

AUDIENCE RESPONSE

SECOND SESSION

PROFESSOR PARDO: My name is Arvid Pardo, and I would like to ask Ambassador Malone a question. I understood Ambassador Malone to state that existing international law provides adequate standards for the protection and preservation of the marine environment and hence that the provisions of the Convention in this respect were unnecessary. I would like to ask Ambassador Malone what international standards govern the dumping of radioactive waste, and what international standards govern oil discharges in the marine environment, such as the recent IXTOC disaster, which are due to seabed exploitation activities within national jurisdiction.

Thank you.

AMBASSADOR MALONE: Well, Professor Pardo, of course the London Dumping Convention is in effect and has been for some time. Many of the conventions in this area which were developed by IMO (what used to be referred to as the International Maritime Consultative Organization) have established standards or norms applicable in the environmental and marine pollution areas. It is our view that these standards can be effectively implemented, certainly in the case of the United States. Now I am well aware, of course, that most of our concerns are vessel-source pollution and that 90% of the vessels that actually come into our territorial sea come into our ports. Therefore, we have the assertion of port-state jurisdiction on that.

It is not as easy for some other countries, say in Europe, where vessels do not make ports there. However, it is very realistic, I believe, to feel that those cases can be taken care of by relying on regional arrangements because they will be going into ports in the region. I mentioned the fact that there is adequate provision under existing international law for the protection against catastrophic accidents, and that, of course, is not materially changed by the Convention. What the Convention does, and this was referred to, is to make changes in the enforcement procedures. The real addition in the Convention is on the enforcement aspect, but I think that that can be achieved and we can implement basically the existing conventions that we do have that are on the books or can be easily worked through IMO to effectively achieve what we would like to see achieved, and, of course, the clear position of the United States is very, very strong on the marine environment to achieve a proper outcome there.

PROFESSOR JACOBSON: I am John Jacobson, currently with the U.S. Naval War College faculty. Unlike Fred Tipson, I do feel free, maybe even obliged, to disassociate my comments and questions from any viewpoints held by my employer, the U.S. Naval War College, the U.S. Navy, the Department of Defense, or any other

organization on the planet, and I see Admiral Harlow is breathing a sigh of relief. I have a question for Ambassador Malone, and I would also appreciate comments from the other panelists.

He did state that the United States would take the position, which is no surprise to most of us here, that passage of the international straits is a customary international law right, and he is also aware, as he indicated, that there are other states, including strait states, of course, that disagree with that. That means to my mind that there will at some point be a controversy concerning the existence of such a customary law, right? And in view of the confidence with which Ambassador Malone expressed the current administration's position, can we assume that the United States will use the first opportunity to have this controversy submitted to the International Court of Justice in order to have the question settled?

AMBASSADOR MALONE: No, I do not think you could assume the latter. I will say in this connection, and I think that you have fairly accurately reflected my remarks, that I think we should look at the text in this area. The clear provisions there are ones of universal application. This was the same situation that existed under the 1958 Convention. They are not for application only to state parties, but they are for universal application. Those provisions also clearly state that the coastal states may not hinder the passage through straits. They have certain rights for the establishment of safety schemes (that is, traffic lanes, pollution matters), but not to the degree where they may actually hinder the passage, which we believe is currently established under international law—as was clearly the case in the 1958 Convention—for universal application and subject to certain clarification [and which] really continues to be the case under the terms of the present Convention. So we feel that, as I have said, there is certainly an adequate basis there. I think that it is also relatively unlikely that there will be moves, and I would disagree somewhat with some of the others on this, to contest this kind of thing and make discriminations between the vessels of different countries. But of course fundamentally what has determined all of this is the practice of states, and I would think that certainly, as I have said, that the practice of the United States will not vary. We would certainly be concerned if the practices of other maritime powers were to diverge on this subject as well, and we have reason to believe that it will not do so. So (and there is one caveat I have to add here), clearly if the Convention comes into force, it seems to me that these provisions, as contrasted with the provisions that are clearly of a law-creating type, such as the Part XI provisions, are going to be universally applicable. However, even if the Treaty were not to come into force, the rights, in our view (and I will not go into a full and detailed explication of this), the rights would actually be in existence, and for that matter, obviously, the text that was adopted, even if it does not come into effect—and I think that we have to recognize that although Ambassador Koh may be right in terms of the Secretariat's estimate of 60 to 80 signers in Montego Bay (I would not cavil with him greatly, at least in orders of magnitude over that) but that is a long way from saying that we are going to have a ratified treaty any time soon—but even if we do not, what has been memorialized in the Treaty obviously will have some impact here as well. So I just really do not see that there is going to be an

overwhelming problem in this connection, and I think we have a very, very strong case in terms of currently existing international law, and that will continue and certainly the LOS Convention cannot extinguish those rights.

MR. BECKER: My name is Gordon Becker, and I am a lawyer from New York. I would like to address a question to Ambassador Malone.

The *London Times* of about October 15 contained a report that the United States had sent a high-level official or former official abroad to contact our Western allies, I believe, and to dissuade them from signing or ratifying the Law of the Sea Convention. Would you be free to comment on this report?

AMBASSADOR MALONE: Yes, Gordon, that is a matter of public information now, so I could comment on it in broad terms. Former Secretary of Defense Rumsfeld has made a trip this last week in which he visited certain European capitals. He was in Paris, London, Bonn, and Rome. He was discussing a number of bilateral concerns, of which the law of the sea was one, and obviously making known to our allies at the very highest levels the position of the United States and attempting to relate to and coordinate that with the countries involved. As you know, we have a continuing relationship with a number of our close allies, key allies, and this was really an opportunity that we have taken to make our views and our positions and, if I might say so, our desires very closely and very clearly available at the very highest levels of government in a number of cases.

