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The Fortieth Anniversary of the United Nations Convention on the Law of the Sea

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The United Nations Convention on the Law of the Sea was opened for signature on December 10, 1982. Four months after the adoption of the implementation agreement modifying its deep seabed mining provisions, the Convention entered into force on November 16, 1994. The Convention has rightly been called a constitution for the oceans, setting forth the system of governance by and among States with respect to all activities in two-thirds of the planet.

Law is a prescription for the future informed by the past. Our understanding of the impact of the Convention during the four decades that have elapsed since its conclusion may be enhanced by considering what occurred in the previous forty years.

In 1942 the world was at war. As World War II drew to a close, the United States actively engaged with the rest of the world to strengthen the global regime. To better protect the world from the scourge of war, the Charter of the United Nations was concluded in 1945, followed by the Geneva Conventions of 1949 designed to mitigate the horrors of armed conflict. To better protect the Western democracies from renewed aggression, the North Atlantic Treaty was concluded in 1949. Legal instruments such as the Chicago Convention of 1944 creating the International Civil Aviation Organization, the Bretton Woods agreements establishing the international financial system, and the General Agreement on Tariffs and Trade, extended that engagement to international trade and communications, as did the 1948 treaty establishing what is now known as the International Maritime Organization (IMO). By the end of the decade of the 1940's the U.N. General Assembly had specifically created a mechanism for the codification and progressive development of international law as part of the larger project for strengthening the fabric of peace. The law of the sea was one of its first priorities.

There is little in these projects of global engagement that reflects the Fortress America insular attitudes that can be discerned in the addresses and some of the actions of President Roosevelt and other American leaders in the late 1930's, remnants no doubt of the American isolationism of the 1920's.

There was also little to reflect such insular attitudes in the inherited international law of the sea as propounded and enjoyed by the United States since its independence. The Grotian conception of the free high seas had prevailed and with it the freedom of the seas enjoyed by every State for se-

curity and for economic purposes. As new technologies emerged, that freedom was extended to self-powered ships, submarines, telecommunication cables, and aircraft. Even in wartime, neutral States—notably including the United States—insisted on respect for their exercise of these freedoms.

While there was an exception to the freedom of the seas, it was a very limited one. Each coastal State was entitled to control the use of the sea within one marine league—three nautical miles—of its coast. But even that exception was subject to a right of innocent passage.

Needless to say there were some deviations, even by the United States. It took an arbitral award in 1893 to tame ambitious claims with respect to fur seals in the Bering Sea. During Prohibition the United States attempted to prevent unlawful importation of alcohol well before the smugglers reached the three-mile limit. A few foreign States made claims to territorial seas or exclusive fishing zones beyond three miles from shore, ranging to six, nine, or twelve miles. But there was remarkable stability in the international law of the sea compared with what was about to happen shortly after the end of World War II.

On September 28, 1945, President Truman issued two proclamations. The more famous of the two laid claim to the natural resources of the seabed and subsoil of the broad continental shelf extending seaward of the three-mile territorial sea of the United States.

This claim was not merely emulated. It triggered vast coastal State claims to the waters of the high seas, beginning with the two-hundred-mile claims of Chile and Peru in 1947. These inspired the Declaration of Santiago of 1952 by Chile, Ecuador, and Peru, laying claim to exclusive sovereignty and jurisdiction in a *zona marítima* embracing both the waters and the seabed and subsoil extending from each of their coasts to a “minimum” distance of two hundred nautical miles. These claims were gradually emulated by other Latin American States and then spread to Africa and elsewhere. A number of the claims were expressly identified as territorial sea claims.

The magnitude of the potential geographic effect of such claims is significant. Most or all of the waters within the world’s semi-enclosed gulfs and seas are within two hundred nautical miles of some coast. This includes the Caribbean Sea, the North Sea, the Baltic Sea, the Mediterranean Sea, the Black Sea, the Red Sea, the Persian Gulf, and the South China Sea. To their dismay, Argentine security officials realized that Brazil’s two-hundred-mile territorial sea claim measured from both its continental coast and its islands extended far to the east, indeed not all that far from the limit of the two-hundred-mile claims extending west from the African coast and islands.

Other types of claims also proliferated. The judgment of the International Court of Justice upholding Norwegian straight baselines was followed by ambitious baseline claims by others. Indonesia and the Philippines claimed sovereignty over all the waters within their archipelagoes. Defending Canada's 1970 claim to control navigation within one hundred miles of its Arctic coast, the leader of the Canadian delegation to the Third U.N. Conference on the Law of the Sea, paraphrasing Shakespeare, quipped that he came to bury Grotius, not to praise him.

Common law courts trying to understand a statute traditionally endeavored to identify the evil sought to be remedied. The most basic evil sought to be remedied by the U.N. Convention on the Law of the Sea was an epidemic of unilateralism inherent in the idea that to have the law that one wishes all one need do is claim what one wishes and try to avoid judicial review. Beginning with the vast coastal State claims made by the United States and some of its Latin American neighbors in the wake of World War II, over time the customary international law of the sea lost that quality of law understood by every child: constraint. Instead, claim subsumed custom, and customary international law became an enabler of a claim-what-you-like unilateralism adorned in the raiment of *lex ferenda*.

Notwithstanding the existence of the four 1958 conventions on the law of the sea that emerged from the work of the International Law Commission and the first U.N. effort at global negotiation of the law of the sea, the claims persisted and proliferated. Resistance might not have been futile, had it actually been possible to try it with some consistency.

—Vast coastal State claims over seabed resources met no resistance at all. Instead, they were emulated and celebrated. “Instant customary law” was the academy’s benediction.

—Vast coastal State claims over fisheries were decried by others as unlawful incursions on the high seas, but there was little effective resistance. Economic sanctions for seizure of fishing vessels were waived under pressure from large companies with investments at potential risk in the country carrying out the seizures. A French official once observed that at the cost of stationing even a small British destroyer to protect British fishing in areas claimed by Iceland, the price of cod would soon exceed that of smoked salmon.

—Direct coastal State claims over navigation and overflight were not as extensive in many areas, but the same process was evident. The classic position of a three-mile maximum limit of the territorial sea became a global Maginot line; in practice claims of a twelve-mile territorial sea, and ambitious

baseline claims, proliferated with some opposition but often without effective resistance. The result was that many straits were falling within the orbit of coastal State sovereignty claims whose lawfulness was increasingly difficult to contest more than verbally.

—Physical resistance entailed risks of alienation, retribution, and escalation. The platform of principle upon which physical resistance might be founded was itself eroding. Would every naval mission necessarily become at least two: to dissuade attempts by a coastal State in one area to restrict one's access to another area where the ultimate object of the mission lay?

—There was no good alternative in some situations to relying on self-restraint and voluntary compliance by foreign governments. How would one protect thousands of miles of submarine telecommunication cables against covert interference? How many people would board a commercial airliner flying a dangerously contested route? What would it cost to insure a ship conducting a contested survey?

Chest thumping about the ability of the United States and its allies—anywhere and anytime—to enforce their view of their maritime freedoms more often than not conjured an abstract world unencumbered by facts. How precisely was one to roll back an explicit Brazilian claim of a two-hundred-mile territorial sea, which as such purported to eliminate freedom of overflight and reduce freedom of navigation to the strictures of a suspendable right of innocent passage subject to unilateral coastal State regulation? How precisely was one to deal with Indonesia's sovereignty claim over the waters within its vast archipelago without pushing the government into the arms of one's adversaries? Or the similar claim of a Philippine ally next door? How precisely was one to enforce one's freedom of navigation in the face of a Canadian claim of a one-hundred-mile zone off its Arctic coast in which it could unilaterally control navigation? What about the Alaskans who tell you the Canadians may have a point?

Were there any doubt that the collapse of customary international law as a real restraint on coastal State maritime claims had a direct impact on the decision to seek a new global treaty on the law of the sea, one need go no further than the source of the effort. The standard history is that the global negotiation originated with a speech at the U.N. by the Maltese ambassador about the future of the seabed beyond the present limits of national jurisdiction. That is only part of the story. At about the same time the world's fastest rising maritime power in the mid-1960's—the U.S.S.R.—came to appreciate the problems posed by proliferating coastal State claims. Notwithstanding the ongoing Cold War, it approached the United States and some others

directly about the possibility of a new global conference to fix the maximum permissible breadth of the territorial sea at twelve miles. After months of study, the United States responded affirmatively, emphasizing three basic points: the need to secure widespread agreement lest a failure prompt even more unilateral claims in derogation of high seas freedoms, the need to protect free transit of straits landward of twelve miles, and the need to accommodate coastal State interests in fishing beyond twelve miles. The decision of the U.N. General Assembly to entrust a committee with substantive preparations for a new comprehensive conference on the law of the sea in effect merged the two initiatives. The Third U.N. Conference on the Law of the Sea convened in New York in 1973, resumed in Caracas in 1974, and continued with two lengthy sessions per year in New York and Geneva, as well as intensive intersessional negotiations, until completion of the Convention in late 1982.

The Convention achieved in the ensuing four decades what customary law was unable to provide in the previous forty years: the stability and predictability we expect from law. It is not the mere adoption of the text at the concluding session of the conference that ensured this. It is the widespread ratification.

The Convention now has 168 parties comprising an overwhelming majority of States from all regions and of all sizes and all degrees of material wealth and military power.¹ The parties include States like Brazil, Chile, Ecuador, Canada, Indonesia, and the Philippines, whose claims were mentioned above. Albeit with occasional interpretive strain, these States and virtually all of the other parties have generally brought their practice into conformity with the Convention. That is a signal achievement.

It is all the more remarkable if one considers that a fair number of the few nonparties, including the United States, treat the Convention's substantive provisions as declaratory of international law binding on all States. International courts and tribunals do so as well. This should not however blind us to the importance of the goal of universal ratification.

1. *See* Status of the United Nations Convention on the Law of the Sea, the Agreement relating to the Implementation of Part XI of the Convention and the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, UNITED NATIONS (July 31, 2019), https://www.un.org/Depts/los/reference_files/UNCLOS%20Status%20table_ENG.pdf; United Nations Convention on the Law of the Sea art. 1(2), Dec. 10, 1982, 1833 U.N.T.S. 397. Five of the listed parties to the Convention are not among the current 193 U.N. members.

A key element of the Convention's contribution to stability of the law of the sea is its dispute settlement system, in particular the provisions of Section 2 of Part XV on compulsory arbitration or adjudication of disputes concerning the interpretation or application of the Convention. Those provisions apply only to the parties to the Convention.

Compulsory jurisdiction was, and remains, far from the norm in international affairs, especially with respect to a treaty of the geographic and substantive scope of the Convention that has been so widely ratified. We might recall that mandatory arbitration provisions were included in only one of the four 1958 conventions on the law of the sea. And that one—on high seas fishing—was the least widely ratified. Accordingly, it is possible, but by no means assured or even likely, that a questionable maritime claim by a State that is not party to the Law of the Sea Convention would be subject to review by an international court or tribunal.

It is to be expected that scholars, in examining the effect of the Convention's dispute settlement system, would concentrate on the disputes that have arisen and the cases that have been decided. But a key issue in assessing the overall effectiveness of a legal system is self-restraint and voluntary compliance. Lawyers routinely advise their clients on the consequences of a proposed course of action and the risks of litigation. There is good reason to suppose that a similar process is at work within governments on questions of the law of the sea where there is a risk of international litigation. That risk accordingly helps to discourage claims of questionable legality in the first place. Canada has conveniently provided us with some empirical data in this regard: it twice excluded a new questionable maritime claim from its prior purely optional acceptance of the jurisdiction of the International Court of Justice under Article 36(2) of the Court's Statute.

Stability in the law is not possible without adaptation to new circumstances. If one relies only on unilateral interpretation and application of the Convention by individual governments to achieve the requisite adaptation, then one risks reviving the problem of unilateralism that prompted the Convention's negotiation in the first place. Accordingly, the Convention includes its own mechanisms for adaptation as well. One notable example is the dispute settlement system, pursuant to which international courts and tribunals evaluate competing views of the meaning and effect of the text in light of the circumstances. Another is the continuing incorporation by reference of generally accepted international regulations developed by the competent international organization on matters such as maritime safety and protection

of the marine environment, including, in particular, the safety and environmental rules developed under the auspices of the IMO. Yet another is the system of combined regulatory authority shared by the coastal State and the competent international organization with respect to sea lanes and traffic separation in straits and archipelagic waters. All of this appears to be working much as contemplated.

That said, there is nevertheless cause for concern.

Serious environmentalists know that the Law of the Sea Convention remains the strongest comprehensive environmental treaty of its kind. That is due in no small measure to the skill and persistence of their pioneering predecessors in linking environmental duties to the economic benefits and compulsory dispute settlement clauses of the Convention.

Yet some now seem to take the Convention for granted. It wasn't even mentioned in the U.N. Secretary-General's statement for Ocean's Day in 2022. And there are a few who, when they mention it at all, do so with the demeanor of a child contemplating a bowl of spinach.

Compliance by the Convention's parties has been reassuring but is hardly perfect. China persists in claims to the South China Sea that are not consistent with its substantive or dispute settlement obligations as a party to the Convention. And now some supporters of China's claims aver that customary law supersedes the Convention. That would bring us full circle back to precisely where we were before the Convention.

The argument nevertheless places a nonparty like the United States in an awkward position. Insofar as its own rights and freedoms are concerned, the U.S. platform of principle is itself necessarily founded on customary law. This is lawfare with one hand tied behind one's back.

Beginning with the *Gulf of Maine* case and continuing through the *Peru/Chile* case, nonparties to the Convention have been careful before the International Court of Justice to describe their claims in terms consistent with the Convention. But now Colombia has broken with that pattern of respect. Should that position be maintained and accepted by the Court with respect to the detailed substantive provisions of Article 76, we risk erosion in the compliance by other nonparties not only with the same provisions establishing the precise limits of the continental shelf and the international seabed "Area" beyond those limits, but with other provisions as well. That in turn will put similar destabilizing pressure on some of the parties.

This is but one example of a larger problem. Each of the coastal nonparties² is living with a time bomb waiting to destroy the general policy of respect for the Convention in the face of some domestic political pressure for a unilateral claim. The largest of the nonparties—the United States—made a unilateral claim in 1945 that triggered a process that threw all of the law of the sea into disarray, ironically at the same time that the United States was fashioning multilateral solutions to problems that doubtless were perceived to be more profound and enduring. It took nearly four decades before a new durable multilateral foundation for the law of the sea emerged. That should be a lesson learned.

The most basic object of the U.N. Convention on the Law of the Sea was to replace a system of conflicting unilateral claims of right with global agreement on the rules of the law of the sea and the process for their implementation, interpretation, and application. That remains the Convention's most significant contribution to the rule of law in international affairs. Its full realization demands nothing less than global ratification.

2. Coastal nonparties include Cambodia, Colombia, El Salvador, Eritrea, Iran, Israel, Libya, North Korea, Peru, Syria, Turkey, United Arab Emirates, United States, and Venezuela. Landlocked nonparties include Afghanistan, Bhutan, Burundi, Central African Republic, Ethiopia, Liechtenstein, Kazakhstan, Kyrgyzstan, Rwanda, Tajikistan, Turkmenistan, and Uzbekistan.