Statement
By
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Mr. Chairman, Members of the Committee, it is an honor to be here before you today and to be on this illustrious Panel which will address issues related to the 1982 United Nations Convention on the Law of the Sea. While I recognize that the Convention is beneficial from a number of perspectives -- in my opinion, the benefits to national security are paramount. I addressed this issue in an article that was published in the Georgetown International Environmental Law Review. I will attach a copy of this article to my full statement.

First, accession to the Convention will be a significant step in reaffirming America's place of leadership in matters relating to the global commons. It was my good fortune as a Navy judge advocate to actively participate in the final stages of the process that produced the Convention, and in the interagency deliberations that followed in 1982-83. At that time, we in the Pentagon were confronted with the decision not to support signature of the Convention because of the deep seabed mining provisions. Under these circumstances we concluded that our best option was to characterize the non-seabed provisions of the Convention as customary international law -- although we knew that certain portions of the Convention, such as the straits and archipelagic regimes, the exclusive economic zone, and the continental shelf delimitation provisions, and others, were negotiated articles that benefit and enhance maritime mobility for all

nations and provide predictability and stability in an otherwise changing environment.

Thus, in President Reagan's 1983 Oceans Policy Statement we, in essence, said we weren't going to sign or ratify the Convention, but we would abide by and accept the non-seabed provisions. This statement was crafted carefully as we were somewhat creating an offer: if other nations would conform their actions to the non-seabed provisions, we would honor those actions, and we would likewise conform our actions to those Convention articles.

In so doing, we effectively used the Law of the Sea Convention as a basis for maintaining a "persistent objector" status towards excessive maritime claims. Our goal was to prevent coastal nations' maritime claims that were inconsistent with the Convention from ripening into customary international law. This policy was facilitated further by the Freedom of Navigation Program whereby we continued to diplomatically protest excessive claims and conducted operational assertions in conformance with the navigational provisions of the Convention. I might add that maintaining that program is essential. The Convention alone is not enough, even as a party. Our operational forces must continue to exercise our rights under the Convention -- particularly in the maritime environment of the global commons, which historically has been one of claim and counter claim.

Accession to the Convention will also enhance America's credibility. The world recognized that we were right about seabed mining and fixed it. This effort was undertaken with the obvious anticipation that the U.S. would then join our allies and many others who are parties to the Convention.

I will now briefly address three areas: customary international law and challenges to U.S. military activity at sea, the effect of the Convention on Maritime Intercept Operations, and Mandatory Dispute Resolution

CUSTOMARY INTERNATIONAL LAW

- Not everyone agreed with our "customary international law" interpretation 20 years ago, but from 1982 until 1994, we continued to exercise our navigational rights and freedoms through international straits, archipelagic waters and the EEZ consistent with our interpretation of what those rights and freedoms entailed in an effort to solidify those concepts as customary norms.

- However, our ability to influence the development of customary law changed dramatically in 1994 when the Convention entered into force. As a non-Party, we no longer had a voice at the table when important decisions were being made on how to interpret and apply the provisions of the Convention.

- As a result, over the past 10 years, we have witnessed a resurgence of creeping jurisdiction around the world.

- Coastal States are increasingly exerting greater control over waters off their coasts and a growing number of States have started to challenge US military activities at sea, particularly in their 200 nautical mile (nm) EEZ.

- For example, Malaysia has closed the strategic Strait of Malacca, an international strait, to ships carrying nuclear cargo. Chile and Argentina have similarly ordered ships carrying nuclear cargo to stay clear of their EEZs. These actions are inconsistent with the Convention and customary law, but will other nations attempt to follow suit and establish a new customary norm that prohibits the transport of nuclear cargo? Will attempts be made to expand such a norm to include nuclear-powered ships?

- China, India, North Korea, Iran, Pakistan, Brazil, Malaysia and others, have directly challenged US military operations in their EEZ as being inconsistent with the Law of the Sea Convention and customary international law. Again,

the actions by those countries are inconsistent with the Convention and customary law, but will other nations follow suit and attempt to establish a new customary norm that prohibits military activities in the EEZ without coastal State consent?

- If we are going to successfully curtail this disturbing trend of creeping jurisdiction, we must reassert our leadership role in the development of maritime law and join the Convention now.

- The Parties to the Convention will develop the customary norms of the future and the international forums it creates – the International Tribunal for the Law of the Sea, the International Seabed Authority and the Commission on the Limits of the Continental Shelf. Unless we participate fully in these forums as a State Party, our ability to shape the development of new customary norms in ways that are favorable to our national security and economic interests will be lost.

EFFECT OF ARTICLE 110 ON MARITIME INTERCEPT OPS (MIO's)

- Some have suggested that becoming a Party to the LOS Convention could impede our ability to engage in Maritime Interception Operations to interdict terrorist and weapons of mass destruction at sea. This is simply not accurate.
- The United States has legally conducted MIO's at sea for over 5 decades. These operations have been conducted using a variety of legal bases that are consistent with customary international law and our treaty obligations as a party to the 1958 Geneva Convention on the High Seas. The provisions of 1958 Convention are mirrored in the 1982 LOS Convention.

- Article 92 of the Law of the Sea (LOS) Convention provides that ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in the Convention, shall be subject to its exclusive jurisdiction on the high seas.

- One exception to exclusive flag State jurisdiction is found in Article 110 of the LOS Convention (right of approach and visit). Article 110 allows a warship to board a foreign flag vessel without flag State consent if there is reasonable grounds for suspecting that

    - The ship is engaged in piracy or the slave trade

- The ship is engaged in unauthorized broadcasting (in certain situations)

- The ship is without nationality or has been assimilated to be a ship without nationality (i.e., sailing under the flags of 2 or more States)

- The ship is, in reality, of the same nationality as the approaching warship.

- However, exclusive flag State jurisdiction and Article 110 are not the only legal bases that can be used to interdict vessels on the high seas.

- Other legal bases for stopping and searching foreign flag vessels on the high seas (beyond the territorial sea) include:

    - Flag State or master's consent. This was recognized most recently as a proper legal basis to interdict vessels at sea in the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the 2000 The United Nations Convention Against Transnational Organized Crime and its Protocol to Suppress the Smuggling of Migrants by Land, Air and Sea. The US is a signatory to both of these agreements.

- Authorization granted by a UN Security Council Resolution. Examples would be the 1990 UN embargo against Iraq; the 1991 UN embargo against Yugoslavia and the 1993 UN embargo against Haiti.

- As a condition of entering port or internal waters

- Pre-existing bilateral or multilateral agreements or ad hoc arrangements, which provide advance authority to board and inspect/search. The US has some 20-plus bilateral agreements to conduct counter-narcotics operations.

- The inherent right of self-defense under Article 51 of the UN Charter. Examples would be the 1962 Cuban Missile Crisis; the 1990 pre-UN embargo against Iraq (for two weeks by the US and UK as collective self-defense with Kuwait); post-911 terrorist MIO's and the Proliferation Security Initiative.

- The belligerent right of visit and search under the Law of Armed Conflict.

- Any one of these legal bases can be used individually or in combination to interdict suspect vessels on the high seas and successfully continue the fight on the Global War on Terrorism.

MANDATORY DISPUTE RESOLUTION

- The first point I would make is that no country would subordinate its national security activities to an international tribunal. This is a point that everyone understood. That is why Article 286 of the Convention makes clear that the application of the compulsory dispute resolution procedures of section 2 of Part XV are subject to the provisions of section 3 of Part XV, which includes the provision that allows for the "military" exemption.

- Article 288 provides that in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

- Some may attempt to argue that Article 288 could be read to authorize a court or tribunal to make a threshold jurisdictional determination of whether an activity is a military activity or not and, therefore, subject to the jurisdiction of the court or tribunal.

- However, Article 288 is found in section 2 of Part XV. It therefore does not apply to a dispute involving what the US Government has declared to be a military activity under section 3 or Part XV.

- This interpretation is supported by the negotiating history of the Convention, which reflects that certain disputes, including military activities, are considered to be so sensitive that they are best resolved diplomatically, rather than judicially.

- When depositing its instrument of accession, the United States could re-emphasize this point by making a declaration/understanding that clearly states that military activities are exempt from the compulsory dispute resolution provisions of the Convention and that the decision regarding whether an activity is “military” in nature is not subject to review by a court or tribunal.