

## 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 at Montego Bay, Jamaica, on 10 December 1982. It entered into force on 14 November 1994 and is presently binding for 154 States, as well as the European Community (as of 24 July 2008). It is considered the “constitution of the oceans” and represents the result of an unprecedented, and so far never replicated, effort at codification and progressive development of international law. The more than 400 articles of the text and of the nine annexes that are an integral part of it are the most extensive and detailed product of codification activity States have ever attempted and successfully concluded under the aegis of the United Nations.

The historic circumstances that brought about the decision to engage in this codification endeavour are complex. They consist, on one side, in a process within the United Nations General Assembly concerning a specific aspect of the law of the sea, and, on the other side, in momentous changes in the structure of international society and in the uses of the sea. These two aspects merged in the decision taken by the General Assembly in 1970 (resolution 2750 (XXV) of 17 December 1970) to hold the Third United Nations Conference on the Law of the Sea.

The process within the United Nations General Assembly started in 1967 with the well known speech of the Maltese Ambassador Arvid Pardo. It focused on the mineral resources of the seabed beyond the limits of national jurisdiction, in particular the polymetallic nodules found at great depths and whose exploitation seemed to promise substantial economic benefits, which in his view were to be proclaimed the common heritage of mankind. The key concepts emerging from this process, conducted in the United Nations “Seabed” Committee, a committee set up in 1967 and continued, under different names, up to 1973, are synthesized in General Assembly resolution 2749 (XXV) of 17 December 1970 according to which the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (the Area), as well as its resources “are the common heritage of mankind”. No State can claim or exercise sovereignty or sovereign rights thereupon, and their use shall be for peaceful purposes only. No exploration for or exploitation of these resources may be conducted outside the “international regime”, including an “appropriate international machinery”, to be established “by an international treaty of a universal character, generally agreed upon”.

The structural changes in international society consisted mainly in that, during the decade preceding Ambassador Pardo’s speech, the number of independent States had doubled. This brought to the fore a sense of mistrust for the then existing rules of international law, confirmed by the fact that the 1958 Geneva Conventions on the Law of the Sea, which had been adopted less than ten years before and had just entered into force, did not attract the ratification or accession of most of the newly independent States. For most of these new States the priorities in the uses of the seas were different than those of the maritime powers that had dominated the scene in Geneva. Exploitation of the living

and non-living resources was seen as more important than, or as important as, navigation of merchant and military fleets. A claim for exclusive or sovereign rights over an area of the sea well beyond the territorial sea, previously put forward only by South American States, gained wide acceptance. At the same time, the need to protect the marine environment, after the 1972 United Nations Stockholm Conference on the Human Environment, and the conclusion of significant specific conventions (the London Dumping Convention of 1972 and the MARPOL convention of 1973) became a broadly accepted objective. Similarly, the awareness that the development of scientific research and of other marine activities fostered by technological progress and economic need required clear and generally accepted rules became widespread. This led to the recognition, in the above quoted resolution 2750 (XXV), “that the problems of ocean space are closely interrelated and need to be considered as a whole”. The merger of the two trends was so accomplished.

The Third United Nations Conference on the Law of the Sea was convened with a broad agenda including items covering all aspects of the law of the sea, from the traditional ones to the newly emerging ones, such as the common heritage principle, the expansion seawards of the coastal States’ jurisdiction and the protection of the marine environment. After a short procedural session in New York in 1973, the Conference started its substantive work in Caracas in 1974 on the basis of a multi-volume report of the Seabed Committee, without the benefit of the previous work of experts, such as that of the International Law Commission (as in the case of the 1958 Conventions), and without a basic draft. The rule of procedure in fact followed, only in part reflected in the formal rules adopted, was that decisions were to be taken by consensus and that, in order to obtain consensus, a “package deal” approach was to be followed on every issue, on groups of issues and on all issues as a whole. Voting would be admitted only if all efforts at consensus were recognized as being exhausted. This procedure was at the same time necessary and lengthy. It was necessary because of the need to reconcile divergent interests only partially represented by the traditional groups of States (Western industrialized States, Socialist States, Group of 77, etc.), such as those of coastal States, maritime States, archipelagic States, landlocked States, land-based producers of the minerals to be extracted from the nodules, etc. It was lengthy, extending the Conference up to 1982, because it involved the reconciliation of the interests of groups as well as of particular States in such a way that each party involved could perceive even in specific provisions not consonant to its desiderata a part of a package that, as a whole, it could consider to bring more advantages than disadvantages.

The procedural devices adopted in order to make progress towards a consensus text were very numerous. The most important were two. The first was the extensive use of restricted negotiating groups to deal with specific issues: some were set up by the Convention’s main bodies (the three main committees, dealing respectively with the deep-seabed regime, the traditional law of the sea, the protection of the marine environment, marine scientific research and transfer of technology and the informal plenary dealing with the settlement of disputes and general and final clauses) while others – such as the one led by the Norwegian Minister Jens Evensen – were set up by delegations according to the perceived needs of the negotiation. These groups were made necessary by the difficulty of negotiating in plenary bodies and the need to achieve progress between the most interested delegations and group representatives. In the case of the Drafting Committee, the creation of six “language groups” which, together with the meeting of their coordinators and the Chairman of the Committee, did most of the work, was due to the need to ensure that the six official authentic texts had been in fact negotiated by the Conference from the point of

view of linguistic equivalence. Notwithstanding the concerns of delegations excluded or only marginally involved in some groups, the process gained general acceptance as the products of the work of the various groups had to be submitted to plenary bodies.

The second important procedural device was that of the “Negotiating Texts”. These texts contained a draft of the articles of the future convention prepared, in separate parts, under their responsibility, by the Chairmen of the main committees starting in 1975, then progressively refined in successive versions and since 1977 unified under the responsibility of the “Collegium” of the main officers of the Conference. This device had the advantage of providing the Conference with a basic draft that would become the exclusive object of amendment proposals. Changes were progressively introduced when consensus was achieved. So it was that the last negotiating text, “The Draft Convention on the Law of the Sea” (1981), could be considered in most of its provisions a consensus text. Irreconcilable divergences remained (especially in light of the changed position of the United States, due to the accession to the Presidency of Ronald Reagan) only regarding Part XI, on the International Seabed Area. This brought about the decision that efforts at reaching consensus had been exhausted, the vote on a limited number of specific amendments (which were all rejected) and the vote held on 30 April 1982 on the Convention as a whole, which resulted in 130 votes in favour, 4 against and 17 abstentions. Already at the final session held in Montego Bay in December 1982, some of the abstaining States signed the Convention, and more did so before the final date for signature, 10 December 1984.

The main difficulties concerning the International Seabed Area regime were overcome in informal consultations conducted under the aegis of the United Nations Secretary-General between 1990 and 1994. These resulted, before the entry into force of the Convention, in the adoption by the General Assembly on 28 July 1994 of an Agreement on the Implementation of Part XI of the Convention, which forms an integral part of it, and which contains the amendments necessary to make it acceptable to the industrialized States. This Agreement has in fact opened the way to the high – and highly representative – number of States that have become parties to the Convention. The most important of the relatively few missing accessions is that of the United States, whose Government, nevertheless, has, since 1994, submitted the Convention to the Senate to obtain its advice and consent for accession.

The Convention has 320 articles, set out in seventeen parts, as well as nine annexes. Parts II to XI concern the different maritime zones: territorial sea and contiguous zone, straits used for international navigation, archipelagic waters, the exclusive economic zone, the continental shelf, the high seas, the International Seabed Area, and special provisions on the regime of islands and of enclosed and semi-enclosed seas. Parts XII to XIV concern specific marine activities and questions in all areas: the protection of the environment, marine scientific research, and the development and transfer of marine technology. Part XV (and annexes 5 to 8) concerns the settlement of disputes. Parts XVI and XVII set out general and final clauses.

A very selective list of the main substantive provisions of the Convention, focusing on those that introduce changes or new concepts in the traditional law of the sea would seem to include the following:

- a) the maximum breadth of the territorial sea is fixed at 12 miles and that of the contiguous zone at 24 miles;

b) a “transit passage” regime for straits used for international navigation is established, while non-suspendable innocent passage applies to straits for which there is an alternative route and to straits connecting the high seas or an economic zone to the territorial sea of a State;

c) States consisting of archipelagos, provided certain conditions are satisfied, can be considered as “archipelagic States”, the outermost islands being connected by “archipelagic baselines” so that the waters inside these lines are archipelagic waters (similar to internal waters but with a right of innocent passage and a right of archipelagic sea lanes passage similar to transit passage through straits, for third States);

d) a 200-mile exclusive economic zone including the seabed and the water column, may be established by coastal States in which such States exercise sovereign rights and jurisdiction on all resource-related activities, including artificial islands and installations, marine scientific research and the protection of the environment;

e) other States enjoy in the exclusive economic zone high seas freedoms of navigation, overflight, laying of cables and pipelines and other internationally lawful uses of the sea connected with these freedoms;

f) a rule of reciprocal “due regard” applies to ensure compatibility between the exercise of the rights of the coastal States and of those of other States in the exclusive economic zone;

g) the notion of the continental shelf has been confirmed, although with newly defined external limits: in view of the applicability of the exclusive economic zone to the seabed up to 200 miles, the continental shelf, that independently of geomorphologic considerations expands up to 200 miles, is relevant for States that have not established an exclusive economic zone and for those that claim a continental shelf beyond 200 miles, a claim that can be successful if certain geomorphologic, distance and depth conditions are satisfied and which can be ascertained with the cooperation and the concurrence of the Commission on the limits of the continental shelf, a 21 member body elected by the Meeting of the State Parties to the Convention;

h) a complex regime, substantially amended by the 1994 Implementation Agreement, has been established for the Area, that together with its resources is proclaimed the common heritage of mankind; the International Seabed Authority (whose members are all parties to the Convention and having its seat in Kingston, Jamaica) being the “machinery” entrusted with the supervision and regulation of exploration and exploitation of the resources;

i) a series of very detailed, and sometimes prescient, articles deal with the protection of the marine environment setting out general principles (for the first time in a multilateral treaty) and rules about competence for law-making and enforcement as well as on safeguards, making the Convention the framework for the existing and future universal, regional and bilateral agreements; and

j) detailed provisions concerning marine scientific research, based on the principle of consent of the coastal State, consent which should be the norm for pure research and discretionary for resource-oriented research.

The Convention has had a substantial impact on customary law. In view of the high number of States bound by it and of its influence on practice, it seems correct to say that there is a presumption that the non-institutional provisions correspond to customary law, unless the contrary is proven. The International Court of Justice, the International Tribunal for the Law of the Sea and arbitral tribunals have often applied the Convention, and sometimes they have done so as a reflection of customary law. This relationship between the Convention and customary law does not preclude new customary rules emerging;

however, when they are in contrast with the Convention, extreme caution is necessary before concluding that they have in fact emerged. States are keen to avoid that rules incompatible with the Convention are read as influencing customary law. This emerges in the cautionary language used in Security Council resolution 1816 of 2 June 2008 authorizing States to repress acts of piracy in the territorial sea of Somalia and not only on the high seas as specified in the Convention.

The Convention – differently from other codification conventions – has put its application and interpretation under the jurisdiction of international judges and arbitrators. Compulsory jurisdiction either of the International Tribunal for the Law of the Sea, of the International Court of Justice or of arbitral tribunals, is the rule, although with important limitations and exceptions. Cases submitted to adjudication on the basis of the Convention since 1994 prove that, although slowly, States are considering submission to judicial or arbitral settlement of their disputes as something normal in international maritime relations, not as a hostile act. A number of agreements concerning law of the sea matters, such as the 1995 United Nations Fish Stocks Agreement, have adopted the dispute-settlement provisions of the Law of the Sea Convention for the settlement of disputes concerning their application and interpretation, even when a party to the dispute is not a party to the Convention. These provisions may be seen as bridges making different law of the sea conventions a “system”.

The Convention presupposes a highly institutionalized world. Not only does it provide for the establishment of four institutions, the International Seabed Authority, the International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf and the Meeting of the States Parties to the Convention. It also entrusts existing organizations, in particular the International Maritime Organization, with a number of tasks and refers to their rules and standards or recommendations as criteria against which to assess the conformity to the Convention of domestic laws and regulations.

The Convention prefers stability to adaptability. The provisions on amendment and revision are extremely difficult to apply. Flexibility is entrusted to the interpretations judicial and arbitral bodies may adopt while settling disputes. In practice, some flexibility has been ensured by the Meeting of States Parties adopting by consensus changes to time limits established by the Convention, and by the possibility of adopting “implementing agreements”, on the model of the 1995 United Nations Fish Stocks Agreement, which, although not requiring that States parties coincide with those of the Convention, develop insufficiently detailed provisions of it, or areas not covered by it, while stating that they shall be interpreted and applied in the context of and in a manner consistent with the Convention.

Implementing and other agreements, together with the action of the United Nations General Assembly and of specialized institutions, such as the Food and Agriculture Organization and the International Maritime Organization, provide the mechanisms for updating the law of the sea and for meeting new challenges such as that posed by the legal regime of the genetic resources of the seabed beyond national jurisdiction. The Convention remains the recognized framework within which such developments occur and such challenges are met.

**Related Materials**

***Legal Instruments***

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 29 December 1972, United Nations, *Treaty Series*, vol. 1046, p. 120.

International Convention for the Prevention of Pollution from Ships, 2 November 1973 as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), London, 17 February 1978, United Nations, *Treaty Series*, vol. 1340, p. 61.

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995,

United Nations, *Treaty Series*, vol. 2167, p. 3.