The Montego Bay Convention 40 years on…

By Patrick Hébrard, Vice-admiral (retired), Board member of EuroDéfense-France

Advocates of the freedom of the seas and supporters of their control or even appropriation have long been at loggerheads. When Grotius published his doctrine on the freedom of the seas in defence of Dutch commercial interests, the English countered with the Navigation Act, which decreed that only ships flying the English flag could berth in British ports, a dispute that culminated in the first Anglo-Dutch war. Once their supremacy had been secured, the English wasted no time in embracing Grotius's ideas and in promoting freedom of the seas under their dominion. Implicit agreement was reached at the time on a distance for territorial waters of 3 nautical miles under what was called the "cannon shot" rule. Beyond that limit, the term "high seas" and the principle of "freedom" applied.

Work on the modern Law of the Sea began at the 1930 Hague Conference and was pursued from 1958 in the United Nations Conference on the Law of the Sea in Geneva. This resulted in adoption of four conventions, including one on the high seas. On 10 December 1982, these four separate texts were combined to form the single-document Montego Bay Convention.

Signed on 10 December 1982, the Convention came into force in November 1994, following its ratification by 60 states. Today, the number stands at 167 (168, counting the European Union), the notable exception being the United States of America.

One of the good things about the Montego Bay Convention was that it successfully struck a balance between respecting the "territorial" needs of coastal states and protecting the freedom of navigation defended by the maritime powers. While territorial waters extend to 12 nautical miles from the coast, the right of innocent passage through these waters remains an obligation. As a counterpart, exclusive economic zones (EEZ) have been established over which states have sovereign rights and jurisdiction but not sovereignty, because freedom of navigation remains the rule and the law of the flag state therefore applies.

The high seas, in other words international marine waters more than 200 nautical miles from the coast, or from other accepted baselines in the case of continental shelves, represent 61% of the surface area of our oceans and remain outside the sovereignty of individual states. All are free to navigate and overfly the high seas, to lay underwater cables and pipelines and engage in fishing. Flag state laws apply. The only regulations in force are those pertaining to piracy and the slave trade, both of which are illicit. Policing must be carried out by military or equivalent vessels and aircraft. These can also intervene against jamming and unauthorised radio emissions. The 1988 Vienna Convention introduced further measures to fight against drug trafficking, while the 2000 Palermo Protocol addressed migrant trafficking.

The seafloor of the high seas, referred to as the "Area", is part of mankind's common heritage and may only be exploited for the benefit of mankind as a whole. Article 137 of the Montego Bay Convention states: *"No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof."* It must, however, be admitted that the notion of common heritage remains vague.

To safeguard the seabed and its future exploitation, an International Seabed Authority has been established for purposes of granting concessions to national companies and sharing the financial and other economic benefits. To date, it has signed thirty-one 15-year contracts for the exploration of seabed resources in the Area. However, no practical solution has yet been found for distributing these benefits, with the result that, while exploration

rights have been awarded to countries (including France) that have requested them, no high sea exploitation rights have yet been granted.
A “mining code” is being developed by the International Seabed Authority to set out regulations for prospecting, exploring and exploiting mineral resources in the international seabed Area. This code currently only applies to nodules.

The Convention also addressed the issue of preserving the marine environment, both on the high seas and in those areas over which individual states exert their sovereignty. “States have the obligation to protect and preserve the marine environment.” (Article 192). Through this principle of responsibility, the Convention creates a continuum between the heritage of States and that of mankind, although this is an area where work remains embryonic. In 2013, the signatory States of the London Protocol adopted an amendment on marine geo-engineering. Any deliberate attempt to tamper with natural processes in the marine environment has to undergo risk analysis and requires authorisation.

Although regulated by the Convention, maritime spaces remain a major strategic challenge. The battle to appropriate resources is therefore underway and could undermine a Convention still not ratified by the United States of America and whose interpretation by China is incompatible with some of its principles.

The United States of America
American distrust of the Convention dates back to President Ronald Reagan, who, at the time, tasked Donald Rumsfeld with discouraging a number of countries from ratifying it. When, in the early 1990s, the US realised that the quorum of 60 signatory states required for the Convention to come into force would be reached, it took steps to introduce amendments to some of the articles, in particular those in Part XI concerning the "Area" and exploitation of the seabed. Negotiations with the UN Secretary General culminated in August 1994 in the signature of a Resolution by the General Assembly on the application of Part XI. The resulting Agreement enabled the United States to participate in the International Seabed Authority on a provisional basis pending its ratification of the Convention, a step it has since failed to take. Since then, three US Presidents (Clinton, Bush, supported on this occasion by Rumsfeld, and Obama) have tried and failed to obtain Senate ratification.

The reasons given by senators for not ratifying the Convention have often amounted to little more than domestic policy. The Foreign Relations Committee, responsible for putting this issue on the agenda, simply ignored it as long as Senator Jesse Helms was in the chair, in other words until 2003. His successor, Senator Richard Lugar, initiated the procedure that should have led to ratification, given the very favourable opinions gathered. But the process was met by fierce opposition from Republican senators, who argued against ratification on the following three grounds:

- Freedom of action of the US Navy was vital to the defence of US territories and interests and could be curtailed by the Convention, the expression “emasculate military and defence initiatives” being used.
- Redistribution of the resources in the “Area” on the “common good of mankind” principle went against US economic interests and gave the UN total control over this redistribution.
- Freedom of navigation was vital for global trade, which could also be limited by the Convention and the oceans could fall prey to bureaucratic red tape.

While the US adopted regulations consistent with the Convention (territorial waters, EEZ, etc.) and ratifying the Convention would have enabled the country to defend its interests, officials from the world’s greatest naval power were disinclined to be bound by a Convention that would require it to relinquish even a modicum of sovereignty. US absence from the international bodies responsible for governing the Law of the Sea undermines the authority of these agencies and leads other countries to turn a blind eye to the law when it runs counter to their interests, opting instead for a “business as usual” policy.

China

China ratified the Montego Bay Convention in 1996. Like other countries, it had reservations with regard to the arbitration of boundary disputes and military activities. Until the early 2000s, China was rather quiet on the subject of international law, but this has changed over the past two decades. The Chinese government has decided to play a greater role in international legal standards. While it is strongly in favour of market globalisation, from which it stands to gain, it is highly critical of the current world order defined by the West.

China bends its interpretation of the Law of the Sea to suit its interests, concurring with the law with regard to the Arctic but not with regard to waters closer to home, such as the China Sea. It considers its 877,000 km² EEZ (3,800,000 km², if disputed areas are included) insufficient in relation to the country's size, population and status. China has been particularly active in defending its interests over seabed mining. Anne-Mary Brady, a professor of political science specialising in China at the University of Canterbury in New Zealand, is wont to refer to the words of a Chinese official for whom, China being home to one fifth of the world's population, it should surely be entitled to one-fifth of these common goods.

The UN

The Montego Bay Convention was a landmark achievement. It managed to preserve the freedom of the seas while calming the appetites of coastal States. However, it was drawn up in 1982 and is now in need of some extra clauses to take account of the new challenges that have emerged, at least in the three following areas:

- maritime security and the fight against trafficking and other threats on the high seas, for which the arsenal of legal possibilities remains insufficient;
- environmental protection, as the Convention currently only mentions fishery resources and pollution, and needs to be extended to sustainable development; and
- maritime zones, where the wording of the Convention leaves room for interpretation and, therefore, dispute.

In their awareness of these issues, the UN and member states considered that action to protect the oceans should be added to the Convention, the goal being to "preserve and use the oceans, seas and marine resources sustainably." A first conference took place in 2017. For Serge Ségura, French Ambassador for the Oceans: "The main challenge is to make it finally clear that the high seas are not a lawless zone... and to define the scope of the freedom provided by the Convention."

Four topics were on the agenda:

- marine genetic resources and sharing the benefits obtained from their use,
- area-based management tools, including the issue of protected high sea marine areas,
- environmental impact studies in these marine environments,
- capacity building and technology transfers.

The fifth conference, which should have been the last, ended on 26 August 2022 without agreement, in particular with regard to sharing the potential benefits obtained from exploiting high sea genetic resources and to establishing protected marine areas.

Although a number of measures seem to have been met with a substantial degree of approval, differences remain legion in the approaches of developed countries, the group of 77 developing countries (which in fact now has 134 members), China, Japan and Russia.

Conclusion

Protecting the oceans and access to resources is a matter of necessity, which will inevitably signal a break with the principles defined by Grotius and gradually lead to the emergence of high seas governance and restrictions on freedom. Ensuring due respect for this common good of mankind is not yet guaranteed, but France, with its long-standing maritime heritage, must leverage the Integrated Maritime Policy of the European Union to work

towards this goal. For this, it will be vital to consult our partners on all possible occasions. We need to bring them on board with our plans for regional maritime governance on the oceans bordering our country so that we can join forces with them in exploiting resources reasonably and sustainably, without giving up our rights in our EEZs. We must also come to terms with the relative vulnerability of our rights and create opportunities for co-managing these areas with those island states with which we have sovereignty disputes.

The Convention governing the Law of the Sea provides a framework for sustainable development of activities on the seas while protecting the oceans. Even though amendments will have to be made to allow for global warming and scientific breakthroughs in our knowledge of the oceans, we will need to ensure that all the countries that have ratified the Convention remain diligent over its application.

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November 2022

Note added subsequently by the author: *On 4 March 2023, the United Nations adopted the international treaty on "the conservation and sustainable use of marine biodiversity in areas not under national jurisdiction" following five years of negotiations.*

Article translated into English by students at ISIT Paris, and proofread by Christine Cross (EuroDéfense-France Council member).