

1998 - INTERNATIONAL YEAR OF THE OCEANS THE STATUS OF THE LAW OF THE SEA CONVENTION

*Margaret L. Tomlinson**

Good morning. Today is Friday the 13th. I have often thought that the Law of the Sea Treaty was born under the sign of Friday the 13th, if there is such a thing. Actually the unlucky day we are facing at the moment happens to be this coming Monday, November 16, at which time we stand to lose our provisional membership in the institutions created under the 1994 Agreement which, in effect, amended the 1982 Law of the Sea Convention, and enabled the United States to sign it, and send it to the Senate for its advice and consent, where it languishes still.

According to the program, this panel is to discuss accomplishments since the 1982 Law of the Sea Convention. My fellow panelists are indeed expert in the evolution of various institutions which have emerged from that Convention, and in a number of interesting current issues in the development of ocean law such as piracy and terrorism, environmental agreements, and conflicts between jurisdictional claims and navigational freedoms such as those that have erupted in the South China Sea, the Taiwan Straits, and elsewhere.

All of these developments arise from, or build upon, the Law of the Sea Treaty which was the beginning, not the end, of a continuing effort to build a rule of law in the world's oceans in the face of multiple uses and conflicting claims. I thought my role might be to set the stage for others on the panel by running through a quick historical overview of the long and torturous history of the negotiation of the Law of the Sea Convention. I do this with some trepidation before such an audience of experts in international law. But I have found that, except among people who follow this issue closely, the mention of the 1982 Convention elicits responses like those of the blind man and the elephant. What you touch is what you see. And because there is so much misunderstanding of what in fact this treaty is about I would like to review the whole, even if in very broad outline.

First a few basic facts. The Law of the Sea Convention entered into force in November of 1994 with the requisite sixty ratifications and after heroic efforts by the United States and others to achieve changes in the part of the 1982 Convention dealing with seabed mining, which would enable the United States to sign the treaty. These changes were embodied in what

* Margaret L. Tomlinson is the Chairman of the American Bar Association's Committee on the Law of the Sea. These comments were made at the International Law Weekend on November 13, 1998 in New York City.

is known as *the Agreement*, adopted at a special session of the United Nations General Assembly in July of 1994, at which time the United States signed the Agreement and the Convention. The Law of the Sea Convention has now been ratified by 127 states (there are several more in process which may by now be complete). These states included all members of the European community, except, I believe, Belgium, the Russian Federation, China, Japan, India, Indonesia, Argentina, Brazil, and so on around the world.

If some opponents of this treaty once believed that the United States should make selective bilateral or regional arrangements with like minded states, that option no longer exists. We are either a part of this now virtually universal treaty or we stand outside as an observer, as all of these related institutions and rules, which other members of this panel will talk about, begin to take shape.

While assessing these new institutions I think it is important to keep in mind that the treaty has not been ratified in the four years since it was sent to the Senate, and indeed there has not even been a hearing in the Foreign Relations Committee because of the opposition of its chairman, Senator Helms. This despite the fact that the United States, which arguably had the most at stake in the successful outcome of this negotiation, worked to that end on a bipartisan basis through three different administrations of both parties to achieve such an outcome; and still later, the Bush and Clinton administrations set forth and obtained changes which were essential to the United States' support and ratification of the treaty.

Does it matter? After all, some argue, we have gotten along so far without being a party to this Treaty. Well, yes, it does matter. Apart from all the specific problems that may arise from our status as an observer rather than a state party, what really matters most is the constriction of American leadership in a rapidly evolving construct of international law, and one which is here to stay, and one which continues to touch vital interests of the United States.

The overarching reason for American support for a universal treaty has been to preserve navigational freedoms in which we have a fundamental strategic interest, and to that end, to contain and rationalize claims of jurisdiction over offshore waters which, in the late sixties, were escalating rapidly. Those territorial claims threatened to overlap strategic waterways and straits around the world and, in effect, to subject navigation in the most important and often confined transit routes of the world's oceans to a regime of innocent passage at best. And while the American concern at the time was, and still is, to preserve naval and air mobility and flexibility - a strategic interest not shared by many other nations - it is interesting to me that as the global economy grows, more and more nations and more and more companies engaged in international trade are becoming aware that freedom of the seas and assured access to navigation routes is also vital to commercial shipping which carries a vast percentage of world trade.

In the 1970's the effort, under the aegis of the United Nations, to create a universal treaty, was not undertaken without trepidation as to our ability to protect our vital interests in such a diverse forum. And, in fact, in the late sixties the United States was engaged in some discussions with a few other countries with a view to further defining the 1958 and 1961 Geneva Conventions with respect to offshore claims. That effort to deal with specific issues came to an end when there was set forth in the United Nations General Assembly a vision of vast wealth from the mineral resources of the deep seabed which would provide a solution to the financial problems of developing countries if they were assured a share of this wealth. Hence the evolution of the so-called *package deal* in a treaty which would accommodate navigation and coastal resource interests would be negotiated in tandem with a regime protecting access for all to the hoped for riches of the *common heritage* of the deep oceans. Such a regime however, did have to deal fairly with certain economic requirements which in the end it failed to do, and thus, in 1982 the United States did not sign the treaty despite the remarkably successful achievement of all of our objectives with respect to navigation and coastal resource rights.

The issue of seabed mining has colored perceptions of this treaty ever since. But the reality is that the limitations on the extent of territorial sea to twelve miles, the protection of transit rights through and over and under international straits and other traditional waterways, and the accommodation of coastal state jurisdiction over economic resources in a 200 mile economic zone with preservation of traditional high seas freedoms of navigation, was an extraordinary accomplishment in retrospect, and one which was only possible because of vigorous American leadership. Had we not taken on such a leadership role despite some concerns about the nature of the forum, we would most surely have found ourselves now with a thousand points of darkness threatening to hinder navigation.

Today, with strategic doctrines which emphasize rapid response and deployment to areas of trouble in the world, those rights of transit, and the accompanying rights of overflight, remain a vital interest of the Department of Defense in the ratification of this treaty. The argument that we can and would maintain our rights by force if necessary, ignores the virtues of being on the side of universally accepted law when an issue arises. Not that there will not be disputes, but the acceptance of a framework of law has in most cases an inhibiting effect on flagrant violations of accepted norms. It is far easier to engage in efforts to assure compliance with accepted norms than it is to impose them by force. It is also cheaper.

Furthermore, as the use of the oceans continue to expand, as they have and will continue to do, it is not only the rules that are important but compliance with the rules, and therefore, access to dispute settlement procedures. These rules and procedures are already being designed. It is very likely - one might say even a certainty - that if we fail to take a leading role we will not like the results. There are a couple of current

object lessons in the Outer Continental Shelf Commission and the Law of the Sea Tribunal, both of which have come into being without official participation by the United States, and both of which deal with issues of concern to us.

Finally, in making the case for ratification it is necessary to deal with the unfortunate problem still presented by what was known as Part XI, or *the seabed mining section* of the treaty. I am reminded of the time, many years later, that I asked the principal United States negotiator of the 1958 Geneva Conventions why the issue of jurisdiction over resources of the continental shelf was left so vague. He said it was because we had no real idea of what might be possible there. Would that the Law of the Sea negotiators been as sensible, but this issue became an ideological mantra of the new international economic order of the 1970s, as a tradeoff for the navigation and coastal resource interests of developed countries. In the end the result was unacceptable to us. Too many people are still unaware that those provisions have been substantially and satisfactorily changed.

This came about in the late Eighties when it became evident that this Treaty was getting close to coming into force with the requisite sixty ratifications without the participation of any significant players, a result which would benefit no one. The then Secretary General initiated a new effort to see if and how the concerns of the United States and others could be accommodated so that the treaty could become the universal framework it was intended to be. First the Bush and then the succeeding Clinton administrations, once again a bipartisan decision, took a quiet but vigorous leadership role in negotiating *the Agreement*, officially known as "the 1994 Agreement Relating to Implementation of Part XI of the United Nations Convention on the Law of the Sea."

That Agreement specifically addressed, and resolved to the satisfaction of the American negotiators, the six specific objections that the Reagan administration had set forth in declining to sign the treaty in 1982, and provided a permanent seat and a de facto veto for the United States in the Council of the International Seabed Authority - a position we keep until Monday after which our status is problematic because of our failure to ratify the treaty within the four year framework that was established for participation on an interim basis by states which had signed but not yet ratified. Presumably this time frame can be extended by agreement of the states parties.

In essence, the Agreement substitutes for the original Part XI in every instance where its provisions are in conflict. And while one might wish that none of this structure be put in place until such time as seabed mining becomes a reality, a circumstance far more remote in time now than was anticipated in the 1970's, the fact is that it is a workable piece of a whole which is far more important. Unfortunately, the public and political perception of this treaty, to the extent there still is one, is that it is all some third world concoction about seabed mining.

It is, of course, a little embarrassing, as well it should be, that the United States having insisted upon, and obtained, every one of its specified *fixes* to Part XI has now failed even to conduct a hearing on the whole treaty. But embarrassment is bearable and hopefully temporary; and alas, not all that unusual a fate of treaties in the Senate. What is less bearable and far less defensible is a prospective failure of the United States to continue its leadership role in this truly global evolution of law of the oceans. When the cat's away is not an inappropriate analogy here.

This is an audience which, far more than most, understands that international law is not a fiction, and that the U.S. role in building it is one of great consequence both to our own country and to the strength of the international system we have done so much to create.

To use the current cliché, "we are the world's only remaining superpower." To the extent that our interests are threatened anywhere in the world we will take appropriate action to defend them. We do not know how that role will evolve in the next century. What we do know is that man's move into the oceans is continuing. What we also know now, because of the ratification of this treaty by all the other significant members of the international community, is that the Law of the Sea Convention will be the framework for the evolution of ocean law whether we are its leader or not.

Whatever may have been the merits of arguments in the past for bilateral negotiations, or some other alternative to a universal convention, those options no longer exist. It is difficult to conceive of any reason why the United States should not ratify this treaty, and do it now. As the members of this panel talk about new institutions and emerging problems, keep in mind that we may be a three hundred pound gorilla observing the proceedings, but an observer is what our status is. It is not one worthy of what we have at stake.

Thank you.