COMMENT

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I will start with an explanation of the limits of the authority under which I speak. Unlike most other government bureaucrats, I cannot get away with the statement that I am expressing only my personal views because under the rules of the Senate Foreign Relations Committee, the staff is admonished that "public statements should avoid the expression of personal views and should not contain predictions of future, or interpretations of past, Committee action." This may sound like a rather comprehensive set of limitations, but to a crafty Washington lawyer like myself it is actually a large and liberating loophole. I either have the privilege of stringing together the verbatim statements of individual members of the Senate on the law of the sea or of simply articulating the collective view of the one hundred members of the Senate, some of whom may uncooperatively change identity between the time I speak and the time these proceedings are published. In short, the simple rule of thumb is that unless I am directly quoting a U.S. Senator, what I have to say represents the distilled wisdom of the greatest deliberative body in the world.

Although I did not have a statement by Ambassador Koh when I prepared these remarks, I did assume that he would present an eloquent and highly persuasive description of the virtues of the present Draft Convention and of the advantages of signing it soon. Tommy Koh is one of the ablest and most effective diplomatic leaders in the world today, and it is an honor to be on the same panel with him. It is also an honor to appear with one of the country's most experienced and respected scholars of international law, Professor Riesenfeld, and our distinguished moderator, Ken Pye.

I would like to emphasize and develop briefly three main points about the law of the sea negotiations and the U.S. Senate, and then perhaps comment on some of the particular aspects of Ambassador Koh's presentation.

The first point is that the objective of a comprehensive, widely ratified law of the sea convention, in which the United States is an active participant, has been for years and presumably will continue to be an objective that is supported in principle by most members of the Senate. It is certainly a fundamental axiom with anyone who has worked around, or carefully observed, the U.S. Congress that the views expressed by individual members of either body—or even large groups of individual members—do not necessarily reflect how a majority will vote once a measure or an issue is actually put to a vote. Certainly the Senate as an institution is something different from the simple sum of its membership in terms of the dynamics which lead to the language and timing of its decisive actions: namely,

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votes. This is not to say that the views of members, as distinguished from the votes of members, are not to be taken seriously, whether in the form of press releases, floor statements, letters to the President, or comments at hearings. Like the famous E. F. Hutton advertisements on television, there are some statements, by some people, in some settings, on some issues, which carry great weight as indicators of how the institution as a whole would vote if called upon to do so. But as one who is often professionally engaged in the inexact process of guessing what the Senate might do in a given case, I can attest to the unreliability of most predictions of this kind—particularly my own!

In short, whatever may be said by individual members of Congress about the law of the sea negotiations, the fact remains that on those few occasions in which the Senate—and the House as well, for that matter—has voted as a body on matters directly related to those negotiations, they have endorsed the objective of a comprehensive treaty as an important goal of U.S. foreign policy. In passing the Fishery Conservation and Management Act of 1976, and again in enacting the 1980 Deep Seabed Hard Mineral Resources Act, Congress not only endorsed the treaty objective, but took care to limit its initiatives in recognition of the importance of the ongoing negotiations. Congress clearly recognized, as many members said on those two occasions, that U.S. interests could be better protected within the framework of a broad and widely supported agreement. Whatever short-term change in circumstances may have resulted from the present course of negotiations, the interests and conditions which support the eventual achievement of a sound agreement have not changed; a fair law of the sea treaty is still very much in our long-term national interest and presumably would continue to receive broad congressional support.

The second point, however, is that the present draft of the Convention would not receive the two-thirds support in the U.S. Senate necessary for ratification by this country. In saying this, I reemphasize the limits of my authority and competence to make such statements, but I know of no one who would dispute such an estimate. Perhaps what is more important, however, I cannot foresee in the short term—that is, within five years—the development of a set of circumstances which would result in Senate advice and consent, unless there were some changes in the present text. There is undoubtedly a range of views of what sort and how many changes would be necessary to adjust the perceived balance of advantages and disadvantages in the treaty, but the "bottom line" seems clear.

Apparently, there is some perception among foreign governments, and among the American public more broadly, that such "bottom line" opposition to the Treaty is unique to the Reagan administration and would be reversed by a successor, followed thereafter by Senate approval. I can only say that I find such a prospect—again within the foreseeable future—as highly remote. The extent of the changes required by President Reagan's administration to make the Treaty minimally acceptable might be debated, but I can only envision U.S. ratification of the Treaty after some significant changes, no matter who is in the White House.

I note for the record, without belaboring the point, that some members of Congress have been critical of the way in which the Reagan administration has gone

about its negotiations on this issue. My own boss, the Chairman of the Foreign Relations Committee, said as recently as last month that we had not made as serious and credible an effort as the issue demanded and that we should make a final, concerted attempt to seek further improvements. But if, as the administration has been saying for some time now, we have come to the "take it or leave it" point with this Treaty, then I cannot foresee favorable Senate action.

Such assertions may suggest the old adage that the U.S. Senate is "the graveyard of treaties" where agreements become buried forever or are picked apart without reason or mercy. Recent difficulties in approving the Panama Canal Treaties and the present limbo of the SALT II Treaty are sometimes cited as examples of the fate which can befall otherwise honorable and important agreements.

I do not wish to minimize the hurdles involved in obtaining the support of two-thirds of the Senate for any proposition; nevertheless, it is useful to recall that the Geneva Law of the Sea Conventions of 1958 were approved overwhelmingly and without apparent opposition. The four substantive Geneva conventions passed the Senate together on May 26, 1960, by a margin of 79 to 4.[1] There was only one day of hearings and little debate, either in committee or on the Senate floor.[2] As Senator Mike Mansfield said in introducing the four conventions to the Senate, "[n]o opposition was registered during this hearing or subsequently."[3] The only uncertain signal for future Law of the Sea agreements was the Senate's rejection (by 49 "yeas" to 30 "nays") of the Optional Protocol on dispute settlement.[4] But it is clear from the record of the debate on that minor agreement that the outcome was mainly a result of confusion on the Senate floor at the time.[5] Nor can it be said

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1. 106 CONG. REC. S11192 (1960).

2. The Committee heard on January 20, 1960, from the chief U.S. negotiator at Geneva, Arthur Dean, and from three representatives of the fishing industry who "were unanimous in urging approval of the conventions." SENATE COMM. ON FOREIGN RELATIONS, LAW OF THE SEA CONVENTIONS, S. EXEC. REP. NO. 5, 86th Cong., 2d Sess. 10 (1960).

3. 106 CONG. REC. S11188 (1960). Military security interests were apparently the administration's chief concern in these negotiations. The following exchange between Senator Russell Long (D-La.) of the Foreign Relations Committee and Ambassador Dean is indicative:

> LONG: We are compelled to recognize [Mexico's 3-league territorial sea claim] by force of gunpoint, and it does seem to me that for the moment . . . our refusal to recognize a limit beyond three miles is working to our prejudice in a number of ways, where we do not get any corresponding advantage from it . . . .
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> DEAN: From a security standpoint, looking at it strictly and only from a security standpoint, the narrower the territorial sea, the better it is for our security interests.

Conventions on the Law of the Sea, Hearings before the Committee on Foreign Relations, United States Senate, 86th Cong., 2d Sess. 21 (1960).

4. 106 CONG. REC. S11193 (1960).

5. Many of the Senators involved apparently were not clear on what they were voting. The Protocol was initially approved along with the other four agreements, and only after a request to reconsider the vote by Majority Leader Lyndon Johnson was there a separate vote. *See id.* (statement to Senator Cooper). Because of the resulting procedural confusion, the meaning of the separate vote is not clear. On the other hand, the basis of the expressed opposition to the dispute settlement protocol involved the so-called "Connally Reservation" issue. Many Senators disapproved in principal of agreements which accepted in advance the compulsory jurisdiction of the International Court of Justice to resolve disputes, even though dozens of earlier treaties had been approved with similar provisions. *See id.* at S11194 (list submitted by Senator Mansfield). However, judging from the subsequent statements of several Senators who voted "no," the opportunity for debate on this issue would probably have changed a number of votes, since the effect of the Optional Protocol was rather limited. *See id.* at S11195. Furthermore, comparing it with the

that the Senate has recently reverted to an earlier attitude of hostility to treaties in general. By the end of the 97th Congress in December, we expect that the Senate will have acted favorably on more than forty treaties, including a number which have been stalled for several years or more.

The problem is not with *any* law of the sea treaty, but with *some* of the deep sea mining aspects of *this* treaty and the cumulative effect of provisions which seem to run counter to the original conception of rationally managing the seabeds for the economic benefit of all mankind. In refusing to go along with this draft of the Convention, the United States cannot fairly be said to have rejected the notion of the seabeds as the "common heritage" of mankind. As my former boss, Jacob Javits, then the ranking minority member on the Foreign Relations Committee, put it three years ago, the common heritage "has always been a phrase in search of meaning, not a legal principle in search of enforcement." There was nothing in the original proposals for international management of the seabeds which required the outcomes embodied in this Treaty on such matters as production limitations, decisionmaking, the scope of technology transfer, or preferences for the Enterprise. The United States long ago accepted otherwise objectionable provisions on some of these issues in the interests of a Treaty. Some of these compromises may have been unrealistic when made, such as those relating to mandatory technology transfer and to seating and voting arrangements in the International Seabed Authority. At least, I would guess that one provision alone, that on the binding effect of amendments voted through the Review Conference, would be enough to lead to Senate rejection, since reservations would not be allowed on a single issue.

No one would have or could have expected other delegations to accept the entire "Green Book" presented by the United States in New York last year. Whether it was tactically wise to present such a document to the Conference, I cannot say. But I will say that the number of changes proposed in that document were an indication of the number of legitimate problems which the United States and many of its allies do have with the present text, and those—among others, no doubt—that the Senate would identify in the Treaty as it stands. If we are eventually to accept many of these provisions in the interests of some future compromise, these would be real and not rhetorical concessions. Similarly, the United States has not had things completely its own way in other parts of the Treaty. There were very real trade-offs and disappointments throughout the process, as there were for most other participants. In short, the implication that the United States has reneged on the original bargain, or on the implicit trade-off between seabed resources and other issues, simply begs the question of what that trade-off was supposed to be. In any event, I do not believe that the Senate would accept such a notion, certainly not as represented by the present text. I question whether all other industrial countries will either.

My final point should therefore be obvious. If the objective of a comprehensive, widely ratified treaty including the United States as a full partner remains an

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proposed drafts on dispute settlement in the forthcoming law of the sea agreement, the latter provides dispute settlement alternatives to the World Court—such as arbitration—which are more likely to be acceptable to most Senators.

important objective, not just for this country, but also in the interests of all other participants, and if the present Treaty will not command United States support, we should seek a way to close the gap. Perhaps this is an agreed process for exploring the provisions of a protocol sufficient to bring the United States into such a Treaty, perhaps it is some other approach. Certainly it would appear that a cooling-off period is appropriate before seeking to initiate such further discussions.

I recognize the sense of fatigue induced by the suggestion of further negotiations on the law of the sea. Many able people at this Conference have sacrificed a great deal in personal and professional energies—and the opportunity costs of not doing other things—to keep those negotiations progressing over the years. We may have to invent a new kind of nausea to describe the feeling created by the notion of a "Fourth United Nations Conference on the Law of the Sea." But I do not believe that such a negotiation would have to reinvent any wheels. Nations must do what is in their long-run interests; if the will continues, and if needlessly provocative actions are not taken which foreclose the realistic prospects for an eventual treaty revision, there will be able people around to accomplish it.

In the great, and perhaps overblown, buildup to the Third United Nations Conference, there were many rhetorical allusions to our responsibilities to future generations. I continue to believe such sentimental notions and do not believe that the elusiveness of a final compromise reflects anything enduring and irreconcilable in the genuine interests of nations.