



Former Legal Advisers' Letter on Accession to the Law of the Sea Convention

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FORMER LEGAL ADVISERS' LETTER ON ACCESSION TO THE LAW OF THE SEA CONVENTION

EDITORS' NOTE

The following is the text of letters dated April 7, 2004, from all living, former Legal Advisers of the U.S. Department of State to Senators William H. Frist (Majority Leader), Richard G. Lugar (Chairman, Committee on Foreign Relations), and John W. Warner and Carl Levin (respectively, Chairman and Ranking Member, Committee on Armed Services, whose hearings on the matter were held the next day).¹

The undersigned comprise all the living, former Legal Advisers to the United States Department of State. We served as general counsel to various Secretaries of State in the Administrations of Presidents Carter, Reagan, George H. W. Bush and Clinton. We are unanimous in our view that it is in the best interests of the United States that the Senate, at its earliest opportunity, grant its advice and consent to United States accession to the 1982 United Nations Convention on the Law of the Sea (the "LOS Convention") and to United States ratification of the 1994 Implementing Agreement that modifies Part XI of the LOS Convention (the "1994 Implementing Agreement").

We write at this moment because of certain objections that have been raised, in spite of the support of the Bush Administration and in spite of the unanimous approval of the LOS Convention and the 1994 Implementing Agreement in the Senate Foreign Relations Committee that was accompanied by a proposed resolution of advice and consent. This letter will not recite the many well-known advantages of the LOS Convention to the national security, economic and other interests of the United States, but rather will briefly address what we understand are residual concerns of certain members of the Senate.

First, the 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.

Second, President Reagan, while rejecting the deep seabed mining regime as then conceived, pronounced it United States policy in 1983 to abide by the LOS Convention provisions dealing with traditional uses of the oceans. All Administrations since then have, without exception, continued this policy. In order to gain unquestioned international acceptance of this United States policy, it is time, in our view, for the United States to take its place, and to assert its influence and leadership, under a Convention to which there are now 145 States Parties, including all other major industrial and maritime nations.

Third, the LOS Convention does not award any decision-making authority on any issue to the United Nations. The fact that the term "United Nations" appears in the title of the

¹ For further background, readers may wish to refer to the Report of the Senate Committee on Foreign Relations, S. EXEC. REP. NO. 10, 108th Cong. (2004); the current on-line records of the hearings of that committee on October 14 and 21, 2003, <<http://foreign.senate.gov/hearings/2003/hrg031014a.html>> and <<http://foreign.senate.gov/hearings/2003/hrg031021a.html>>, the hearing of the Committee on Environment and Public Works on March 23, 2004, <http://epw.senate.gov/hearing_statements.cfm?id=219579>, and the hearing of the Committee on Armed Services on April 8, 2004, <http://armed-services.senate.gov/e_witnesslist.cfm?id=1143>; Statement by the President, United States Oceans Policy (Mar. 10, 1983), 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983); and comments by the late John R. Stevenson, Legal Adviser of the Department of State from 1969 to 1972, at 88 AJIL 488 (1994). A comparison of the 1994 Implementing Agreement with the objectives stated by President Reagan can be found at 88 AJIL 687 (1994); see *id.* at 688 n.6 for citations to Reagan administration statements.

LOS Convention is legally meaningless and is an accident of history. The LOS Convention is a multilateral agreement that governs the legal relations among the States Parties. It creates three bodies, the International Seabed Authority, the Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf. All three are funded and organized by the States Parties to the LOS Convention and not by the United Nations. Any monies that may ultimately flow to the International Seabed Authority are under the control of the States Parties, not of the United Nations. Because the Finance Committee of the International Seabed Authority, under the terms of the amended LOS Convention, operates by consensus, the United States, once a State Party, will participate in all financial and administrative decisions, which the Authority cannot take over an objection from the United States. In addition, the United States will have a permanent seat on the governing Council of the International Seabed Authority, where consensus is required for the approval of all regulations, including those dealing with financial matters.

Fourth, the United States will not submit to the jurisdiction of the International Tribunal of the Law of the Sea or the International Court of Justice in the settlement of any non-deep seabed mining disputes arising under the LOS Convention. In addition, the United States will opt out of all mandatory dispute settlement procedures with respect to military (which includes intelligence) activities and certain law enforcement and international boundary matters. Furthermore, the United States will make it clear in an understanding attached to its accession that it will be the sole judge as to what constitutes "military activities." Thus, in no way will the LOS Convention award any control over United States military activities to any international bureaucracy or court.

We are pleased to express our unreserved support for prompt affirmative action by the Senate in approving adherence by the United States to this important international Convention.

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