trend to a 12-mile territorial sea will continue but without any clear consensus for aircraft, ships and submarines to transit over 100 straits less than 24 miles wide that would be completely enveloped by overlapping 12-mile territorial seas.

Virtually all of the strategically significant straits from a U.S. policy perspective fall within this category. The Strait of Hormuz, through which the world's lifeblood, oil, passes in the Persian Gulf; the Strait of Gibraltar, which separates the Atlantic Ocean from the Mediterranean Sea; and the Straits of Malacca and Singapore, which link the Pacific and Indian Oceans, are just a few of the seaways vital to U.S. economic and security interests threatened by creeping jurisdictional claims. Of course nations like the U.S. could attempt to negotiate transit rights on an individual basis or simply ignore the territorial claims of straits states; but in either case the results will be uncertain, time consuming, and the diplomatic costs potentially high.

Similarly, landlocked and island nations will not receive global recognition of their paramount concerns; and nations interested in exploiting the resources of the deep seabed will neither have a universally recognized right to mine nor exclusive mineral rights to a minesite—a major uncertainty affecting the ability of miners to attract capital. As every would-be deep seabed mining concern is aware, unilateral actions by the United States to guarantee exclusive mining rights through national legislation alone would be meaningless, with no clear standing in international law, and
highly vulnerable unless the U.S. is prepared to defend individual sites with a military presence. Even the mini-treaty concept cannot afford the kind of protection that would likely be needed in order for mining companies to carry out the billion dollar investments required. Thus, both developed and developing nations interested in benefitting from deep seabed mining will be left with an empty slogan—the common heritage of mankind.

Continuing the search for the necessary accommodations to conclude a comprehensive Law of the Sea treaty is absolutely essential if the rule of law in international relations is to be advanced. So much progress has been made already in the conference that it would be a tragedy if misplaced pride, unrealistic ambition, or undue influence by one particular interest group were to prevent the conference from succeeding in its efforts to produce a comprehensive, widely-supported treaty.

In this connection, the Administration's announcement on March 3 that the U.S. representative at the conference had been instructed "to seek to insure that the negotiations do not end at the present session of the conference, pending a policy review by the United States Government," sent shock waves through the delegations of participating nations who had just begun to assemble in New York for the opening of the tenth session of the conference. Although it was to be expected that a new Administration would want to review the complex issues in the conference, the timing of the announcement—just seven days before the conference was to begin and coinciding with an intensification of mining industry lobbying against the treaty—and the peremptory tone of the announcement, aroused bitter speculation among many conference participants that the United States was about to revise its objectives so radically as to pose a direct threat to the success of the conference.

The negative signals sent out by the March 3 announcement were in sharp contrast to statements made by the chief U.S. negotiator, Elliot Richardson, at the end of the last conference session that wound up in August 1980. At that time Ambassador Richardson stated in an August 29 press conference in Geneva that only one final working session would be required to deal with the four principal outstanding tasks:

—establishing a preparatory commission to lay the foundation for the International Seabed Authority,
—making provisions for protecting those who make investments in seabed mining in the interval between signature of the treaty and its entry into force,

—determining what entities other than states may become parties to the treaty, and
—completing work on the wording of the more than 400 treaty articles in the six official languages. (In subsequent statements, Ambassador Richardson substituted maritime boundary delimitation for this basically procedural question.)

Ambassador Richardson left the clear impression that these were essentially the only issues that stood in the way of U.S. support for a treaty, and in a statement in the conference's plenary session on August 26, he called upon certain other delegations to "abandon demands for significant substantive changes that could upset the balance of the convention and hurt the chances for its general acceptance." That was sound advice to other delegations, and it ought to be heeded by the United States as well.

The deep seabed articles of the draft treaty clearly need improvement, and the United States should not sign a treaty unless they are improved. But Ambassador Richardson had already launched an initiative to accomplish that objective, and there was every indication that his effort would succeed, although probably not in only one final working session as he had hoped.

Apart from the need to improve the seabed articles, I believe that the remaining provisions are very much in America's national interest. These provisions provide for a maximum 12-mile territorial sea, free passage through international straits and archipelagoes, a 200-mile exclusive economic zone, national resource jurisdiction over the continental margin, protection of the environment, security for scientific research, and dispute settlement. Together, these provisions constitute a well-balanced package not only in the interest of the United States but the international community as a whole.

The United States has played a leading role both in convening the Law of the Sea Conference and in advancing its objectives. Through the years it has enjoyed strong bipartisan support in this country. The conference began under a Republican Administration, and the objectives sought during both the Nixon and Ford Administrations were supported and advanced under President Carter. Under every Administration, the chief U.S. negotiator was

a Republican. The fate of the conference now rests in the hands of a third Republican Administration and another Republican negotiator.

Some cynics have speculated that the Reagan Administration has already decided to scuttle the conference and to look for other ways to advance America's interests in the oceans. I am willing to take the Administration's pronouncements at face value—namely, that it wishes an opportunity to assess the provisions in the draft text and that no other motives are intended. The Administration for its part must take steps, which it has not done to date, to allay the concerns raised by the announcement of the policy review—a review which is apparently slated to drag on for the remainder of this year.

Even without a conscious intention to abandon treaty negotiations, the Administration could do irreparable harm if it decides to propose changes in the draft text going substantially beyond those enumerated by Ambassador Richardson last year. At the same time, other governments would do well to work closely with the Administration as it conducts its review and not to assume the worst.

I am by nature an optimist and a firm believer in patient, quiet diplomacy. There is no reason why the conference must complete its work this year, and if a modest delay enhances the likelihood of a treaty ultimately entering into force with American support, the entire world will benefit. Such a delay, however, is not without risk. A quick review of events since the first conference convened in 1958 reveals that unilateral claims by nations to new rights in the oceans have proceeded at an ever accelerating pace. To delay too long would mean additional demands to consider changes of provisions already contained and agreed to in the text. But it is important for the United States to reaffirm its commitment to a comprehensive treaty and to make known its objectives as quickly as possible. Otherwise, I fear that the spirit of confidence and goodwill that has sustained the conference over many difficulties in the past will unravel, and a golden opportunity to advance the cause of world peace and cooperation will be lost, to no one's benefit.