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Introduction: Perspectives on the History of U.S. Non-Ratification of the U.N. Convention on the Law of the Sea, and on the Prospects for an Early Reversal

By
Harry N. Scheiber*

The 1982 United Nations Convention on Law of the Sea (UNCLOS) has been called one of the greatest achievements in the history of international diplomacy—an agreement that has largely achieved its ambitious goal of providing what many commentators term “a constitution for the oceans.” The former Secretary-General of the United Nations, Boutros Boutros-Ghali, in 1994 hailed the conclusion of the Convention in the following terms:

“The dream of a comprehensive law of the oceans is an old one. Turning this dream into reality has been one of the greatest achievements of this century. It is one of the decisive contributions [and] it will be one of our most enduring legacies.”¹

The Convention is of exceptional character because of this comprehensive content, representing the culmination of more than three decades of UN expert studies and successive international meetings, the latter starting with the Geneva meeting in 1958 that produced four international conventions addressing ocean resource, navigational, and boundary issues. Equally important is the success of the UNCLOS in winning the signature and ratification of nations throughout the globe. It went into force in 1994, and today some 157 nations and the EU are parties to the Convention. Only the League of Nations and the United Nations in contemporary history are of comparable importance in these regards.

As Judge Tullio Treves and other commentators have emphasized in scholarly discourse on how the UNCLOS was designed and continues to

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1. Quoted in Satya N. Nandan, *An Introduction to the 1982 United Nations Convention on the Law of the Sea*, in *ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 9* (Willy Østreg and Davor Vidas eds., 1999).

function as the basis of the global ocean order, the content of the instrument goes beyond the formulation of obligations and rights of sovereign states in regard to ocean space and uses; it is also the founding document for the institutionalization of an ocean management structure, establishing the International Tribunal for the Law of the Sea; the Commission on the Limits of the Continental Shelf; and the International Seabed Authority.² In their respective roles, these institutions represent dramatic departures from what was essentially autarky in the history of ocean affairs in the former era when so little in the way of agreed principles of constraint were in force on the high seas, beyond the three-to twelve-mile offshore limits that had for two centuries demarcated the jurisdiction of coastal nations.³

The Tribunal (ITLOS) quickly assumed a major role as a forum for adjudication of disputes among states relating to the terms of the Convention. The Commission (CLCS) was given authority to receive petitions from states and to make scientific determinations as to the outer limits of the Continental Shelf, which would determine the reach of coastal states' rights to seabed resources, including hydrocarbon resources. The Seabed Authority (ISA), now entering belatedly into the implementation of the powers given to it in the Convention, as modified in 1994 by the implementing agreement for Part XI, has begun to oversee the exploitation of the resources of the seabed of the high seas. These resources lie beyond the outer boundaries of coastal state jurisdiction—an area that, prior to the UN initiatives beginning in 1958, was the “high seas” region where there were neither rules nor any governing authority to order exploitative operations on the deep seabed. The vision of the seabed

2. Tullio Treves, *The Development of the Law of the Sea Since the Adoption of UNCLOS: Achievements and Challenges for the Future*, keynote address to be published in the forthcoming Proceedings volume for the Nansen Institute international conference, The World Ocean in Globalization, August 21-23, 2008 (Oslo, Norway). Tullio Treves, *The Development of the Law of the Sea Since the Adoption of UNCLOS: Achievements and Challenges for the Future*, in THE WORLD OCEAN IN GLOBALIZATION: CHALLENGES FOR MARINE REGIONS: COMPENDIUM OF SUMMARIES 13-9 (2008), available at <http://www.fni.no/conference/COMPENDIUM-FINAL.pdf>. See also the papers in the symposium volume OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES (ed. Alex. G. Oude Elferink and Donald R. Rothwell, 2004).

3. The challenge to the three-mile rule was introduced in scholarly discourse in a comprehensive way by the late Stefan Riesenfeld, a distinguished member of the UC Berkeley Law School faculty in later years, in his magisterial work completed in 1939 (inspired by the threat to the established U.S. management regime for the salmon fishery of the Bristol Bay area, when a Japanese mother-ship fleet entered waters beyond the three-mile limit formerly exploited only by small sailing vessels of the American fleet and by Canadian fishers). His study was published later by the Carnegie Endowment for International Peace, under the title PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW (1942), on which see also Harry N. Scheiber, *Taking Legal Realism Offshore: The Contributions of Joseph Walter Bingham to American Jurisprudence and to the Reform of Ocean Law*, 26 LAW AND HISTORY REVIEW 649 (2008), available at <http://www.historycooperative.org/journals/lhr/26.3/scheiber.html>. For analysis of the subsequent debates of policy and law that began with limited entry as an objective and later incorporated scientific and economic concepts of sustainability and efficient use, see Harry N. Scheiber and Chris Carr, *From Extended Jurisdiction to Privatization: International Law, Biology, and Economics in the Marine Fisheries De bates, 1937-1976*, 16 BERKELEY J. INT'L L. 201-45 (1999).

resources as part of the “common heritage of mankind,” as phrased famously by Ambassador Arvid Pardo in the negotiations for the 1982 Convention, has been expansively applied in aspirational terms to the entire range of marine environment and resources—not to “socialize” resources or give them legal status beyond the reach of sovereign states, as critics of the UNCLOS have feared, but rather to encourage multilateralism in the study, management, and conservation of the marine heritage.⁴

The regime that the UNCLOS set in place was not without gaps, some ambiguities, and a significant number of major questions requiring further negotiation on an issue-by-issue basis.⁵ The long years of negotiation took place amidst the Cold War, with the United States and NATO, and the Soviet bloc of nations, at odds on numerous issues (including the key question of how far coastal state jurisdiction should extend out beyond the shore) that bore on both economic interest and the overriding questions of military confrontation and ambition. The imperatives of the Cold War were further complicated, in the course of negotiations, by the rising assertiveness of the developing states, especially as the process of decolonization created new states that were represented in the meetings and became prominent in the discourse. The North-South division over development policy, resource sustainability, and sovereignty had come to full flower by the time that the UNCLOS was opened for signature.⁶ The negotiations, ranging over so wide an area of overlapping controversies and ambitions, had an extraordinary level of complexity. Thus, Professor Bernard Oxman, a leading scholar in the field who was himself active in the negotiation of the final agreement of 1982, has emphasized that the diplomacy of the Convention over a long period of years dealt with multiple subjects, each of them involving vital interests of one state or another, or blocs

4. Alan Boyle, *Further Development of the 1982 Convention on the Law of the Sea*, in *THE LAW OF THE SEA: PROGRESS AND PROSPECTS* (David Freestone, Richard Barnes and David M. Ong eds., 2006). See also papers in *BRINGING NEW LAW TO OCEAN WATERS* (David D. Caron and Harry N. Scheiber eds., 2004).

5. Further on this point, Boyle comments that the UNCLOS “is not a separate or self-contained legal regime. At numerous points it makes reference to rules of general international law or incorporates generally accepted international rules and standards derived mainly from other treaties.” *Id.* at 43. One situation in policy and ocean diplomacy that exemplifies the complexities of implementation is the role of the UN Food and Agriculture Organization and the regional fishery management organizations established as part of a process in which multilateral agreement on fishing management norms has spread in scope and acceptance, on which see, e.g., the papers in *GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES* (Olav Schram Stokke ed., 2001). A case study illustrating the dynamics of institutional and policy innovation within the general framework of the UNCLOS and the specific terms of the 1995 Fishery Stocks Agreement, in Harry N. Scheiber, Kathryn Mengerink, and Yann-huei Song, *Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum*, 30 U. HAW. L. REV. 97 (2007-2008).

6. See, *inter alia*, on the history, ANNE L. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* (1981); Harry N. Scheiber, *Pacific Ocean Resources, Science, and Law of the Sea: Wilbert Chapman and the Pacific Fisheries, 1935-1970*, 13 *ECOLOGICAL L. Q.* 381 (1986); ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* (1993); and LAWRENCE JUDA, *INTERNATIONAL LAW AND OCEAN USE MANAGEMENT: THE EVOLUTION OF OCEAN GOVERNANCE* (1996).

of states. “[I]f the truth be told,” Oxman recalls, “. . . virtually every state found itself in a potential minority on at least one important issue whose resolution could affect its ability to ratify the Convention.”⁷ It is another measure of the extraordinary success of the negotiations that not only were the roadblocks posed by such complexity in the end surmounted, but the instrument as a whole well merits what President Ronald Reagan said of it in March 1983, viz., that its provisions “fairly balance the interests of all states.”⁸

It was appropriate, although also ironic in the extreme, that President Reagan should have expressed this appraisal of the UNCLOS, since the United States Government under his predecessors in the White House—Lyndon Johnson, Richard Nixon, Gerald Ford and Jimmy Carter—had consistently devoted the influence and diplomatic efforts of this country in the cause of a successful conclusion to the UN negotiations. And in fact, despite some significant compromises that the United States delegates had been required to accept, the major objectives that had been pursued by the U.S. representatives were largely achieved. It is important to recall the great extent to which the United States emerged as a “winner” in regard to a broad range of specific issues—quite apart from the achievement of a multilateral agreement of such magnitude, consistent with the multilateralist posture and internationalist institution-building pursued as a key objective of U.S. diplomacy (albeit in the polarized context of great-power conflict) since World War II.⁹

The irony of President Reagan’s assessment of the UNCLOS lay in the fact that his administration refused to join as a signatory to the Convention, and in subsequent years—while all the other major developed nations have become parties to it—there has been such intransigent opposition to the Convention that it took, first, the supplementary agreement of 1994 on the administration of seabed resources, and then the decision by the Clinton Administration, to finally attach the U.S. signature to the treaty and get the question before the Senate for advice and consent. Thus, the global ordering of ocean affairs is moving forward within the UN institutions operating under the UNCLOS without the formal participation of the U.S. as a government with “a seat at the table.” The ironies of this posture are compounded by the fact that on several parallel fronts in ocean law and ordering—most prominently the UN driftnet control effort, the Fish Stocks Agreement of 1994 for multilateral management of high seas

7. Bernard Oxman, *The 1994 Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea*, in Østreng and Vidas eds., *supra* note 1, at 15. See generally Friedheim, *supra* note 6; and, for the larger context in the jurisprudence of international law, see Bernard Oxman, *The Territorial Temptation*, 100 AM. J. INT’L L. 830 (2006).

8. Statement by the President, *United States Ocean Policy*, March 1, 1983, in 19 WEEKLY COMP. PRESIDENTIAL DOCS. 383 (1983).

9. See the articles that follow in this volume by John B. Bellinger, III; by John Briscoe and Peter Prow; and by John E. Noyes; see also David D. Caron and Harry N. Scheiber, *The United States and the 1982 Law of the Sea Treaty*, 11 ASIL INSIGHT 16 (June 15, 2007), available at <http://www.asil.org/insights070611.cfm>; and John Norton Moore and William L. Schachte, Jr., *The Senate Should Give Immediate Advice and Consent to the United Nations Convention on the Law of the Sea*, 59 J. INT’L AFFAIRS 1-24 (2005).

fisheries, a global coral reef initiative, actions of the Nordic Council for protection of Arctic resources, the moratorium of 1986 on whaling adopted by the International Whaling Commission, and more recently the Nuclear Proliferation treaties (to name just a few of the most prominent among these initiatives)—the United States has taken a major role in shaping policy and pursuing effective implementation. This leaves the questions, then, of how such sustained resistance to ratification by the United States has come about? And, looking ahead, what will be the real price, of continuing non-ratification for the future success of the UNCLOS and its core objective of securing peace, justice, and rule of law on the world's oceans?

* * *

The articles in this symposium volume offer a set of valuable perspectives on these intriguing and, in vital respects, highly controversial questions. They derive from conference papers originally presented by the authors in sessions of an international conference co-sponsored by the Law of the Sea Institute of UC Berkeley (LOSI) and the Ocean Law Program of Inha University (Incheon, Korea), with the present author and Professor Seokwoo Lee of Inha University as co-organizers.

This conference, on the larger theme of innovations and institutions in contemporary ocean law, was the final one in a series of three conferences on ocean law co-sponsored by LOSI and Incheon colleagues and held annually since 2006. The two previous events were held in Seoul; this third conference was held in November 2008 in Berkeley. We were fortunate in this instance to obtain the participation of Mr. John B. Bellinger, III, of the U.S. Department of State, whose paper (given as a lecture at Boalt Hall School of Law as a prefatory session in connection with the conference) provides an invaluable analysis and account of first-hand experience of congressional relations with the Executive on the UNCLOS-ratification question. Messrs. John Briscoe (a key organizer of the Law of the Sea Institute conference in San Francisco in 1983) and his colleague Peter Prow offer an overview and analysis of the historic and present position of the U.S. Government on the ocean law issues that have been aired in the extended controversy over ratification; and, like Mr. Bellinger, they probe the question of what is lost, in pursuit of U.S. interests, by the non-ratification posture that still prevails.

In Professor John E. Noyes' article, we are given an analysis in depth of the historic attitudes and behaviors of Americans and their government with regard to foreign policy and international law, and of the ways in which the various "traditions" or "strands" in this history have been expressed in the debate over ratification. The constitutional issue of to what extent, and on what jurisprudential and constitutional basis, decisions of international courts and arbitral bodies are to be controlling under the Supremacy Clause receives detailed analysis. Noyes concludes by examining how the specific terms and general thrust of the Advice and Consent Resolution developed in the recent Senate consideration of the UNCLOS ratification can suggest the probable

position of the United States on third-party dispute settlement if ratification is achieved. In closing, Noyes reiterates themes that were consistently expressed by U.S. delegates to the UNCLOS talks before 1982, as to the desirability of compulsory dispute settlement provisions in the Convention, in the interest of advancing rule of law for the global oceans.

Professor Nilufer Oral's article offers learned commentary from a very different geographic and geopolitical standpoint with regard to non-ratification, assessing how complex boundary disputes between Greece and Turkey have confounded both the achievement and stabilization of a peaceful ocean order in the Aegean Sea region. The perplexities that she explores in her insightful study provide a vivid example of boundary conflicts more generally in ocean waters around the world, conflicts that bear the explosive potential for confrontations of force in areas such as the South China Sea, and the waters in which Korea, China, and Japan have had overlapping and conflicting claims. Not least relevant to this larger problem of boundary-setting and resolution of tensions is the emerging situation as to continental shelf claims in the Arctic region, which was the subject of another panel of our conference.¹⁰

Additional papers from the conference, addressing questions of human rights and illegal immigration by sea into the EU area, environmental law in the polar region, transit of vessels in a relatively ice-free Northwest Passage navigation season, and emerging procedural issues in the Tribunal, are under revision now and planned for publication in other forums, including the Law of the Sea Institute web site. (Earlier conference proceedings of the Law of the Sea Institute at UC Berkeley have been published in book form and in journal symposia.)

The Law of the Sea Institute of UC Berkeley, Professor David Caron and I as LOSI Co-Directors, our colleagues on the faculty of the UC Berkeley Law School, and the several students at the School—among them notably Jennifer Jeffers, Louise Gibbons, and Benjamin Jones, and graduates Dr. Kathryn Mengerink and Jordan Diamond—who have done dedicated work as research assistants in LOSI, are grateful to the office of Dean Christopher Edley and the President's Office of Inha University for the principal financial support that made the conference possible. Additional co-sponsorship was provided by the University of California Marine Council and by private donors to the Institute for Legal Research at UC Berkeley, in whose offices at the Law School the LOSI is housed and administered, and to the Boalt Hall Fund. Above all, we are indebted to the authors who have contributed their articles for this publication and who join with LOSI in appreciation of the honor of participating in this inaugural issue, launching the *Berkeley Journal of International Law's* online publication *Publicist*.

10. For essays on a broad range of outstanding boundary issues in law and international relations, see the papers that appear in the symposium (sponsored by the Law of the Sea Institute at UC Berkeley in cooperation with Inha University), *Frontier Issues in Ocean Law: Marine Resources, Maritime Boundaries, and the Law of the Sea*, in ISSUES IN LEGAL SCHOLARSHIP (Berkeley Electronic Press Publication), available at <http://www.bepress.com/ils/oceanresource/>.