

The U.N. Convention on the Law of the Sea Turns 27, and American Ratification is Not in Sight – Still

By
John Briscoe & Peter Prows*

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I. INTRODUCTION

The United States, almost from its birth, has been a leader in the development of the Law of the Sea. As the country has grown, the United States has helped build the structure of the modern Law of the Sea while also pushing for the responsible use and management of the oceans. The United States was a principal broker of consensus on many of the key issues that enabled an agreement on the 1982 Convention on the Law of the Sea. Yet since December of that year, when the Convention was done at Montego Bay, Jamaica, the United States has refused to ratify the Convention. Its voice in the Law of the Sea has been diminished ever since, to the increasing detriment of the United States.

At the time, President Reagan was primarily concerned about Part XI, which deals with the seabed beyond national jurisdictions—the “Area.” Part XI treats the Area as the “common heritage of mankind” and, as drafted in 1982, imposed international taxes and technology transfers on seabed mining ventures to support developing and landlocked countries, while establishing a new international organization (the “Enterprise”) to conduct its own seabed mining.

* John Briscoe is a partner of the San Francisco Law Firm of Briscoe Ivester & Bazel LLP. He was a visiting scholar at the University of California, Berkeley, School of Law from 1990 until 2000. Mr. Briscoe has authored books on natural resources, land use, land title, and ocean law, and he is a member of the advisory board of the Law of the Sea Institute at the University of California, Berkeley, School of Law. Peter Prows is an associate of Briscoe Ivester & Bazel who joined the firm in 2008 after clerking for the Honorable Charles N. Brower in London and the Honorable Abdul G. Koroma of Sierra Leone at the International Court of Justice in The Hague. He focuses his practice on natural resources, maritime boundaries, and complex dispute resolution involving sovereigns.

Concerns over new taxes and a perceived burdensome international bureaucracy should have been mollified by the 1994 Part XI “Implementing Agreement,” which did away with the technology transfers, sharply limited the Enterprise, and significantly restructured the original seabed mining taxes. This Implementing Agreement cleared the way for President Clinton to sign the Convention in 1994 and send it to the Senate, which under the American Constitution must give its “advice and consent” to a treaty before it can be ratified. President Clinton fully expected the Senate, in which his Democratic Party held a majority, to promptly give its advice and consent.

But the “Republican takeover” of Congress in the mid-term election in November 1994 dashed those hopes. Many conservatives continued to oppose the Convention, asserting that it would surrender U.S. sovereignty, including military operations, to international courts and tribunals, stifle U.S. industry in the high seas and deep seabed, and offer no appreciable new protections for U.S. interests over existing treaties and customary international law. After his administration conducted a thorough review of the Convention, however, President George W. Bush was not persuaded that these concerns were real or significant and he supported accession “as a matter of national security, economic self-interest, and international leadership.” The Senate Foreign Relations Committee again took up the Convention in 2004 and 2007—reporting it favorably out of Committee to the full Senate on both occasions. President Obama and Secretary of State Clinton have made ratification of UNCLOS a priority for the new administration, as has Senator John Kerry, Chair of the Foreign Relations Committee.¹

Alas, opposition to the Convention remains in some quarters of Congress. The United States, as is well known, stands since 2003, when Canada ratified, as the only developed coastal country in the world not to have become party to the Convention. The empty seat at the table has meant many things. For example:

- The United States had long been critical—and effectively so—of extravagant and unjustified straight-baseline claims by other coastal states that would far-extend unilateral sovereign claims on ocean space and increase the possibilities for conflict. Its absence from the Convention and its lack of membership in the organs created by the Convention diminish its voice in the matter of the use and abuse of straight baselines.
- The continental shelf provisions of the 1982 Convention (contained in Article 76) differ significantly from both President Truman’s 1945 Continental Shelf Proclamation, and from the 1958 Convention on the Continental Shelf. A new continental shelf jurisprudence is developing around Article 76, without the thoughtful and assertive views of the United States, which had conceived the very notion of the continental shelf just 64 years ago.

1. *Nomination of the Honorable Hillary R. Clinton to be Secretary of State: Hearing Before the Committee on Foreign Relations of the United States Senate*, 111th Cong. 1 (Jan. 13, 2009), available at <http://foreign.senate.gov/hearings/2009/hrg090113a.html>.

- The framers of the 1982 Convention thought they were accounting for every activity and every resource of the sea and the seabed, from pollution to submarine navigation to rights to manganese nodules in the Area. They were wrong. Just as the final compromises were being made in 1977, scientists discovered strange new forms of life in the sea—life forms which have no utility as a food source, but vast potential in the laboratory. The status of these “marine genetic resources,” unaddressed in the Convention, will be negotiated and developed by the parties to the treaty, without the input of the United States.

As the world faces ever-growing demands on ocean space, will the United States take up the opportunity to lead again?

II.

CONTRIBUTIONS OF THE UNITED STATES TO THE LAW OF THE SEA FROM JEFFERSON TO UNCLOS III

Beginning a mere six years after its birth as a country, the United States has led the development of the Law of the Sea. Since the United States established its presence as a maritime force shortly after its birth as a nation, it has led the development of the Law of the Sea. At a time when the “cannon-shot rule” held sway – three nautical miles, the theoretical distance a shore-based cannon could fire into the sea, was the maximum permissible breadth² for a territorial sea² – on April 22, 1793, Secretary of State Thomas Jefferson formally declared a three-mile offshore “neutrality” zone in which he directed France and Great Britain to avoid hostilities towards each other.³ During the mid-nineteenth century, America protested that three miles was the maximum permissible, even as other countries began to claim, six, nine, twelve, or more miles.

It kept to this limit through the interwar years, even as it invented the modern contiguous zone to levy customs duties and chase down ships smuggling liquor during Prohibition.⁴ It asserted this during World War II, despite also declaring defense zones of several hundred miles connected by straight lines personally drawn by President Roosevelt.⁵ It claimed but a three-mile territorial sea even as Truman issued his Continental Shelf and Fisheries Proclamations in 1945, and through the first and second United Nations Conferences on the Law of the Sea.⁶ The United States claimed only three miles

2. SAYRE A. SWARZTRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* 24-5, 33 (1972).

3. Proclamation of Neutrality, Apr. 22, 1793. See Thomas Wemyss Fulton, *THE SOVEREIGNTY OF THE SEA* 572-74 (1911).

4. RENÉ JEAN DUPUY ET AL., *A HANDBOOK ON THE NEW LAW OF THE SEA* 268 (1991).

5. Declaration of Panama, Oct. 7, 1939, in 5 *FOREIGN RELATIONS OF THE UNITED STATES* 36-37 (1957). See Ann L. Hollick, *The Origins of 200-Mile Offshore Zones*, 71 *AM. J. INT'L L.* 494, 498-99 (1977).

6. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945) (implemented by Exec. Order No. 9633, 3 C.F.R. 437 (Sept. 28, 1945)), Proclamation No. 2668, 10 Fed. Reg. 12,304 (Sept.

throughout the entire UNCLOS negotiations and until the very last days of President Reagan's term, when by Executive Order he finally claimed the customary twelve miles for the United States.⁷ The stinginess of the United States with respect to its own territorial sea helped create an environment where a reasonable twelve-mile limit could become the consensus compromise.

The United States has also been a voice of reason when it has come to protesting excessive straight baselines. The *Limits in the Sea* series, published by the Office of the Geographer of the Department of State, has been a superlative source for collecting and mapping each country's claimed baselines, while also, in subtle diplomatic fashion, critiquing the legality of certain claimed baselines. In the wake of the 1951 *Fisheries Case* decided by the International Court of Justice, more than eighty countries have laid claim to straight baselines under Article 4 of the 1958 Geneva Convention or Article 7 of UNCLOS. The United States has protested more than half of these lines with some effectiveness.⁸ Not being party to the Convention, however, the United States cannot invoke the binding dispute settlement procedures of UNCLOS Part XV to legally challenge any baselines.

At the same time as it took this critical view towards countries' sovereign claims over the seas, the United States was instrumental in pushing for the development of expanded offshore economic and regulatory jurisdictions, transit rights, and marine scientific research rights. The Truman Proclamations stand as the prime example of American leadership in the Law of the Sea: barely a month after Japan's surrender aboard the U.S.S. Missouri, President Truman declared that the United States had jurisdiction over fishing and the continental shelf for areas "contiguous" to the U.S. coast. According to one hyperbolic commentator at the time, Truman's Proclamations were "one of the decisive acts in history, ranking with the discoveries of Columbus as a turning point in human destiny."⁹ In part these Proclamations were a reaction to Japan's network of fishing boats used for intelligence-gathering in the Pacific during the years leading up to the War.¹⁰ These Proclamations also signaled a categorical expression of federal authority over the states and the introduction of the United States to the world as a new superpower.¹¹ Until that point, as another commentator has observed, the

28, 1945) (implemented by Exec. Order No. 9634, 3 C.F.R. 437 (Sept. 28, 1945)).

7. Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

8. E.g., J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESS MARITIME CLAIMS 127-28 (2d ed. 1994) (discussing the successful challenge to the Federal Republic of Germany's excessive straight baseline claims in the North Sea).

9. Harold F. Clark & George Renner, *We Should Annex 50,000,000 Square Miles of Ocean*, SATURDAY EVENING POST, May 4, 1946, at 16.

10. See Harry N. Scheiber, *Japan, the North Atlantic Triangle, and the Pacific Fisheries: A Perspective on the Origins of Modern Ocean Law, 1930-1953*, 6 SAN DIEGO INT'L L. J. 27, 38-59 (2004).

11. John Briscoe, *Federal-State Offshore Boundary Disputes: The State Perspective*, in THE DEVELOPING ORDER OF THE OCEANS: PROCEEDINGS OF THE 18TH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE, OCTOBER 24-27, 1984, 380, 383 (Robert B. Krueger & Stefan A. Riesenfeld, eds., 1985).

United States had acted more like a “regional or middle power strong enough to defy the prevailing legal system, yet too weak to impose a new legal regime.”¹²

That was then. Now, broad margins for fishing and for continental shelf resource rights are firmly enshrined in the Law of the Sea, yet the United States remains locked out of an extended continental shelf beyond 200 nautical miles, because it still sits outside the Convention.

In the wake of the failure of the first Conference on the Law of the Sea to fix a breadth for the territorial sea, the United States was a prime instigator, along with the Soviet Union, for the second and third UN Conferences on the Law of the Sea. It was President Lyndon Johnson, prefiguring Ambassador Arvid Pardo’s famous speech to the General Assembly the next year, who in 1966 first called the deep seabed “the legacy of all human beings.”¹³ The chief U.S. concerns for the Conferences, however, were not only the breadth of the territorial sea, but also transit rights for its merchant and military ships and a relaxation of restrictions on marine scientific research. The United States Navy made it a policy to sail through waters newly claimed by other countries so it could legitimately maintain a right-of-way. This practice gave the United States leverage to negotiate successfully for the expansive transit rights now contained in UNCLOS, which ultimately benefits commerce and relations for coastal and land-locked countries alike. The United States, however, cannot totally secure these rights for itself until it becomes party to the Convention.

The right to conduct marine scientific research is also one of this country’s lasting contributions to the current Law of the Sea regime. The United States pushed for, and secured, expansive research rights in the high seas, as well as limited rights to conduct research on the continental shelf and Exclusive Economic Zone (EEZ) of other countries. It was after all an American scientist, John Mero, who picked up where the H.M.S. *Challenger* expedition left off in the effort to illuminate the hidden treasures of the deep seas. In 1958, while a post-doctoral fellow at the University of California, Mero identified black manganese, copper, nickel, and cobalt-rich nodules dredged up from deep waters in the Pacific as the same nodules the *Challenger* crew had discovered 75 years earlier. Mero’s subsequent enthusiastic projections of the value of deep seabed mineral deposits lit the imaginations of industry and foreign ministries around the world and served as a primary impetus for Ambassador Pardo’s call that the seabed and its mineral resources be dedicated to the “common heritage of mankind.”

It was also the American-led expeditions aboard the Navy-owned *Alvin* submersible in 1977 and 1979 that discovered that the deep ocean teems with life that even to the contemporary eye still looks like the stuff of science fiction and nightmares. The biological mechanisms of these organisms that allow them to thrive in such harsh conditions doubtless will yield scientific benefits for us

12. *Id.* (quoting ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 19 (1981)).

13. William Wertenbaker, *I—The Law of the Sea*, THE NEW YORKER, Aug. 1, 1983, at 38.

on dry land. This discovery of the wealth of deep sea life came too late in the negotiations to be included as its own subject in UNCLOS and remains an open issue with which the United States can either engage directly or watch pass by.

In addition to these official diplomatic, political, and legal actions, American scholars have contributed to the development of the Law of the Sea. In the last century, luminaries such as Steve Riesenfeld published *Protection of Coastal Fisheries under International Law* with the Carnegie Endowment for International Peace in 1942, and Philip C. Jessup published *The Law of Territorial Waters and Maritime Jurisdiction* in 1927. America produced some of the most prominent political geographers of the century as well. Samuel Whittemore Boggs was a powerful presence at the 1930 Conference for the Codification of International Law in The Hague. Boggs held the title “The Geographer, United States Department of State,” and published many influential papers. He was succeeded by two other prolific and influential Geographers, G. Etzel Percy and Robert D. Hodgson.

II.

THE NON-PARTICIPATION OF THE UNITED STATES IN THE LAW OF THE SEA SINCE 1982

By the time Robert W. Smith, the protégé of Dr. Hodgson, had attained prominence in the State Department, the joke in the Department had become (purportedly first cracked by Assistant Secretary of State James Malone in 1984), “Law of the Sea? *What* Law of the Sea?” In current times, the international community loses a wealth of enthusiasm and ideas by the non-participation of the United States. We have mentioned some of them already, but we will expand on the continuing ramifications of the United States not participating in the Law of the Sea, after 200 years of vigorous engagement.

After the Convention concluded on December 10, 1982, the United States implicitly recognized that there was a new Law of the Sea: precisely three months later, President Reagan issued his Oceans Policy Statement, declaring that the Convention expressed customary international law – with the important exception of Part XI – and that he would not sign the Convention. That same day, he proclaimed a 200-mile Exclusive Economic Zone for the United States.¹⁴ The United States belatedly also claimed a twelve-mile territorial sea and a twenty-four-mile contiguous zone under President Bill Clinton.¹⁵

Without becoming party to the Convention, the United States cannot benefit from all the Convention offers, while the rest of the world also loses from our non-participation in the continued progressive development of the Law of the Sea. The United States cannot turn to the binding dispute settlement regime of Part XV should it wish to contest overly assertive straight baseline claims or arbitrary restrictions on innocent passage or marine scientific

14. Proclamation No. 5030, 48 Fed. Reg. 10, 605 (Mar. 10, 1983).

15. Proclamation No. 7219, 64 Fed. Reg. 48701, 49844 (Sept. 2, 1999).

research.¹⁶ The United States cannot make a claim for an extended continental shelf beyond 200 nautical miles under Article 76. The United States has also been without representation on the Commission on the Limits of the Continental Shelf. The Commission has been quietly developing international law on the continental shelf by formulating its *Scientific and Technical Guidelines* and by reviewing the dozen or so claims that have so far been made. If and when the United States ever does become a party, its extended continental shelf claim will be assessed, perhaps decades after the Commission began its work, on the basis of standards now being worked out without its participation.

Exploration for mineral resources in the Area is also proceeding apace, following the entry into force of the 1994 Implementing Agreement. As the prices of commodities rose in recent years, the International Seabed Authority signed more than a dozen contracts with companies from around the world for the exploration and exploitation of polymetallic nodules in the Clarion-Clipperton Zone in the Southeast Pacific and in the Mid-Basin of the Indian Ocean. Meanwhile, the United States has yet to assume the seat effectively reserved for it on the ISA Council. American deep sea mining companies, which Ambassador Paul Bamela Engo of Cameroon, Chair of the Conference's seabed committee, and others imagined would be the first to mine the deep seas, remain frozen out. The rest of the world is poorer for it.

The deep seas are also opening up as a new frontier for genetic research. Research institutions, as well as the pharmaceutical, health care, cosmetics, and agricultural industries, are increasingly interested in the biodiversity associated with mineral-rich, deep sea, warm hydrothermal vents, and cold-seeps, which were only discovered as the Conference drew to a close. At least several hundred patents have now been issued by the United States, the European Union, Japan, and other developed countries for organisms, products, and processes originating in the deep. Many developing countries, however, object to the patentability of deep sea materials, on the basis that it runs afoul of the spirit of the "common heritage of mankind" and of the provisions of UNCLOS prohibiting using marine scientific research to appropriate marine resources or "any part" of the seabed.¹⁷ The Convention recognizes the fundamental truth that "the problems of ocean space are closely interrelated and must be addressed as a whole." Without consensus on the legal structure governing these genetic resources, patent holders cannot enjoy the protections necessary in the global marketplace to spur continued investment in deep sea genetic resources.¹⁸

16. The weakness of the U.S. position regarding the positive international law on innocent passage through international waters may have undermined its protests against the interception by Chinese vessels of the U.S.N.S. Impeccable in the South China Sea on March 5, 2009.

17. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 241 ("[m]arine scientific research activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources"), art. 137 (prohibiting any exercises of sovereignty or appropriation over "any part of the Area").

18. Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (and What Is to Be Done About It)*, 42 TEX. INT'L L. J. 241, 290-95 (2007).

The European Union has tried to bridge the gap between developed and developing countries by proposing that a new Implementing Agreement be developed to address the marine environment more broadly. The EU would like to see such an agreement treat the issue within a broader context of the sustainable use of all marine resources and alongside ventures such as carbon sequestration, ocean fertilization, and the mitigation of ocean noise and pollution. The EU proposal is pragmatic in that it seeks to avoid the ideological question related to the legal status of marine genetic resources, namely, whether they are part of the “common heritage,” and instead focuses on the governance questions of how they can be used sustainably and how their benefits can be shared equitably. The United States continues to sit on the sidelines of these negotiations with the untenable view that patenting deep sea organisms is simply part of the customary freedom of the high seas. The United States will not be successful in imposing a unilateral view and will likely have to accommodate the concerns of developing countries and approach the issue within the broader context of sustainable use that the European Union has identified. It must either re-engage on this issue, or else be left behind.

III.

CONCLUSION: RENEWING AMERICA’S LEADERSHIP AND RESPONSIBILITY IN THE LAW OF THE SEA?

To conclude, let us offer an “alternate reality” for consideration—one in which the United States is again fully engaged in the Law of the Sea. One can envision this alternative by looking at how the United States has engaged aggressively and constructively on fisheries issues. The world’s fish stocks are in crisis, with the FAO estimating that nearly three-quarters of the world’s fish stocks are fully or over exploited and one recent study projecting that all commercially viable fisheries will be depleted by 2048.

International cooperation to achieve sustainable fisheries is an urgent global necessity, and the United States has been generous with its engagement and leadership in attempting to forge this cooperation. The United States was a prime architect of the large-scale pelagic driftnet fishing ban to which the General Assembly agreed in the late 1980s and early 1990s, and it continues to play an important role in the implementation and enforcement of sustainable policies for high seas fisheries. Part IV of the Magnuson-Stevens Act empowers the United States to impose sanctions on countries whose vessels engage in driftnet or illegal, unreported, and unregulated (IUU) fishing. The threat of sanctions has motivated compliance with the driftnet ban and, more recently, the General Assembly has acted to curb unregulated high seas bottom trawling and other destructive fishing practices. President George W. Bush also deserves great credit for acting to set aside vast portions of the waters off western Hawaii, the Northern Marianas, and the mainland Atlantic and Pacific coasts as marine protected areas, thus serving a key goal of the Convention on Biological Diversity. The rest of the world would be wise to follow.

The United States has also proven to be an indispensable party to the 1995 Fish Stocks Implementing Agreement. It is a vigorous participant in Regional Fisheries Management Organizations (RFMOs), both existing and currently under negotiation, particularly in the Pacific Ocean. The United States acts as the coordinator for the General Assembly's annual resolutions on sustainable fisheries and comes to every negotiating session armed with a full compliment of NOAA scientists to ensure our debates are informed and based on the best available scientific information. The rest of the world relies on the United States for leadership on fisheries issues, and the international structure of law and institutions regarding fisheries could not function without it.

In contrast, the United States continues to not participate in the Law of the Sea Convention. For example, at the annual States Parties meeting, it sits as an observer in the back of the room, allowed to speak only after every party has had their say and unable to present candidates or vote on the membership of International Tribunal for the Law of the Sea or the Commission on the Limits of the Continental Shelf.

We are living in what could be a time of change. The United States has just elected a new President and a new Congress. Increasing world population, resource demands, and environmental stresses place ever-greater challenges on ocean space and have created an increased need to move from reactive to proactive governance. We are witnessing the rise of new global powers and the relative decline of others, and yet there remains a serious lack of leadership in addressing the problems that ultimately face us all. The United States' becoming a party to the Law of the Sea Convention will not solve these problems, but it would set the country on a path towards working with others on solutions.