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"CURRENT DEVELOPMENTS IN THE LAW OF THE SEA"

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I. Introduction

The topic on which I have been asked to speak, "Current Developments in the Law of the Sea", provides a very broad range of issues from which to choose. In addition to the practice of states in implementing their national policies on maritime issues, there are also developments in many international and regional forums, where the formulation of co-operative policies for the management, exploitation and conservation of the oceans is accorded high priority. The implications of developments in the law of the sea are far-reaching.

For example, I have come to this Conference from Tokyo, where I led the Australian delegation to the ninth session of the Antarctic Treaty Special Consultative Meeting on the establishment of a minerals convention for the Antarctic. The 1982 Law of the Sea Convention did not specifically contemplate its application in the unique circumstances of the Antarctic, so those negotiations are, among other things, clarifying arrangements consistent with the Convention for the possible exploration and exploitation of any seabed resources in offshore zones of the Antarctic continent, subject to especially stringent environmental protection. This is an important task, the successful practical completion of which is necessary to the preservation of peace and concord there.

In the time available today, I am not able to address more than a few of the issues within the scope of "current developments" in the law of the sea - nor, I must admit, am I qualified to do so in view of the detailed specialist knowledge which is required for an intelligent discussion of many of those issues. Instead, I shall try to take a long view and survey in general terms developments in relation to the 1982 Convention, with the focus on its current status in the light of state practice. My perspective will, inevitably, be an Australian one, taking account of Australia's regional setting. The views which I shall put forward are, of course, not necessarily those of the Australian Government.

II. Background

First, let me recall briefly some of the factors which provided the impetus for convening the Third United Nations Conference on the Law of the Sea (UNCLOS III) and motivated the persistence with which the negotiations were pursued by nearly all states from 1973 to 1982. Although the four Geneva Conventions of 1958[1] had brought a limited measure of certainty into the law of the sea, they were not comprehensive, nor did they receive wide enough adherence to provide enduring rules for the governance of states' activities on and in the oceans. Such an important issue as the maximum breadth of the territorial sea, for example, was not determined.

During the years following the 1958 Geneva Conference and the Second Conference which was held in 1960 (and again failed to reach agreement on the territorial sea breadth and the related question of fishing limits), there were a number of developments which emphasised the limitations and inequities of the traditional law of the sea rules. These included: the extended jurisdictional claims made by many coastal states over parts of the high seas; the concerns of the major maritime nations about the impact of those claims, particularly on navigation; the mounting awareness of the damage caused by the failure to regulate marine pollution; the depletion of fishing stocks; and the demands of the developing nations for a more equitable international order, including their fears that the resources of the seabed beyond national jurisdiction would be 'grabbed' by those developed countries which had the financial and technological capabilities to exploit them.

In looking at current developments, I do not wish to delve too deeply into the history of the UNCLOS III negotiations. It is important, however, when considering developments since the Convention was adopted in 1982, to bear in mind the very unsatisfactory situation which prevailed in

1. Convention on the High Seas; Convention on the Territorial Sea and the Contiguous Zone; Convention on Fishing and Conservation of the Living Resources of the High Seas; Convention on the Continental Shelf.

the 1960s and into the '70s. Many nations, including Australia, regarded the negotiation of a comprehensive Convention, which would be widely supported, as essential to redress this unsatisfactory state of affairs by the establishment of an orderly regime for the multitude of states' activities on the oceans.

Australia, as a nation with a coastline of approximately 36,800 km and a broad continental margin, and being dependent for much of its trade on maritime routes, has significant maritime interests. The achievement of an equitable balance between coastal states' powers and the continuation of high seas freedoms, and access to ocean resources in a manner which would benefit all nations, were important objectives for Australia during the UNCLOS III negotiations.

The Convention which emerged from the negotiations does provide a comprehensive framework for the use of the oceans - it reflects the negotiation by consensus of the rules governing rights to the exploration and exploitation of the resources of the sea and seabed, and of the rules governing the most important activities, such as navigation, marine scientific research and pollution control.

The consensus approach by which so much was achieved broke down in the final stages of the Conference over the Part XI provisions on deep seabed mining. But support for all other parts of the Convention was overwhelming and it would not be in the interests of any state if developments were to result in a return to the uncertainties, conflicts and inequities which characterised the pre-1982 Convention law of the sea. Let us not, in lamenting the shortcomings and problems remaining, fail to recognise the great achievements already in place.

III. Ratification

At the time of writing, the half-way mark to the 60 ratifications needed to bring the Convention into force has been passed, 32 ratifications having been deposited with the

United Nations. This rate of ratification compared with, for example, that of the 1958 Geneva Conventions, is relatively fast. If this pace is maintained, it seems likely that the Convention will enter into force at the end of this decade or in the early 1990s. There could, of course, be a rush of ratifications if a bloc of countries, for example, the Africans, decided to ratify.

On the other hand, ratifications may stall as the sixtieth ratification approaches and states consider the possible financial implications of being a party to the Convention when it enters into force, without a number of the states most significant in terms of United Nations financial contributions. In Australia's region, Fiji, Indonesia and the Philippines are the only countries to have ratified so far.

I should say here a few words about Australia's attitude towards ratification. Although Australia had difficulties with Part XI, we considered that, on balance, our national interests, especially in relation to navigational and jurisdictional issues, would be best served by signature of the Convention. We have begun the process of considering ratification with the appointment of a consultant to examine the implications for Australia of being a party when the Convention enters into force, particularly the additional national legislation or amendments to existing legislation which might be required. The usual process of Federal/State consultation will also need to be undertaken.

In the meantime, Australia's stance is that, as a signatory, we are obliged not to act in a manner which would defeat the Convention's object and purpose[2], and we are in fact going further by acting consistently with it. Generally, we also encourage and respect the implementation by other states of the provisions of the Convention, provided that they observe the duties it imposes as well as claim the rights it provides.

2. Art. 18, Vienna Convention on the Law of Treaties.

IV. Current Status and Effect of the Convention

In considering developments since the Convention was adopted, it is worth looking beyond Australia to the extent to which its provisions are already influencing the policies and activities of other states. Related to this is the issue of to what extent its provisions are now binding on all states or will become so when the Convention enters into force.

Looking first into the future, a year after the Convention receives its sixtieth ratification and enters into force, states parties to the Convention will, of course, be bound by its provisions. Article 26 of the Vienna Convention on the Law of Treaties confirms the customary international law rule of 'pacta sunt servanda': a treaty is binding on its parties and must be performed by them in good faith. But what will be the position of states which are not parties? The general principle is that a 'treaty does not create either obligations or rights for a third State without its consent'[3].

There are, however, some circumstances in which treaties can become binding on non-parties. Rights can arise for a third state if the treaty parties so intend and the third state assents[4].

As has been pointed out,[5] the 1982 Convention variously uses terms such as "the coastal States", "the archipelagic States", "landlocked States", "all States" and simply "States". Although their exact meaning must be interpreted in the context in which they are used, in general they could be taken to mean all or any of the States referred to, unless a contrary intent is shown. In determining whether there is such a contrary intent, the "package" nature of the agreements which were reached during the UNCLOS negotiations must be remembered.

3. Art. 34, Vienna Convention on the Law of Treaties.

4. Art. 36, Vienna Convention on the Law of Treaties.

5. Luke T.Lee "The Law of the Sea Convention and Third States" 77 American Journal of International Law 541 (1983) at 546.

The "package deal" was a necessary corollary of the consensus approach to decision-making. It was relevant not only to the balance between the non-seabed mining parts of the Convention and Part XI, but also to the many compromises and concessions made in the negotiating process: recognition of archipelagic status, for example, in return for guaranteed transit rights through the archipelago. There were many references by delegations during the Conference sessions to the 'quid pro quo' nature of the deals struck.

The injunction against "picking and choosing" from the Convention's provisions was also a theme of some of the statements made by states when the Convention was opened for signature in December 1982. According to those states, enjoyment of the rights provided under the Convention was dependent on acceptance of its obligations. There is thus some evidence of an intention by many states that the Convention would not accord rights to non-parties.

Under the law of treaties, a non-party is bound only if it accepts in writing the obligations of a treaty[6]. Although it can again be argued that the LOS Convention's terms can be interpreted as meaning "all States" in relation to provisions creating obligations, the acceptance of such an obligation by third states cannot be implied.

I have considered briefly the treaty rules relevant to the position of non-parties; these do not, however, preclude a non-party being bound by a treaty provision which is also a customary rule of international law.[7] The question of the extent to which the 1982 Convention represents customary international law is a subject not only of academic controversy but also of practical importance when considering current developments in state practice.

When the Convention closed for signature on 10 December 1984, it had 159 signatories, an unprecedented number

6. Art. 35, Vienna Convention on the Law of Treaties.

7. Art. 37, Vienna Convention on the Law of Treaties.

for such a complex and far-reaching treaty. This reflected a very high degree of consensus about most of the Convention's provisions, at least the non-seabed mining parts. But several important maritime states - the United States, United Kingdom and Federal Republic of Germany - did not sign, principally because of their concerns about Part XI, concerns which resulted in the break-down of the consensus approach which had until then prevailed. The Convention cannot be said, therefore, to represent a universal consensus.

As I understand it, the approach taken by the United States since 1982 is to argue that, except for the deep seabed mining provisions, most of the remaining provisions of the Convention (especially those which are important to United States national interests, such as navigation and overflight) are grounded in customary international law. However, that is too sweeping.

It is clear that the Convention did not merely codify existing customary international law: it also clarified and resolved uncertainties and conflicts about what the law was, and provided appropriate rules to govern activities where the law had not developed in line with technological and other advances. The preamble to the Convention refers to "the codification and progressive development of the law of the sea achieved in this Convention". It is difficult to argue, for example, that concepts such as transit and archipelagic sea lanes passage, which were put forward for the first time in UNCLOS, were part of customary international law, and subsequently codified in the Convention.

On the other hand, it has been accepted in a number of decisions by various international tribunals that a treaty rule can subsequently acquire the status of customary international law. The International Court of Justice in the North Sea Continental Shelf cases stated that a rule which is conventional in origin can become part of the general body of international law and "become binding even for countries which

had never, and do not, become parties to the Convention"[8] The specific criteria which the Court applied were:

(1) a fundamentally norm-creating character which could form "the basis of a general rule of law";

(2) widespread and representative participation in the Convention;

(3) extensive and virtually uniform state practice evidencing "a general recognition that a rule of law or legal obligation is involved"; and

(4) the passage of time, even though it might be short.

In considering whether there has been codification of existing customary international law or whether a Convention provision has developed into a customary norm, it is necessary to identify particular provisions and examine the evidence of state practice, before and/or after the Convention comes into force, as well as the relevant negotiating history.

For example, many aspects of Section 3, Part II of the Convention, dealing with Innocent Passage in the Territorial Sea, repeat the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone provisions. For the most part, the provisions of the earlier Convention represented a codification of the customary rules, or set down rules which developed into customary rules in the ensuing years through state practice, combined with the requisite opinio juris. But the 1982 Convention also contains some innovations: for example, the scope of non-innocent passage is arguably broader by reason of Article 19(2)(l) which provides that "any other activity not having a direct bearing on passage" shall be considered as prejudicial to the peace, good order or security of the coastal state. Is that now customary international law?

8. North Sea Continental Shelf Cases (Federal Republic of Germany, Denmark and the Netherlands) 1969 ICJ 3 at 41.

Although the Convention is not yet in force, many states, including Australia, look to the Convention as an authoritative guide to the modern law of the sea and, for the purposes of national policy formulation and implementation, they are acting in accordance with its provisions. They are thus actively together contributing to the development of customary international law. The more states that do this the more quickly and firmly their practice will confirm the Convention rules as customary international law.

The claims of archipelagic states and the response of other states illustrate this trend. A number of states which can claim archipelagic status have done so, generally by reference to the 1982 Convention. How to treat such claims is an important question for states. Most, including Australia, have taken the view that they will not object to states asserting archipelagic rights in accordance with the Convention, provided that the duties of archipelagic states as set out in the Convention are also respected. Implementation of the Convention's provisions is, therefore, taking place on the basis of state practice.

This process is also occurring in relation to other provisions of the Convention. According to the 1985 Report of the United Nations Secretary-General[9] on the Law of the Sea, 89 States had at the time of that Report (November 1985) claimed a territorial sea to the maximum 12 nautical miles (nm) breadth and 79 States from all regions had established 200 nm exclusive economic zones or fishery zones. The extent of state practice supports, I think, the view that the 12 nm territorial sea and EEZ concept have developed into customary norms. The ICJ in the Libya/Malta Continental Shelf Case[10] 1985 stated that the "institution" of the EEZ is now part of international customary law.

9. Law of the Sea Report of the Secretary-General A/40/923 27 November 1985.

10. Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) 1985 ICJ.

The extent to which all the details of the EEZ provisions (rather than the 200 nm EEZ concept as such) have developed into customary international law is more difficult to establish: state practice varies in terms of the national legislation which has been enacted to implement EEZ claims, with varying degrees of adherence to the Convention's provisions. There is, for example, virtually no state practice with regard to the EEZ provisions on land-locked and geographically disadvantaged states[11] and it would be difficult to substantiate a claim that these represent customary international law.

V. South Pacific Fisheries

A specific important current development which I should mention is the negotiations between the Forum Fisheries Agency (FFA) states (Australia, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa) and the United States for a treaty which would govern the access of United States tuna vessels to fish in the 200 nm Zones of the FFA states.

With regard to highly migratory species, the United States has taken the view that, as a matter of customary international law, the coastal state's sovereign rights do not extend to such species, including the commercially significant species of tuna. This view led to a number of incidents, including the arrest of the "Danica" in PNG's EEZ and the "Jeanette Diana" in Solomon Islands' EEZ. The latter arrest resulted in the sanctions of the United States "Magnuson Act" being applied to the Solomon Islands.

It is Australia's position, and that of the great majority of states, that the coastal state does have jurisdiction over highly migratory species, although Article 64(1) of the 1982 Convention obliges the coastal state to co-operate with other coastal states, and states whose nationals fish in the region, with a view to ensuring conservation and promoting the objective of optimum utilisation.

11. Arts 69 and 70

The negotiations between the FFA and the United States have been taking place for two years and seem to be nearing a conclusion. Under the proposed Treaty, the FFA member States would allow fishing by United States vessels in specified areas on the terms and conditions set out in the Treaty. An arragement such as this is particularly significant in a region like the South Pacific, where the resources of the 200 nm Zones are of great importance to the economies of the island states.

VI. Declarations

A feature of the Convention's signatures and ratifications to date has been the relatively small number of declarations made in connection with them. The 1982 Convention does not permit "reservations or exceptions"[12] but it does allow declarations made with a view to "the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations do not purport to exclude or modify the legal effect of the provisions of the Convention".[13] It is a fine judgement whether a declaration harmonizes rather than modifies.

The provision for "harmonization" may well be seen by some states as providing a means by which their general adherence to the Convention can be tempered to allow what those states regard as their own special or unique circumstances in particular areas to be given some exceptional treatment. It will be necessary to keep this aspect under close review.

VII. The Preparatory Commission

A survey of current developments in relation to the LOS Convention must include a reference to the work of "Prepcom", the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea. Without going into the detail of Prepcom's functions, its main task can be stated briefly as working out the details of the framework provided in Part XI of the

12. Art. 309.

13. Art. 310.

Convention for the Authority and its operational arm for deep seabed mining, the Enterprise. It has met eight times since March 1983.

Australia has participated in all the Prepcom sessions, with the main objective of encouraging the development of a commercially viable and practical deep seabed mining regime that would be supported by the major western deep seabed mining countries, whose financial and technological resources will be necessary for the effective functioning of the regime established by the Convention. We recently submitted to Prepcom a study on "The Economic Viability of Deep Seabed Mining of Polymetallic Nodules" which concluded that, at present and projected metals prices, commercial deep seabed mining is unlikely for the foreseeable future, and certainly into the next century. We would expect that this study will have an influence on the nature and extent of the operational arrangements agreed on for the Enterprise. The results of the study confirm that there is time to ensure that Part XI is implemented on a practical and workable basis.

The main issues which have preoccupied the Prepcom, especially in its last several sessions, include:

- the registration of seabed mine sites by the "pioneer investors" designated in Resolution II of the Convention's Final Act. This issue has involved the resolution of overlapping claims of the four state-associated pioneer investors (USSR, Japan, France and India) and the possible claims of potential applicants, also named in Resolution II, including the resolution of overlaps between the pioneer investors' sites and those claimed by the four US-registered private consortia;

- the potential effects of sea-bed mining on developing land-based producers of the same minerals;

- drafting of the rules of exploitation for the deep seabed, ie. the "mining code";

- the international legality of deep seabed mining licences issued by states in areas outside their national jurisdiction.

The negotiations which have taken place in the Prepcom on most of these issues are too detailed and technical for discussion here. In regard to the registration issues, I shall mention only that at the Resumed Fourth Session in August and September of this year, Prepcom reached certain understandings, on the basis of which registration of the four state pioneer investors' sites might be possible at the next session, scheduled for March 1987.

The last-mentioned issue - that of the international legality of deep seabed mining licences issued by individual states - is centred in the controversy about the relationship between the Convention and customary international law and therefore warrants some discussion. It relates also to the crux of the argument about the "package deal". The concept of the "common heritage of mankind' - that the Area beyond national jurisdiction and its resources are the common heritage of mankind and therefore that they are not open to exploration and exploitation by individual states - was a major factor in the UNCLOS negotiating stance of many countries, especially members of the G77. The acceptance of this concept in the overall package was crucial to the final adoption of the Convention text.

At the Prepcom Resumed Third Session in Geneva in August 1985, and in the Fourth Session held in Kingston in March/April 1986, declarations initiated by the G77 countries, supported by East European states, rejected as "wholly illegal" the deep seabed mining licences issues by the United States, the United Kingdom and the Federal Republic of Germany. The Declaration rejecting the US licences was adopted at the Geneva session without formal dissent, but a statement from the

Chairman indicated that a number of delegations (Western states) did not support the Declaration because of their reservations about its substance and effect. The Kingston Session Declaration concerning UK and FRG licences was adopted by a vote of 57 in favour, 7 against and 10 abstentions (including Australia).

Those countries which consider that the issue of national licences is not valid in international law argue that the unilateral exploitation of the seabed beyond national jurisdiction is not authorised by existing principles of international law, including the freedom of the high seas doctrine. They argue further that the "common heritage of mankind" concept, as expressed and elaborated in the 1982 Convention, is now part of customary international law.[14] The counter-argument in general terms is that mining of the deep seabed is an exercise of the freedom of the high seas, the only restraint on which is that it must be exercised with due regard to the high seas activities of other states. According to this view, the 1982 Convention is not yet in force and the "common heritage" concept, as enunciated in Part XI, is not yet binding as a conventional rule nor has it developed into customary international law.[15]

The legal questions involved are complex and difficult. Australia has not been prepared to support the G77-sponsored Declarations because the legal judgements which they make are not, in our view, within Prepcom's mandate and cannot in any case be asserted so categorically. Even if the common heritage of mankind concept is accepted as a principle of customary international law, whether the detailed expression

14. See, e.g., G. Biggs "Deep Seabed Mining and Unilateral Legislation" 8 Ocean Development & Internat. Law Journal 223 (1980).

15. See, e.g. D. Arrow - The Customary Norm Process and the Deep Seabed 9 Ocean Development & Internat. Law Journal 1 (1981).

of it as set out in Part XI is also customary international law is more problematic, especially in the light of the explicit rejection of Part XI by major affected States such as the US, UK and FRG.

VIII. Conclusion

I can perhaps best conclude on this point by recalling the statement made by Australia's chief Law of the Sea negotiator, Keith Brennan, on Australia's signature of the Convention on 10 December 1982: "... The great majority of states now recognise the resources of the seabed beyond national jurisdiction as the common heritage of mankind. Even if individual states question the majority view on this point, it is beyond question that any attempt to exploit the resources of the seabed beyond national jurisdiction outside the Convention would give rise to the most serious political and legal consequences".

It is important that the achievements of the Convention, particularly the greater order which has been brought to state's activities on the oceans, are maintained and that the conflicts and uncertainties of the 1960s and early 70s do not re-emerge. It is, therefore, in the interests of all states, including those which have stood aside from the Convention, to reach accommodations satisfactory to all, particularly on the issue of deep sea bed mining. There is still time to do this.