

**OCEAN'S PROTECTION:
A NEW ZEALAND PERSPECTIVE**

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Introduction

My gaze will be seawards of the maritime zones on which a country's oceans' policy generally concentrates. I will be looking more at external than domestic influences. My comments will conclude with a case study - or rather a case - dealing with a current high seas fishing dispute.

The issues on the agenda of this Conference cover the spectrum of maritime issues. In political terms the matters that I want to address are unashamedly at the "wetter" end of that spectrum. Environmental law is one of the most rapidly developing areas of international law.ⁱ

But the conservationist message of my remarks should not be seen as espousing conservation for the sake of conservation. Nor should it be read in any way as denying rational and responsible use of the resources of the sea, that is, optimum utilisation, under sound fisheries management. The message has a much broader and deeper backdrop, that of the very order of the uses of the oceans. Indeed, it goes to the heart of the rule of law on which those uses - whether shipping, fishing, or otherwise - depends.

The Law of the Sea

Whatever the activity being pursued, those carrying it out need to be conscious that the Law of the Sea Conventionⁱⁱ - rightfully described as the constitution for the oceansⁱⁱⁱ - is a carefully and deliberately balanced treaty^{iv}. The rights and duties of maritime states in the deployment of their navies are calibrated with certain rights and duties of coastal states. The rights of merchant flags to ply their trade through international waters carry with them certain responsibilities in relation to marine pollution. The treaty also allows coastal states to exercise resource jurisdiction in the 200 mile exclusive economic zone without limiting other uses of that zone by the international community. And so on.

UNCLOS has indeed established itself as part of the global system for peace and security.^v That the last great terrestrial frontier should be the scene of disputes over its resources must be abhorrent to all of us who have interests in the use of the oceans.

The point is that, as on the domestic scene, if conduct of a particular kind that is deleterious to public order is allowed to go unchallenged it may have an incipient impact on world public order in general. If the activity in question relates (as is the subject of this paper) to a living resource, the consequences may result if not in breaches of international peace and security then certainly in depletion of that species and harmful impacts on the ecosystem that sustains the environment and associated species.

High Seas Fisheries

Traditionally, the freedom of fishing on the high seas has been a somewhat broad one. That freedom has become increasingly circumscribed, first by the Law of the Sea Convention and more recently by an agreement that specifically elaborates on the relevant provisions of that Convention (but which has yet to enter into force)^{vi}.

There are several reasons why this balance has been revisited and clarified. First, in the case of stocks that habituate the high seas border of, or migrate through, the exclusive economic zones of coastal states, unregulated fishing on the high seas just outside the EEZ will infringe rights of the coastal state to catch those same resources when they are in-zone.

Secondly, and of greater global significance, fisheries resources, wherever they occur, are increasingly under threat of depletion. The urgency for greater co-operation in the conservation of fisheries resources is palpable.

The health of our oceans is obviously linked inextricably to our own health. The mess we make on land we gift to the sea. What we cannot take from the land, where there is often keen oversight, we draw from the sea where vigilance is both inherently difficult and poor. Land-based pollution - the run-off of agricultural and other chemicals - is one of the greatest threats to marine life close to our coasts.

We like to think of the oceans as self-renewing, and to an extent they are. But we can already measure, for instance, the impact of land-based pollution on coral reefs and inshore fisheries. The more local stocks become depleted, by whatever cause, the further out to sea our fishing fleets and those of other nations set sail. And come in competition with one another.

Nor do we yet understand the impact on the global ecosystem of the depletion of a living ocean resource. We can measure the entire demise of a species such as Atlantic cod in terms of loss of an entire Canadian industry - a staggering A\$3 billion dollars and damage to the communities dependent on it, but we have can only guess at the impact on non-human members of that particular food-chain.

Last year the Food and Agriculture Organisation (FAO)^{vii} noted as follows:

“Recent reviews tend to confirm that, among the major fish stocks for which information is available, an estimated 44% are fully exploited and are therefore producing catches that have reached or are very close to their maximum limit, with no room for further expansion. And 16% are overfished... . Another 6% appear to be depleted... and 3% seem to be recovering slowly.”

In other words, a precautionary approach is required to the exploitation of almost 70% of the world's fish stocks.

The problems confronting Governments are not confined to land-based pollution and overfishing. The world's distant waters fleets are not only too large for the entire sustainable resource: they are also heavily over-subsidised.

If there are all these problems, can UNCLOS rightly be described as the "constitution" of the oceans? But this is not a matter of the legal framework, but of the lack of overall oversight of the management of the world's oceans.

New Zealand's Environment Minister and Associate Minister of Foreign Affairs, Simon Upton - who is also a driving force behind the development of New Zealand's oceans' policy - recently seized the opportunity to get the international community to focus on redressing this problem. As chair of the seventh session of the Committee on Sustainable Development (CSD), Mr Upton conducted an intensive round of diplomacy with a wide number of states and key non-governmental organisations before presiding over the Committee's decision.

The decision of CSD was to recommend to the General Assembly of the United Nations that a discussion of oceans' issues become a permanent part of its agenda. Later this year we expect that the international community will address the essential issue of securing greater cohesion for the management of ocean uses; of doing amongst the diverse 180-odd member Governments of the United Nations what comes naturally and more readily to us within our law firms, companies and Government agencies, that is of developing priorities and an action plan to deliver them before there are any more irreversible impacts on the uses of the global seas.

The CSD and the UN are not the only bodies in which New Zealand and Australia give voice to our concerns to protect the oceans. Some of you will be aware that at meetings held a week or so ago in Auckland, APEC leaders took up the causes of the need to reduce excess fishing capacity and ensure sustainable fisheries and aquaculture.

Regional Fisheries Organisations

APEC declarations also addressed the need to strengthen cooperation in regional fisheries organisations and agreements. This leads me to a regional fishery of quite some significance to Australia and New Zealand, over which we are in dispute with a country with which we otherwise enjoy close relationships, Japan.

That fishery is for a seriously depleted and enormously valuable species, southern bluefin tuna. It is managed by Australia, Japan and New Zealand under the 1993 Convention for the Conservation of Southern Bluefin Tuna. (More detail of the background to the dispute will be provided in my presentation by way of a case study.)

In essence, Australia and New Zealand saw Japan's conduct in the management of the stock as amounting to a pattern which, although arising in the context of the 1993

Convention, had a broader and deeper impact constituting a breach of two duties under the Law of the Sea Conference, the duty to cooperate and the duty to conserve. Accordingly we sought recourse to the dispute settlement procedures of UNCLOS, including those affording a request for provisional measures, that is, an injunction. Such a request, we hoped, would place maximum pressure on Japan to foreshorten its EFP and generally restrain its catch.

In the event we were successful. The Tribunal issued measures - binding on the parties at international law - which had the effect of bringing Japan's unilateral action to an end and of requiring the parties to undertake negotiations over future conservation and management measures. As those negotiations proceed, so too does the process of constituting an arbitral tribunal under UNCLOS to hear the merits of the case, unless the three parties agree on an alternative avenue such as ITLOS itself.

Conclusions

It will be surprising in the light of this experience and the broader backdrop I painted before dealing with the case study, if New Zealand's future ocean policy is not rather forthright on principles of long-term sustainability, the interests of future generations, integrated ecosystem management and, to these ends, on the need for cooperation and - to anticipate this afternoon's next session - consultation.

Certainly we would much prefer to achieve our conservation objectives through consultation and agreement rather than dispute settlement. On the other hand, like Australia, we are prepared if necessary to seek to enforce obligations to avert more serious consequences, whether for high seas stocks in general, southern bluefin tuna in particular, or in the final analysis, for the global order of the oceans.

ⁱ Judge Weeramantry, ICJ Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports p 118

ⁱⁱ abbreviated to UNCLOS

ⁱⁱⁱ H.E. Tommy B Koh, President of the Third United Nations Law of the Sea Conference, final session, Jamaica, 11 December 1982; see also the following comment about UNCLOS of the then UN Secretary-General of the U.N., Boutros Boutros-Ghali, made in Jamaica on 16 November 1994:

"The dream of a comprehensive law of the oceans is an old one. Turning this dream into a reality has been one of the greatest achievements of this century."

^{iv} H.E. Satya N Nandan, Secretary-General, International Seabed Authority, 6 August 1998.

^v *ibid.*

^{vi} Agreement on 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.

^{vii} FAO publication, "The State of World Fisheries and Aquaculture"