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International Law of the Sea

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The Law of the Sea was at the forefront of international legal developments in 2007. As the U.N. Convention on the Law of the Sea (UNCLOS) marked the twenty-fifth anniversary of its opening for signature, the Bush Administration decided to give the treaty a fresh hearing in the United States. With that support, the treaty was referred by the Senate Foreign Relations Committee to the full Senate, where, at the time of this writing, it awaits an uncertain future. Meanwhile, rising temperatures and melting ice brought the Arctic region—and competing claims to its undersea resources and navigable waterways—to the world's attention. In addition, international tribunals resolved several international maritime disputes, and the fight against piracy continued in the face of a rising number of attacks.

I. U.N. Convention on the Law of the Sea

A. RATIFICATION EFFORTS IN THE UNITED STATES[1]

In 2007, the almost universal support among U.S. leaders for ratification of UNCLOS yet again came under fierce attack by a far right opposition spreading unfounded fears that ratification would represent a giveaway of U.S. sovereignty. To recapitulate for those who have not followed this saga, UNCLOS was opened for signature in 1982,[2] and although the United States was closely involved with the decade-long negotiations that produced the treaty, the Reagan administration objected to provisions dealing with deep seabed mining and declined to sign the final text. Contrary to the allegations of present-day opponents to ratification, President Reagan did not oppose the rest of the treaty, and his Secretaries of State—James A. Baker III and George P. Schultz—expressed their support for ratification in 2007.[3]

During the 1990s, a new round of negotiations repaired the treaty's objectionable sections and the resulting Agreement Relating to the Implementation of Part XI of the Con-

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1. Margaret L. Tomlinson, Chair, Law of the Sea Committee, contributed this section on ratification efforts.

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

3. James A. Baker III & George P. Shultz, *Why the "Law of the Sea" Is a Good Deal*, WALL ST. J., Sept. 26, 2007, at A21.

vention (the "Part XI Agreement"), which deals with exploitation and management of the deep seabed, was opened for signature in 1994.[4] President Clinton signed UNCLOS and the Part XI Agreement that year and submitted the treaty to the Senate for its advice and consent. No further action was taken by the United States at that time, but UNCLOS achieved the requisite number of signatures to enter into force, and no adverse consequences have appeared in the thirteen years since that event.

Meanwhile, further action in the Senate was blocked for many years by the then chairman of the Senate Foreign Relations Committee, Senator Jesse Helms (R-N.C.). In 2004, absent Senator Helms, then chairman Senator Richard Lugar (R-Ind.)—a strong UNCLOS supporter—secured a rare unanimous vote by the Foreign Relations Committee to send the treaty to the floor of the Senate for a full vote. However, Senator Bill Frist (R-Tenn.), then majority leader, declined to put it on the calendar.[5]

Fast forward three years. In May 2007, President George W. Bush urged Senator Joe Biden (D-Del.), the new chairman of the Foreign Relations Committee, to take action on the treaty during that session of Congress.[6] President Bush summarized four principal reasons that the United States should ratify UNCLOS:

> First, the President noted that the Convention advances the national security interests of the United States, "including the maritime mobility of our armed forces worldwide." Second, he indicated that the Convention would "secure U.S. sovereign rights" over extensive marine areas and the valuable natural resources they contain. Third, he stated that accession would "promote U.S. interest in the environmental health of the oceans," an issue of increasing concern. Finally, President Bush noted that acceding to the Convention would give the United States "a seat at the table when the rights that are vital to our interests are debated and interpreted."[7]

The drive towards ratification received additional momentum in the form of a letter to the majority and minority leaders of the Senate from one hundred national leaders—including governors and former statesmen, foundation presidents, and heads of numerous industry and environmental groups—in strong support of ratification.[8] The American Bar Association also submitted a statement supporting the treaty,[9] and numerous newspapers urged the Senate to end the hold out status of the United States.[10]

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4. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 41.

5. *See* John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1, 2 (2005-06).

6. Press Release, The White House, President's Statement on Advancing U.S. Interests in the World's Oceans (May 15, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html.

7. David D. Caron & Henry R. Scheiber, *The United States and the 1982 Law of the Sea Treaty*, ASIL INSIGHTS, June 11, 2007, *available at* http://www.asil.org/insights/2007/06/insights070611.html.

8. Letter from James D. Watkins, Admiral, U.S. Navy (Ret.), et al., to Senators Harry Reid and Mitch McConnell (Sept. 24, 2007), *available at* http://www.oceanlaw.org/index.php?name=News&file=article&sid=50.

9. Letter from William H. Neukom, President, Am. Bar Ass'n, to Senator Joseph Biden, Chairman, U.S. Senate Comm. on Foreign Relations (Sept. 27, 2007), *available at* http://www.abanet.org/intlaw/leadership/policy/ABA_Statement_in_Support_of_Convention_on_the_Law_of_the_Sea_9-27-07.pdf.

10. *See, e.g.*, Editorial, *Sea Treaty Needs Safe Passage*, CHRISTIAN SCI. MONITOR, Nov. 2, 2007, at 8; Editorial, *Twenty-Five Years and Counting*, N.Y. TIMES, Oct. 31, 2007, at A22; Editorial, *Unbury this Treaty: The*

In September and October 2007, the Senate Foreign Relations Committee heard testimony from government and private sector witnesses,[11] and on October 31, 2007, the Committee approved the treaty by a seventeen to four vote and referred it to the full Senate for a vote.[12] In advance of the vote, Senator Biden offered the following remarks:

> The Convention is long and complex, but for the United States, I believe the choice is relatively simple. Do we join a treaty that establishes a framework to advance the rule of law on the oceans, that is clearly in our military, economic, and environmental interests, and that has broad acceptance among the major maritime powers? Or do we remain on the outside, to the detriment of our national interests? I strongly believe that we should become a party to the Convention, and that any risks it poses are far outweighed by the benefits.[13]

As of early December 2007, however, no vote by the full Senate had yet been scheduled.

The lack of unanimity reflected by the seventeen-to-four vote by the Foreign Relations Committee—a step back from the unanimous nineteen-to-zero vote in 2004—reflected the addition of several new Republican senators to the Committee. Following the vote, several Republican senators who are not on the Committee asked President Bush to withdraw his support.[14] In addition, Senator John McCain (R-Ariz.), a long-time UNCLOS supporter, reversed his position and signaled his opposition to the treaty, following the lead of all the Republican presidential candidates.[15] The situation was further complicated by the fact that twenty-two Republican senators facing re-election in 2008 saw their constituents flooded by opposition fear-mongering.

Ultimately, the wide-ranging support for UNCLOS ratification appeared largely unavailing in the face of a virulent grass roots campaign of fear and misrepresentation by the

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Senate Can Protect American Interests By Ratifying The Law of the Sea Convention, WASH. POST, Oct. 31, 2007, at A18.

11. At the hearing held on September 27, 2007, Deputy Secretary of State John D. Negroponte, Deputy Secretary of Defense Gordon England, and Admiral Patrick. M. Walsh, Vice Chief of Naval Operations, urged ratification of the treaty. *See The U.N. Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 1 (2007) [herinafter "*Hearings*"] (statements of John D. Negroponte, Deputy Secretary, Department of State, et. al.), *available at* http://foreign.senate.gov/hearing2007.html. Additional witnesses testified at a second session held on October 4, 2007. *See The Convention on the Law of the Sea: Hearing Before S. Comm. on Foreign Relations*, 110th Cong. 1 (2007) (Admiral Vern Clark, U.S. Navy (Ret.), Former Chief of Navy Operations, et. al.), *available at* http://foreign.senate.gov/hearing2007.html.

12. Jim Abrams, *Senate Panel Backs Sea Treaty*, ASSOCIATED PRESS, Oct. 31, 2007, *available at* http://abcnews.go.com/Politics/wireStory?id=3801532; Kevin Drawbaugh, *Senate Panel Backs Law of the Sea Treaty*, REUTERS, Oct. 31, 2007, *available at* www.reuters.com/article/latestCrisis/idUSN31335584. UNCLOS was backed by all eleven Democrats and by six Republicans but was opposed by Senators Jim DeMint (R-S.C.), Norm Coleman (R-Minn.), Johnny Isakson (R-Ga.), and David Vitter (R-La.).

13. Press Release, Joseph R. Biden, Opening Statement: Senate Foreign Relations Business Considers the Convention on the Law of the Sea, (Oct. 31, 2007), *available at* http://biden.senate.gov/newsroom/details.cfm?id=286463&&.

14. The letter was signed by Senators John Cornyn (R-Tex.), Mitch McConnell (R-Ky.), Trent Lott (R-Miss.), Jon Kyl (R-Ariz.), Kay Bailey Hutchison, (R-Tex.), and John Ensign (R-Nev.). *See* Press Release, Senator John Cornyn, Cornyn Joins Senate Republican Leaders in Urging Delay of Law of the Sea Treaty (Nov. 1, 2007), *available at* http://cornyn.senate.gov/public/index.cfm?FuseAction=ForPress.NewsReleases.

15. *See* Stephen Dinan, *Law of the Sea Treaty Draws GOP Focus*, WASH. TIMES, Oct. 26, 2007, at A1; Editorial, *The Board: Out to Sea on Law of the Sea*, N.Y. TIMES, Nov. 2, 2007, *available at* http://theboard.blogs.nytimes.com/2007/11/02/out-to-sea-on-law-of-the-sea.

opposition—attacks that were regrettably adopted by some mainstream media.[16] Procedurally, opposition tactics included attempts to delay action on the treaty beyond the session and to produce a letter of opposition demonstrating the lack of the necessary votes to win Senate approval. Notably, the rationale of the opposition varied from day to day. At one point, it focused on the UNCLOS dispute settlement provisions, which are, in fact, similar to the dispute resolution provisions in numerous other treaties to which the United States is a party. Furthermore, those provisions do not apply to military actions and do not create private rights of action. Importantly, despite persistent attempts by treaty opponents to suggest the contrary, the treaty does not create a U.N. bureaucracy or sign away U.S. interests or sovereignty to the International Seabed Authority or any other intergovernmental body.

On the plus side, the recent flurry of claims to the continental shelf beyond 200 miles in the Arctic (as discussed below) has focused attention on the immediate importance of the treaty, which provides an elaborate mechanism for certifying claims and resolving those that conflict. The United States has extensive continental shelf claims off the coast of Alaska, but, as the only Arctic nation not a party to UNCLOS, has no seat at that table. Not surprisingly, UNCLOS is supported by both of Alaska's Republican senators.

In sum, the need for U.S. ratification of UNCLOS took on new urgency in 2007 but was met with familiar old tricks by a small but vocal opposition bent on thwarting the treaty and its multilateral approach to oceans management, despite the costs.

B. Ratification of UNCLOS and Related Agreements by Other States

Overall, the number of other states to have ratified UNCLOS continued to grow. Three additional states—Moldova, Morocco, and Lesotho—acceded to the Convention, bringing the total number of parties to 155.[17] Those three countries, as well as Brazil and Uruguay, also ratified the Part XI Agreement, which 131 countries have now joined.[18] In addition, the Czech Republic, Latvia, Lithuania, and Romania ratified the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which now counts sixty-seven states parties.[19]

C. Commission on Limits of the Continental Shelf

Article 76 of UNCLOS defines the continental shelf and sets forth the procedures for determination of its outer limit where the shelf extends more than 200 nautical miles from

16. *See, e.g.*, Editorial, *Hot Topic: A Sinkable Treaty*, Wall St. J., Nov. 3, 2007, at A8; Lou Dobbs, *Beware the Lame Duck*, CNN.com, Oct. 17, 2007, *available at* http://www.cnn.com/2007/US/10/16/Dobbs.Oct17/index.html.

17. *See* Oceans and Law of the Sea, http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm (last visited Feb. 25, 2007).

18. *Id.*

19. 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, Aug. 4, 1995, 2167 U.N.T.S. 88.

the coastal state.[20] Claims to the continental shelf are administered by the Commission on Limits of the Continental Shelf (the "Commission"), which was established pursuant to UNCLOS Annex II and acts as "[t]he policeman who oversees the application of Article 76."[21] A state must submit its application to the Commission within ten years of the Convention's entry into force for that state.

In 2007, the Commission continued to review pending applications by Australia, New Zealand, and the joint partial submission made by France, Ireland, Spain, and the United Kingdom in 2006,[22] and it adopted recommendations regarding a pending Brazilian claim.[23] In addition, the Commission began its review of new submissions by Norway—dealing in part with Arctic claims—and by France.[24]

II. Developments in the Arctic

The unprecedented retreat of the polar ice cap during 2007 provided additional evidence of the effect that global climate change is having on the region. In short, the ice is melting.[25] As a result, previously inaccessible areas of the Arctic seabed are becoming reachable, an important development because experts estimate that the region may hold anywhere from 6 to 25 percent of the world's oil and natural gas resources.[26] In addition, previously icebound shipping lanes through the region may soon be clear enough to permit the regular transit of cargo vessels.

A. The "Scramble" for Underseas Resources

Eight countries—Canada, Denmark, Norway, Russia, Sweden, Iceland, Finland, and the United States—have Arctic Ocean coastlines and, accordingly, may have claims to the continental shelf that extends more than two hundred nautical miles from those coasts. Some of those countries, including the United States, are currently compiling the scientific data needed to substantiate claims to the continental shelf.[27] Russia, however, grabbed the biggest headlines in 2007 by planting a titanium Russian flag into the seabed

20. UNCLOS, *supra* note 2, art. 76. *See also* David A. Colson, *The Delimitation of the Outer Continental Shelf Between Neighboring States*, 97 Am. J. Int'l L. 91 (2003).

21. Colson, *supra* note 20, at 93.

22. *See* The Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea*, ¶ 34, *delivered to the General Assembly*, U.N. Doc. A/62/66/Add.1 (Aug. 31, 2007) *available at* http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm.

23. The Chairman of the Commission on the Limits of the Continental Shelf, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, ¶¶ 14-22, U.N. Doc. CLCS/54 (Apr. 27, 2007.

24. Norway's application, which was submitted in late November 2006, deals with three separate areas in the North East Atlantic and the Arctic. The French application relates to the continental shelf extending from New Caledonia and French Guiana. *See* Commission on the Limits of the Continental Shelf, http://www.un.org/Depts/los/clcs_new/clcs_home.htm (last visited Feb. 25, 2008).

25. *See* Andrew C. Revkin, *Arctic Melt Unnerves the Experts*, N.Y. Times, Oct. 2, 2007, at F1; James Kraska, *The Law of the Sea Convention and the Northwest Passage*, 22 Int'l J. Marine & Coastal L. 257, 257-59 (2007).

26. Richard R. Burgess, *Cold War? Melting of Ice Spurs Maritime Activity as Nations Rush to Stake Claims for Potential Arctic Resources*, Sea Power, Oct. 2007, at 15. More recent estimates lean towards the more conservative figure. *Id.*

27. *Id.*

at the North Pole.[28] Although the stunt represented an impressive technical achievement, a consensus quickly developed that the flag-planting feat was more a piece of political theater than a legitimate means of staking a legal claim. The Canadian foreign minister, for example, commented that "[t]his isn't the 15th century. . . . You can't go around the world and just plant flags and say[,] 'We're claiming this territory.'"[29] As The Economist newspaper explained:

> For all the historic resonance of Russia's flag-planting foray, the current dash to the Arctic is not—or, at any rate, not yet—a simple race to create "facts on the ground" which can then be consolidated, and if necessary defended, by military power. It has more to do with the establishment of legal arguments, which have to be shored up by scientific data.[30]

In reality, the action served as a notice to the rest of the world of what Russia believes the scientific evidence will ultimately support—its claim that the Lomonosov Ridge beneath the Arctic Ocean, which extends from the Russian coast to Greenland, is an extension of the Eurasian continent. Russia's initial claim to that territory in 2001 was rejected by the Commission because Russia had not at that stage sufficiently developed the scientific case for its claim. As the situation develops, Russia may encounter particular opposition from Denmark, which sees the ridge as extending outward from Greenland.[31]

B. Legal Status of the Northwest Passage

Also in 2007, the legal status of the Northwest Passage—a long simmering dispute between Canada and several other countries, including the United States—resurfaced as an issue of public concern.[32] The Northwest Passage consists of a series of straits and channels—bordered by Canadian lands—connecting the Atlantic and the Pacific Oceans through Arctic waters, a route that can trim 9,000 kilometers from the journey a cargo vessel makes when transiting the Panama Canal.[33] Canada views the waterways that comprise the sea route as "historic internal waters" over which Canada exercises complete sovereignty; that position is at least partly motivated by concerns that substandard vessels transiting the passage may pose safety or environmental risks. The United States and the European Union, however, have long taken the position that the Northwest Passage is an international strait and that vessels have the right to navigate the passage without Canadian interference.[34] Interestingly, one commentator has suggested that the "outcome of

28. C.J. Chivers, *Eyeing Future Wealth, Russians Plant Flag on the Arctic Seabed, Below the Polar Cap*, N.Y. Times, Aug. 3, 2007, at A8.

29. *Id.*

30. *The Arctic: Drawing Lines in Melting Ice*, Economist, Aug. 15, 2007, at 51.

31. *See* Burgess, *supra* note 26, at 15.

32. For a concise history of U.S.-Canada negotiations over the legal status of the Northwest Passage as well as a legal analysis of the competing positions, see Kraska, *supra* note 25. In short, the United States has twice previously sent vessels through the passage on an unannounced basis, each time raising Canadian objections. Since the transit of the *Polar Sea*, a U.S. Coast Guard icebreaker, in 1985, the United States and Canada have abided by an informal arrangement pursuant to which the United States provides advance warning to Canada of vessels that will be transiting the passage, and Canada refrains from interfering.

33. *See* Kraska, *supra* note 25, at 258.

34. Pursuant to UNCLOS Articles 44 and 45, vessels are entitled to innocent passage through territorial seas and "to the more robust right of non-suspendable transit passage in international straits." *Id.* at 263.

the debate may not be as critical as some would believe" because Canada's acknowledgment of the passage as an international strait would allow it to develop regulations under the auspices of the International Maritime Organization (IMO) that likely would achieve "compliance with Canadian regulations for enhanced safety, security, and environmental protection of the passage."[35]

Nonetheless, Canada has charged ahead with efforts to assert a more visible military presence in the Arctic in support of its legal position. In August, Canadian Prime Minister Stephen Harper announced that Canada would construct "two new military facilities within contested Arctic waters to bolster its" claim to sovereignty over the passage.[36] That announcement came on the heels of an earlier statement in which Harper had backed off of "an election promise to put powerful armed icebreakers in the Arctic," instead opting for a "more versatile" fleet of "six to eight Canadian-made patrol ships capable of operating in ice up to a metre thick."[37] It remains unclear whether Canada's initiatives are a reflection of domestic politics or if Canada actually intends to begin stopping or seizing vessels passing through the Northwest Passage now that some amount of vessel traffic—at least during the summer months—is taking place.[38]

III. Decisions by International Tribunals

A. International Court of Justice: Nicaragua v. Honduras

In October 2007, the International Court of Justice (ICJ) rendered a final judgment in Territorial and Maritime Disputes between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*).[39] Nicaragua initiated the proceedings in December 1999 in order to resolve a long-running dispute—with its origins in the nineteenth century—concerning the maritime boundary separating the areas of the territorial sea, the continental shelf, and the exclusive economic zone of Nicaragua and Honduras in the Caribbean Sea. Nicaragua asserted that no maritime boundary had ever been delimited. In response, Honduras contended that the 15th parallel constituted a traditionally recognized boundary dating back to the era of colonial administration over the territories. Citing the principle of *uti possidetis juris*, Honduras urged the ICJ to respect the boundaries inherited at decolonization and to confirm the 15th parallel as the relevant boundary line. In addition, the parties sought a determination as to which country possessed sovereignty over certain islands north of the 15th parallel.[40]

35. *Id.* at 259-60.

36. *New Arctic Bases Will Stress Sovereignty Claim*, Globe & Mail (Toronto), Aug. 11, 2007, at A6.

37. Ian Bailey, *Harper Plans Arctic Patrol Fleet*, Globe & Mail (Toronto), Jul. 10, 2007, at A1.

38. During an August 2006 training exercise involving warships and icebreakers at the eastern entrance to the passage, Canadian forces did conduct a mock interdiction. *See* McKenzie Funk, *Cold Rush: The Coming Fight for the Melting North*, Harper's, Sept. 1, 2007, at 45.

39. Territorial and Maritime Disputes Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 I.C.J. 120 (Oct. 8, 2007). *See generally* Pieter Bekker & Ana Stanic, *The ICJ Awards Sovereignty over Four Caribbean Sea Islands to Honduras and Fixes a Single Maritime Boundary between Nicaragua and Honduras*, ASIL Insights, Oct. 17, 2007, *available at* http://www.asil.org/insights/2007/10/insights071017.html.

40. Nicar. v. Hond., 2007 I.C.J. 120 at ¶¶ 72-73.

First, the ICJ concluded that the four disputed islands were the sovereign territory of Honduras but not on the basis of *uti possidetis*.[41] The court found that neither party could establish that Spain—the former colonial power—had allocated the disputed islands to either country.[42] Instead, the court identified several post-colonial *effectivités* that favored the Honduran claim. Namely, Honduras had enforced its criminal and civil law on the disputed islands, regulated immigration (e.g., had issued work permits to Jamaican and Nicaraguan nationals living on the islands), and issued fishing permits with respect to the surrounding waters. Honduras had also granted the United States permission to fly over the islands in 1993. These *effectivités* were found to "constitute a modest but real display of authority over the four islands."[43]

With respect to the maritime boundary, the ICJ found that the 15th parallel did not constitute a maritime boundary on the basis of *uti possidetis juris* or "tacit agreement" between the states.[44] With no historical basis on which to make the delimitation, the court established the boundary itself by drawing a bisector line based on "the angle created by the linear approximations of coastlines."[45] The ICJ further adjusted the course of that line to account for the twelve mile breadth of territorial sea surrounding the islands that had been allocated to Honduras. The starting-point of the maritime boundary, however, was set at a fixed point three nautical miles out to sea because of uncertainty surrounding the exact endpoint of the land boundary—marked by the River Coco—between Honduras and Nicaragua; that uncertainty stems from considerable instability at the river's mouth on the Atlantic coast. Accordingly, the court instructed the parties to negotiate in good faith to determine the maritime boundary between the endpoint of the land boundary and the starting-point of the maritime boundary as fixed by the decision.[46]

Commentators noted that although the ICJ "confirmed that equidistance remains the general rule for the delimitation of the territorial sea," that method "'does not automatically have priority over other methods of delimitation' when it comes to fixing an all-purpose boundary covering the territorial sea, the exclusive economic zone, and the continental shelf."[47] This decision may be of particular interest to other states with pending maritime delimitation claims before the ICJ, including the disputes between Nicaragua and Colombia—which was scheduled to be decided in December 2007—and between Romania and Ukraine.

41. *Id.* ¶¶ 227-36. The ICJ could have refused to consider that question because it was not submitted in the original application, but "the Court concluded that its jurisdiction to decide the sovereignty of the islands was inherent in Nicaragua's original claim." Bekker, *supra* note 39. The islands' sovereignty was of particular importance because the territorial sea around the islands—with a breadth of twelve nautical miles—affected the placement of the maritime boundary. *Id.*

42. Nicar. v. Hond., 2007 I.C.J. 120 at ¶¶ 146-67.

43. *Id.* ¶¶ 168-208.

44. *Id.* ¶¶ 236, 258.

45. *Id.* ¶ 287. The Court determined that several geographic factors made it inappropriate to apply the provisions of Article 15 of UNCLOS, which calls for the provisional drawing of a median or equidistance line subject to possible adjustment with regard to "special circumstances." *Id.* ¶¶ 280-81. Instead, the Court adopted the bisector method as a substitute. *Id.* ¶ 298.

46. *Id.* ¶¶ 306-19.

47. Bekker, *supra* note 39.

B. International Tribunal for the Law of the Sea: Prompt Release Cases

The International Tribunal for the Law of the Sea (ITLOS)—the dispute resolution body established by UNCLOS—rendered final judgments in two "prompt release" cases between Japan and the Russian Federation. In addition, the Tribunal adopted a resolution in March to form a standing special chamber of eight ITLOS members to deal with maritime delimitation disputes.[48]

1. *The "Hoshinmaru" Case (Japan v. Russian Federation)*

This dispute arose from the detention of the fishing vessel *Hoshinmaru* by Russian authorities for the alleged infringement of national fisheries legislation in the Russian exclusive economic zone.[49] Unlike previous prompt release cases before ITLOS involving unlicensed fishing, this case arose from allegations that the *Hoshinmaru* had misreported its catch—twenty tons of raw sockeye salmon—as the cheaper chum salmon. Russia viewed the underlying violation as a "classic manifestation of illegal, unreported and unregulated fishing."[50] The Tribunal's decision, however, turned on whether the bond set by Russia, the detaining state, was reasonable. Pursuant to UNCLOS Article 73, "[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security."[51] The failure of the detaining state to comply with Article 73 provides the basis for the flag state of the detained vessel to submit an application to ITLOS for its prompt release.[52]

Japan filed an application pursuant to UNCLOS Article 292 for the prompt release of the *Hoshinmaru* on July 6, 2007. One week later—more than five weeks after the vessel's initial detention—Russia set the bond for its release at 25,000,000 roubles (approximately U.S. $980,000). That amount was later reduced to 22,000,000 roubles.[53]

Russia asserted that such a bond was reasonable based on the potential fines to which the vessel would be subject, the value of the vessel, and costs incurred by the Russian investigating authorities. That approach, Russia contended, was consistent with the framework of the Russian-Japanese Commission on Fisheries. The Tribunal, however, found that (1) Russia had failed to establish that Japan consented to those procedures for calculation of a bond, and (2) it was not reasonable for the amount of a bond to be based on the "maximum penalties which could be applicable to the owner" or "the confiscation of the vessel."[54] Accordingly, the bond set by Russia was not reasonable. Nonetheless, the Tribunal emphasized that the underlying offense was neither "minor" nor "of a purely technical nature," and that "the accurate monitoring of catches "is one of the most essen-

48. Press Release, Int'l Tribunal for the Law of the Sea, The Tribunal Forms a Standing Special Chamber To Deal With Maritime Delimitation Disputes, ITLOS/Press 108 (Mar. 16, 2007), *available at* http://www.itlos.org/start2_en.html. Curiously, ITLOS has not rendered any maritime delimitation decisions in its ten-year existence. *See* Bekker, *supra* note 39.

49. Japan v. Russian Federation, Case No. 14, ¶ 27-51 (Aug. 6, 2007).

50. *Id.* ¶ 96.

51. UNCLOS, *supra* note 2, art. 73.

52. *Id.* art. 292.

53. Japan v. Russian Federation, Case No. 14 at ¶¶ 1, 51.

54. *Id.* ¶ 93.

tial means of managing marine living resources."[55] The Tribunal ordered the prompt release of the *Hoshinmaru* upon the posting of a bond of ten million roubles.[56]

2. *The "Tominaru" Case (Japan v. Russian Federation)*

The second case decided by ITLOS in 2007 concerned the detention of another Japanese fishing vessel—the *Tominaru*—for alleged unlawful fishing in Russia's exclusive economic zone.[57] The *Tominaru* was boarded by officials from a Russian coastguard patrol boat on October 31, 2006, and an unaccounted catch of 5.5 tons of walleye Pollack was discovered; the vessel was rerouted and detained at the Russian port of Petropavlovsk-Kamchatskii.[58] Japan, however, did not file an application seeking the vessel's release until July 6, 2007. Prior to that date, the Petropavlovsk-Kamchatskii City Court had already ordered the "confiscation" of the *Tominaru*, and that decision had been upheld on appeal to the Kamchatka District Court on January 6, 2007.[59] During the course of the ITLOS proceedings, the Supreme Court of the Russian Federation dismissed a complaint regarding the vessel's confiscation.[60]

The Tribunal was faced with two questions: (1) whether confiscation of a vessel has an impact on its nationality that deprives the Tribunal of jurisdiction; and (2) whether Japan's application was "without object"—i.e., moot—in light of the proceedings in Russian court and the vessel's confiscation.

On the first question, the Tribunal determined that confiscation "does not result *per se* in automatic change of the flag or in its loss," particularly given the important functions of a flag state—as set forth by UNCLOS Article 94—and the role of the flag state in initiating a prompt release procedure pursuant to UNCLOS Article 292.[61]

On the second question regarding the effect of a vessel's confiscation on a prompt release application, however, the Tribunal held that "[a] decision to confiscate eliminates the provisional character of the detention" and "render[s] the procedure for its prompt release without object."[62] The Tribunal emphasized that confiscation of fishing vessels "must not be used . . . to upset the balance of the interests of the flag State and of the coastal State" established by UNCLOS, and that confiscation should only be undertaken through proceedings consistent "with international standards of due process of law."[63] The Tribunal also noted, however, that flag states have an obligation "to act in a timely manner" when a vessel has been detained, either through the national legal system or through Article 292 procedures.[64] Finally, the Tribunal also noted that an application would remain "with object" as long as proceedings are pending before the relevant domestic courts. In the case of the *Tominaru*, however, the decision of Russia's Supreme Court brought "to an end

55. *Id.* ¶ 99.
56. *Id.* ¶ 100.
57. Japan v. Russian Federation, Case No. 15, (Aug. 6, 2007).
58. *Id.* ¶ 24.
59. *Id.* ¶ 43.
60. *Id.* ¶ 46.
61. *Id.* ¶ 70.
62. *Id.* ¶ 76.
63. *Id.* ¶¶ 75, 76.
64. *Id.* ¶ 77.

the procedures before the domestic courts."[65] For that reason, the Tribunal determined that ordering the vessel's release would "encroach upon national competences" and contravene Article 292(3) itself.[66]

C. Permanent Court of Arbitration: Guyana v. Suriname

On September 17, 2007, an arbitral tribunal constituted to establish a single maritime boundary between Guyana and Suriname awarded Guyana sovereignty over a 12,837 square-mile area of the Atlantic Ocean that had been claimed by Suriname; Suriname was allocated its own 6,900 square-mile area.[67] The boundary had "long been a subject of disagreement," but the conflict had taken on new momentum when potential oil and gas deposits were identified in "a cone-shaped area of uncertain sovereignty with its apex at the mouth of the Corentyne River," the waterway that separates the two countries.[68] Proceedings were initiated by Guyana in 2004 pursuant to UNCLOS Articles 286 and 287, and a five-member panel was established pursuant to Annex VII.

First, the Tribunal rejected Suriname's jurisdictional objection that because Guyana's claims arose from a disputed land boundary, the dispute was outside the panel's competence.[69] Next, the Tribunal proceeded to establish a different maritime boundary between the two states than that claimed by either party in its pleadings:

> The boundary for the most part follows the equidistance line between Guyana and Suriname. However, in the territorial sea, the boundary follows a N10°E line from the starting point to the three nautical mile limit, and then a diagonal line, from the intersection of the N10°E line and the three nautical mile limit, to the intersection of the twelve nautical mile limit and the equidistance line. . . . The line adopted by the Tribunal to delimit the Parties' continental shelf and exclusive economic zone follows an unadjusted equidistance line.[70]

The deviation from the equidistance line was based on the Tribunal's view that "special circumstances," including the previous practice of the parties, necessitated a maritime boundary that would permit access to the Western channel of the Corentyne River from Suriname's territorial sea; this accounts for the different angles of the boundary within and beyond the three nautical mile limit.[71]

Finally, the Tribunal held that both Guyana and Suriname violated their obligations pursuant to UNCLOS Articles 74(3) and 83(3) to enter into provisional arrangements—

65. *Id.* ¶ 79.

66. *Id.* ¶ 80. Pursuant to UNCLOS art. 292(3), the Tribunal "shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew."

67. Maritime Boundary Delimitation (Guy. v. Surin.) (Perm. Ct. Arb. 2007), *available at* http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf. *See* Press Release, Foley Hoag LLP, Foley Hoag Helps Republic of Guyana Assert Sovereignty Over Oil- and Gas-Rich Seas in Maritime Dispute with Neighboring Suriname (Sept. 20, 2007) [hereinafter "Foley Hoag Press Release"], http://www.foleyhoag.com/NewsCenter/PressCenter.aspx.

68. Foley Hoag Press Release, *supra* note 67.

69. Guy. v. Surin., ¶ 280.

70. Press Release, Permanent Court of Arbitration, (Sept. 20, 2007), *available at* http://www.pca-cpa.org/upload/files/PressRelease20070920.pdf.

71. Guy. v. Surin., ¶¶ 306-07.

i.e., in this case regarding the types of exploratory activity that could be undertaken—during the pendency of the dispute in order to avoid jeopardizing a final agreement.[72] In addition, Suriname was found to have acted unlawfully when it used the threat of military force—by sending gunboats of the Surinamese Navy—to expel a Guyana-licensed drilling rig operated by CGX Resources Ltd., a Canadian oil and gas company, from the disputed area in June 2000. Over Suriname's objection, the Tribunal concluded that Suriname's conduct was not "mere law enforcement activity" but constituted a threat of the use of force in violation of not only UNCLOS but also the U.N. Charter and general international law.[73] Citing *M/V Saiga*—a decision in which ITLOS interpreted UNCLOS Article 293 to provide it with competence to apply both UNCLOS and "the norms of customary international law"—the Tribunal determined that it was competent to reach such a decision.[74]

IV. International Security: Piracy and Counter-Proliferation

The International Maritime Bureau of the International Chamber of Commerce reported an increase in piracy attacks in 2007.[75] Through the first nine months of 2007, 198 attacks were reported, up from 174 attacks over the same period in 2006.[76] In addition, fifteen vessel hijackings were reported, and 172 crew members were taken hostage.[77] The report singled out the waters off the coasts of Somalia, Nigeria, and Tanzania as areas of particular concern but, on a positive note, reported that the notorious Malacca Straits area continued to see a decline in attacks.[78]

The worsening situation off the coast of Somalia, however, drew sustained international attention, due in part to attacks on World Food Programme (WFP) ships engaged in the delivery of humanitarian aid.[79] In July 2007, the IMO and the WFP issued a joint *communiqué* seeking U.N. Security Council authorization for naval vessels to enter Somalia's territorial sea to engage in operations against suspected pirates.[80] The Security Council addressed that request in Resolution 1772, which encouraged states "to be vigilant to any incident of piracy" off the coast of Somalia and "to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid, against any such act, in line with relevant international law."[81] Nonetheless, at least three additional incidents in the region were reported in October 2007 where vessels were hijacked in international waters and then forced into Somali territorial waters.[82] In one case, a U.S. Navy

72. *Id.* ¶¶ 474, 476-77.

73. *Id.* ¶ 445.

74. *Id.* ¶¶ 405-06.

75. ICC Commercial Crime Services, *Piracy Attacks Rise 14% as Nigerian and Somalian Coasts Become More Dangerous*, Oct. 15, 2007, *available at* http://www.icc-ccs.org/main/news.php?newsid=95.

76. *Id.*

77. *Id.*

78. *Id.*

79. Press Release, Int'l Mar. Org., *UN Secretary-General Confirms Support For IMO Initiative on Somalia*, Briefing 24/2007 (July 11, 2007), *available at* www.imo.org/Newsroom/mainframe.asp?topic_id=1472&doc_id=8229.

80. *Id.*

81. S.C. Res. 1772, ¶ 18, U.N. Doc. S/RES/1772 (Aug. 20, 2007).

82. ICC Commercial Crime Services, *IMB Reports Spike In Hijackings Near Somalia*, Oct. 31, 2007, *available at* http://www.icc-ccs.org/main/news.php?newsid=97.

vessel successfully intervened to thwart the hijacking of the *Dae Hong Dan*, a North Korean flagged cargo vessel, after the North Korean ship had discharged its cargo in Mogadishu.[83]

In addition, the Bush administration issued its Policy for the Repression of Piracy and Other Criminal Acts of Violence at Sea, which was appended to the National Strategy for Maritime Security. That policy reaffirms the strong interest of the United States in combating piracy and initiates an interagency process to, among other things, "[s]eek international cooperation . . . to enhance the ability of other states to repress piracy and other criminal acts of violence against maritime navigation and to support U.S. anti-piracy actions."[84] That language, with its emphasis on enhancing the capacity of other states to contribute effectively to maritime security, is broadly consistent with U.S. efforts since 2003 to involve a consortium of states in counter-proliferation activities through the Proliferation Security Initiative (PSI).[85] Although the PSI was largely absent from the headlines in 2007, the United States entered into a bilateral PSI shipboarding agreement with the Republic of Malta in March—the seventh such agreement entered into by the United States with a major ship registry state.[86] Although opponents to U.S. ratification of UNCLOS have complained that the treaty would undermine the PSI, the U.S. Navy has emphasized that UNCLOS ratification would enhance, not hinder, U.S. counter-proliferation efforts.[87]

83. *Id.*

84. *See* Memorandum on Maritime Security (Piracy) Policy, 43 WEEKLY COMP. PRES. DOC. 803, (June 14, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/06/print/20070614-3.html.

85. *See* Michael A. Becker, *International Legal Developments in Review: 2006—Public International Law: International Law of the Sea*, 41 INT. LAW. 671, 674-75 (2007).

86. Press Release, U.S. Dep't of State, *The United States and the Republic of Malta Proliferation Security Initiative Shipboarding Agreement* (Mar. 15, 2007), *available at* http://www.state.gov/r/pa/prs/ps/2007/mar/81773.htm.

87. For example, see the testimony of Admiral Walsh to the Senate Foreign Relations Committee, *supra* note 11.