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Navigational Freedom: The Most Critical Common Heritage

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Navigational Freedom: The Most Critical Common Heritage

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The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of the Navy or the U.S. Naval War College.

I. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: ONE OF THE GREATEST ACHIEVEMENTS IN THE RULE OF LAW

A. Importance

Surely a list of the most important multilateral law-making treaties would include the Charter of the United Nations, the Statute of the International Court of Justice and the Vienna Convention on the Law of Treaties. To that list might be added the four Geneva Conventions on the Law of War and numerous human rights, environmental and arms control conventions.

But by many indicia, the United Nations Convention on the Law of the Sea (UNCLOS) is one of the greatest achievements in international law-making. The Convention provides a virtual constitution for over two-thirds of planet Earth, it resolved disagreements about oceans law going back at least four centuries, it deals with literally hundreds of substantive and procedural issues in its 302 Articles and nine annexes. On dispute settlement, it created an important new international court—the International Tribunal for the Law of the Sea—along with two new arbitral procedures and a new conciliation procedure. It also created two important new functional international institutions, the International Sea-Bed Authority and the Commission on the Limits of the Continental Shelf.

UNCLOS was negotiated during the Cold War, but remarkably with great power cooperation setting aside Cold War disagreements. With over 150 participating countries, it was one of the first major law-making treaties to include the post-colonial world.¹ It is one of the most important environmental treaties, it dealt successfully with an entirely new international issue, that of deep seabed mineral resources, and it overcame a decade long failure of agreement on these resources through an innovative United Nations-led renegotiation of Part XI on deep seabed mining. It also developed an important new procedure in international law-making negotiations referred to as “the gentleman’s agreement” or “consensus procedure” and the related “package deal.” The Convention oversaw the greatest expansion of coastal

1. There were also 45 observers participating at sessions of the conference representing states and territories, specialized agencies, and intergovernmental organizations. And there were 57 non-governmental organizations participating as observers, from the International Chamber of Commerce through the Sierra Club.

nation resource rights in history, and it added to oceans law the concept of archipelagic states for certain mid-ocean island nations. Its negotiation, from early beginning in the mid-1960s through the final successful renegotiation of Part XI in 1994, consumed more than a quarter century. It broadly reflects community common interest rather than special interests, and today it serves as a framework agreement for newer issues and remaining oceans governance challenges, and is broadly in force with 167 State parties plus the European Union. *That* is an achievement which stands in sharp contrast with the sad legacy of violent conflict and narrow nationalism all too evident in the twentieth and now the twenty-first century.

B. The Convention and the Rule of Law

The rule of law matters. Law serves to provide clear expectations as to jurisdictional boundaries and national rights and obligations so necessary for cooperative relations, economic life, and more broadly, human creativity. Thus, we need to know the breadth of the territorial sea, who manages coastal stocks of fish, the rules for straits transit and a myriad of other rules to function cooperatively in the oceans. If some states claim three nautical miles for the territorial sea and others two hundred nautical miles, we simply do not know the basic rules. But of even greater importance, the rule of law serves as a check on power. An oceans space driven by out-of-control national claims and a “might makes right” credo can neither serve community common interests nor restrain conflict. The Law of the Sea Convention is a remarkable achievement in the rule of law—providing both stability and a check on power.

C. The Background of the Negotiations

The global context leading to the successful law of the sea negotiations was complex. It included four centuries of failure to functionally separate resource and navigational oceans issues with a preoccupation instead on a single line in the oceans focused on the breadth of the territorial sea. Since effective coastal fisheries management required a broad territorial sea and navigational freedom a narrow territorial sea, such a single line could neither serve the common interest nor could it work as the basis for agreement. Because of this failure to functionally separate the issues of fishery management and navigation, the First and Second United Nations Conferences on the Law of the Sea, held in 1958 and 1960, while making progress on the

new concept of the continental shelf and rules for the high seas, simply could not reach agreement on the appropriate breadth of the territorial sea.

Other factors converging for a comprehensive new approach included the United States and Soviet Union discovery of the crucial straits issue—that transit through the more than 100 straits used for international navigation of critical importance for global commerce and military transit and, as such, the rules developed for innocent passage through the territorial sea were hopeless for straits—the belated discovery of the environment during the late 1960s and early 1970s, a host of newly independent states that wished to participate in shaping oceans law, and, as the final catalyst, a speech by Ambassador Arvid Pardo, Permanent Representative of Malta to the United Nations, electrifying developing countries with the prospect of little-known deep seabed resources as the “common heritage of mankind.”

D. *Assessing the Common Interest*

Now, how should we assess the common interest in international oceans law matters and whether the Convention does a good job? The answer requires functional division of oceans uses. Uses such as navigation and laying of cables are uses, which, for all practical purposes given the size of the world's oceans, can be repeated over and over without scarcity. Such uses are also of enormous benefit to the world as a whole, with trade moving through oceans transportation driving the global economy. There is no case that these uses should be controlled by coastal nations. Nor do these uses require property rights in oceans space. Moreover, coastal nation efforts to control ship construction and operation for those transiting off their coast would create an impossible hodgepodge of standards. It would also threaten access for the more than *half* of all *coastal nations* in the world that are “zone-locked” by the 200-nautical mile exclusive economic zone adopted by UNCLOS.² That

2. The author gave the first speech on this concept of “zone-locked” states at the final Geneva session of the Seabeds Committee in 1973. He was as astounded as everyone else at the meeting to learn that *a majority of all coastal nations* would have no access to any ocean they faced without going through the 200-mile EEZ's of neighboring states. He first discovered the problem over lunch with the Thai Representative to the Seabeds Committee. Thinking there might be other nations with the same access problem as Thailand, he asked the State Department Geographer to send him a list of states he termed as “zone-locked.” The result was this discovery of the enormous number of “zone-locked” states so crucial as to why coastal states should not be granted the ability to control vessel-source pollution in the 200-nautical mile EEZ. The speech effectively ended the effort by a few states to include jurisdiction over vessel-source pollution in the EEZ.

is, counter to all our initial instincts about what a “coastal nation” is, nations such as Thailand, and *over half of all other coastal nations*, would have no access to the oceans without going through the economic zones of neighboring states. Understandably, this large block of coastal nations does not want to be turned into the functional equivalent of land-locked states with access controlled by their neighbors. For these and other reasons, environmental, safety and liability issues in shipping must be addressed through a single international entity rather than a myriad of coastal states. Today, given impetus by the decisions at UNCLOS, the International Maritime Organization (IMO) carries out these tasks. Similarly, the global interest in access from one ocean area to another through the narrow strait choke points supported a new regime of straits transit passage with full navigational freedom through, over and under the more than 100 straits used for international navigation.

But fisheries, the oil and gas of the continental margins and deep seabed minerals all are exhaustible, and require the equivalent of property rights. Absent some management regime coextensive with the range of individual stocks, fisheries will be decimated through a free-for-all; and this was happening. This is the well-known “common pool” problem in economic theory. The solution was to provide a management regime coextensive with the major groupings of fish stocks—coastal, anadromous, catadromous and highly migratory—and to provide for appropriate access rights and environmental standards for each. Since coastal nations already controlled a significant territorial sea off their coasts, the management of coastal stocks, and preferential access rights for these stocks, could easily and appropriately be given to coastal states. Similarly, since anadromous and catadromous stocks depended on a life-cycle relation even with a coastal state’s internal waters, the relevant coastal state, termed the host state, was the obvious answer for management of these stocks. Highly migratory stocks, on the other hand, required some degree of regional management throughout their range within and beyond areas of coastal state jurisdiction.

With respect to the oil and gas of the seafloor on the continental margins, these resources too needed property rights. Since the coastal nations already controlled part of the continental shelf, through the 1958 Convention on the Continental Shelf, it was appropriate to turn over these resources to the coastal nations. Indeed, decentralized global development of these resources was also likely more efficient than an effort to centralize their management. And with respect to both coastal fish stocks and the oil and gas of the continental margins, it was clear that agreement could never have been reached

without assigning these to the coastal states. That is precisely what was done by the 200-nautical mile exclusive economic zone under Article 57 of the Convention and the “extended” continental shelf under Article 76 of the Convention.

But, when it came to the mineral resources of the deep ocean floor, property rights were needed for development even though there was no relation with any coastal nation. The appropriate answer was to create a new international functional agency, which would provide the equivalent of property rights and regulate environmental issues in the development of these mineral resources that were beyond areas of national jurisdiction. That is precisely what Part XI, and its renegotiation in 1994, achieved. While non-experts hypothesize a “fishing approach” to deep seabed minerals, that is simply turning firms loose to gather the resources like they would catch fish, the billions of dollars required for a seabed mining operation coupled with the reality that the refining operation for manganese nodules must be tailored to minerals from a particular site requires security of legal tenure not consistent with a “fishing approach.” That, in turn, requires the equivalence of internationally recognized property rights.

Assessing the Convention by these standards, it was a remarkable success in supporting community common interest. The core genius of the Convention was the functional separation of oceans space by different oceans uses. Indeed, the political core of the Convention was an extension of coastal state resources rights in a 200-nautical mile exclusive economic zone and extended shelf while fully retaining navigational freedom in these areas, and adding a new critically needed regime for navigational freedom through, over, and under straits used for international navigation. This solution could both resolve the need for extending management regimes for fisheries while fully protecting navigational freedom. The same functional division, coupled with reasonable limitations on qualifying islands, resulted in acceptance of the archipelagic concept for certain mid-ocean islands nations such as Indonesia, the Philippines, Fiji and the Bahamas. That is, acceptance of broad archipelagic state control of archipelagic waters subject to appropriate protection of navigation through these large oceans areas, including protecting navigational freedom in broad corridors through the archipelagoes. And the creation of a new regime for international recognition of the equivalent of property rights for exploration and exploitation of deep seabed minerals completed this common interest package.

E. Substantive Contributions Protecting Navigational Freedom

UNCLOS has been of enormous importance both in resolving ancient oceans disputes and in modernizing oceans law for the twenty-first century. Most importantly, it functionally separated oceans uses to permit an oceans law in the common interest. No longer would the choice be between protecting coastal fish stocks or navigational freedom. The 200-nautical mile economic zone places coastal stocks under a coastal state management regime throughout the range of most such stocks, while simultaneously preserving high seas navigational freedom in the zone. This was the singular genius of the Convention; enabling success where there had been only failure when the issue was drawing a single territorial sea that could never accommodate both needs. But the Convention went on to modernize and improve navigational regimes in multiple ways. These include:

- Agreement on the maximum breadth of the territorial sea as twelve nautical miles (Article 3);
- Clarification of the regime of “innocent passage” through the territorial sea, including providing an exhaustive list of activities which would make passage non-innocent (Article 19(2)), and clarifying that coastal states may not make laws and regulations for the design, construction, manning or equipment of foreign ships passing through the territorial sea (Article 21(2)). Importantly, this provision prevents an impossible situation for shipping, avoiding a hodgepodge of national laws and regulations rather than the international standards as set by the IMO;
- A critically important new Part III on Straits Used for International Navigation providing a regime of transit passage through, over and under such straits rather than the inappropriate “innocent passage” regime;
- A new Part IV recognizing special provisions for archipelagic states while both appropriately limiting the concept to certain island nations, and providing full high seas navigational freedom in broad corridors through the archipelagoes;
- A new 200-nautical mile Exclusive Economic Zone (EEZ) in which the coastal state not only controls the natural resources of the zone, but also “other activities for the economic exploitation and exploration of the zone,” while at the same time retaining full high seas navigational freedom in the zone for other states (Part V);

- An updating of high seas law (Part VII). In connection, it should be noted that Article 88 on “Reservation of the high seas for peaceful purposes” provides no new limits on warships or military activities, but rather simply restates the existing ban on aggression as set forth in Article 2(4) of the United Nations Charter. There was no interest as the negotiations progressed in expanding the negotiations to arms control;
- A special provision for coastal state authority over vessel-source pollution in “Ice-Covered Areas” (Articles 234, 236 and 297(1)); and
- A completely new regime and machinery for dispute resolution, including the creation of an International Tribunal for the Law of the Sea, two new arbitral procedures and a new conciliation procedure. Importantly, Part XV on “Settlement of Disputes,” includes the “prompt release of vessels and crews” (Article 292).

F. Challenges to Navigational Freedom Today

These important provisions for navigational freedom are of the utmost importance in protecting global trade, one of the core mechanisms for global economic growth, and for lessening the risks of conflict involving efforts to assert jurisdiction over warships and other vessels entitled to sovereign immunity. For “zone-locked” states, the absence of these navigational freedoms would mean losing access to the oceans as though the state were land-locked. Indeed, without the clear legal recognition of these fundamentals of navigational freedom, UNCLOS would not have been possible. Sadly, however, the international community must be diligent in combating the challenges to navigational freedom that still exist. These include:

- Aberrant and vague “area” claims such as the old “Libyan Line of Death,” the Chilean “Mar Presencial,” China’s “nine-dashed-line” and North Korea’s 50-mile security zone claim;
- Excessive straight baseline claims;
- Excessive claims concerning innocent passage in the territorial sea; particularly claims concerning consent or notification for warships; claims which have never been accepted as part of oceans law and which have been jointly rebutted by the United States and Russia in the Jackson Hole Statement of September 23, 1989;

- Illegal claims asserting ship construction or operation standards for transit through the territorial sea or the economic zone which have not previously been adopted through the IMO mechanism; and
- Claims limiting full high seas navigational freedoms in the exclusive economic zone.

For the most part aberrant and vague area claims and claims beyond permissible limits for the territorial sea and economic zone seem to be slowly receding as the Convention takes greater hold each and every year. The more concerning problems for the future likely relate to the “character” of each of these zonal areas in UNCLOS. We must not permit gradual encroachments to roll back the core UNCLOS compromise of extended coastal state resource rights in return for full navigational freedom in the EEZ and straits transit rights through, over, and under straits used for international navigation.

G. Recommendations for Protecting Navigational Freedom

Some of the important actions we must take to protect navigational freedom, which is quite literally the most important common heritage in the world’s oceans, are as follows:

- Above all, we must never reopen the navigational provisions in UNCLOS. UNCLOS was a remarkable package and these critical navigational provisions must never be lost. *Because of the enormous success of UNCLOS, as well as its design as a framework agreement permitting consistent implementing agreements, it would be an enormous mistake to seek to renegotiate, or reopen, UNCLOS itself.* In UNCLOS, the international community has an extraordinary success!
- Nations should work together to jointly coordinate the sending of protest notes to countries that are not complying with UNCLOS. This compliance obligation should not be left to a few maritime powers.
- More nations should copy the U.S. practice of conducting freedom of navigation activities in relation to illegal claims.
- For my own country, the United States, we must adhere to the Convention fully with Senate advice and consent in order to more effectively lend our voice to compliance with the Convention.

H. The Problem of United States Non-Adherence

The United States was one of the most active and influential participants in the successful negotiations leading to UNCLOS. This is particularly true in the period through the adoption of the Informal Single Negotiating Text, representing the great bulk of the present Convention. The United States was absolutely correct in not accepting the flawed Part XI as originally adopted in 1982, though it bears some responsibility in the ongoing late-stage confusion regarding the negotiation over Part XI, particularly in the tenth and eleventh sessions in 1981 and 1982. The United States should also have moved more expeditiously to reopen negotiations on Part XI when that became feasible after the 1982 failure on this Part. Nonetheless, Part XI was fatally flawed in the 1982 version and would not have served the interest of any state, developed or developing, as mining simply would never have taken place. As such, Part XI needed to be changed and United States firmness on this point served the world well.

President Ronald Reagan's conditions for U.S. acceptance eventually were met. After which, the United States strongly supported the Convention, and it was promptly submitted to the Senate for advice and consent. Subsequently, every U.S. President of both parties has supported U.S. adherence.³ Sadly, despite repeated favorable votes and recommendations from the Senate Foreign Relations Committee, for over two decades the Convention has languished in the Senate and has yet to come up for a vote in the full Senate. The reason is opposition from an isolationist faction endlessly repeating a patina of falsehoods about the Convention; a faction which at least has seemed to Senate leadership to have a blocking third in votes and has thus been able to prevent Senate advice and consent under Article II, section 2, of the United States Constitution requiring treaty concurrence by a two-thirds majority.

The United States will at some point fully adhere to the Convention. Every oceans industry interest in the United States supports the Convention, from the oil majors to the environmentalists. Indeed, the only opposition is ideologically based, rather than interest based, and even then is senseless unless rooted in inaccuracies about the Convention. In the meantime, the United States accepts the normative provisions of the Convention as customary international law, and the United States Navy has one of the best records in the world in careful compliance.

3. It is too early to know the position of U.S. President Donald J. Trump.

II. CONCLUSION

UNCLOS is truly a gift to the World and its greatest legacy is protecting navigational freedom on the World's oceans. *That* is a legacy to protect!

Thank you.