'THE LAW OF THE SEA'

by

R. L. HARRY*

1. *Introduction — The Need for International Law*

The generosity of the Turner family in endowing this series of lectures in memory of E. W. Turner, and his contribution to the theory and practice of law in Tasmania, has made it possible for the legal fraternity in Hobart to reflect from time to time on a number of the growing points of law in general, or at least on points which should be growing.

One of these is undoubtedly the 'progressive development of international law', in which the Charter of the United Nations requires the General Assembly to 'initiate studies and make recommendations'. Forty years ago, this Law School offered no course in Public International Law. Today, it is an essential object of study. For, although the states which comprise the international community have been sparing in transferring their sovereign powers to permanent legislative institutions, their growing interdependence in an ever more crowded planet has produced a mass of special law in the form of treaties and a growing body of rules of universal customary law. It is, I believe, a vital interest of the Australian people to promote the international rule of law, to replace the hazards of purely political processes.

In the case of the international law of the sea we have very special interests to protect, which make it important that a universal convention be achieved.

2. *Particular Australian Interests*

Indeed vital Australian strategic, political, economic and other interests are involved in the negotiations of the Third United Nations Conference on The Law of the Sea.[1] And the Law of the Sea has already changed as a result of those negotiations.[2]

As an island-continent, Australia depends on unhampered use of the sealanes for its interstate and overseas trade and on the mobility of its own and allied navies for its defence. The energy resources of the continental shelf and the high protein foods provided by the living

---

* C.B.E., LL.B. (*Tas.*), M.A. (*Oxon.*) Former Australian Ambassador to the United Nations.

This is the text of a Turner Memorial Lecture delivered in July 1979, at the University of Tasmania.

1 Minister for Foreign Affairs, Mr Andrew Peacock, Department of Foreign Affairs, News Release, 21 August 1978.

2 See Bernard H. Oxman, the *Third United Nations Conference on the Law of the Sea, the 1976 New York session*, American Journal of International Law, April 1977, p. 247.

resources of the waters around its coasts are assuming an ever greater importance in the national economy. Australian relations with its archipelagic and ocean neighbours, with the maritime and distant fishing countries and with the international communities require agreed sea-bed and economic zone boundaries, and co-operative arrangements for resource exploitation and conservation and the protection of the maritime environment.

The prosperity of Tasmania, in particular, is bound up with economical sea transport, the development of fisheries, and possibly with the long term exploration and exploitation of the Tasmania Ridge, the Cascade Plateau, and the South Tasman Rise, and our Antarctic Territories.

These Australian interests require the earliest possible international agreement on rules of law to govern the limits of national jurisdiction, the rights and duties of states in relation to the use of the sea both inside and outside their jurisdiction, the exploitation and conservation of both renewable and non-renewable resources, and prevention of pollution of the sea.

For almost a decade, the United Nations has been discussing the changes in international law made necessary by changes of technology and in the political situation since the last consolidation of maritime law in 1958.

For five years, the Third United Nations Conference on the Law of the Sea has been actively attempting to draft a comprehensive Convention which can command the agreement of the world community and replace or extend the norms for the Territorial Sea, Continental Shelf, Fisheries and High-Seas formulated by the first Conference of 1958. The second Conference in 1960, limited to the question of the breadth of the Territorial Sea, achieved no positive result.

Although some of the issues have been keenly debated in Australia, largely because of the constitutional problems of the respective limits of legislation, administration and jurisdiction of the Federal and State Governments, other aspects of the United Nations negotiations and of the 'package' emerging through the draft Convention have not received the same attention. It is important that the contents and balance of the Convention as a whole should be understood not only by Governments and the relevant industries, but also by Law faculties, the legal profession and the general public.

For Australia's principal objective in the Conference is the early conclusion of a comprehensive and widely supported convention on the Law of the Sea.

To appreciate the scope of the innovations under consideration, it is necessary first to compare them with the classical doctrines and with the codifications and modifications contained in the conventions concluded twenty years ago.

3. *The Classical Doctrines of the Law of the Sea*

It has been said by a cynic that the Law of the Sea used to be, 'the nautical equivalent of the law of the jungle'. It was, of course, an area in which many famous jurists, from Grotius onwards, made their reputation by propounding and analysing the freedoms of the sea. These doctrines were preferred to the concept of 'closed seas' advocated by the Tudor lawyers. They formed an excellent framework within which British, Dutch, French, Portuguese, Spanish and United States maritime power and merchant fleets could be deployed. They were approved by other trading and distant fishing states as they emerged.

The freedom of the high seas, of fisheries, of navigation, of passage through straits, and the rigorous limitation of the belt of sea over which a state could exercise sovereign rights, worked well in an era of open frontiers and ample, apparently even limitless, resources.

There were of course some national claims to the right to control areas of sea of crucial significance, such as historic bays, while special regimes had to be devised for strategically important straits, like the Bosphorous and Dardanelles. In 1936 S. M. Bruce of Australia presided over the Montreux Conference which agreed on a new Straits Convention. There also developed in the 19th and first part of the 20th century, claims to a territorial sea wider than the traditional three miles, based on a cannon's range. There were many claims to a more extensive fisheries jurisdiction.

But broadly speaking, up to the end of the Second World War, the rule of freedom of the high seas, combined with a right of innocent passage even in the territorial sea, held sway, backed by the great naval powers including the United States and Japan, as well as France and Britain, the latter supported by the self-governing dominions.

This stable system, admirable for free enterprise exploitation of the bountiful resources of the sea, began to show deficiencies and stresses even between the wars. Some efforts were made to review and codify the rules of international law in the thirties. But the Hague Conference, called under League of Nations auspices in 1930, was largely unsuccessful as far as maritime law was concerned. As the world set about reconstruction in 1945, it was clear that new norms were urgently required to cope with the application of new technologies for the extraction of petroleum off-shore and for catching fish by modern mass methods.

4. *Technological Change*

For centuries there had been distant fishing operations on the rich fishing banks of the North-West Atlantic, but in this century sophisticated fleets have spread their nets and othed devices world wide, and keen competition developed after World War II in the fisheries off the west coast of Latin America. These extended seawards to the nutriment-rich upwellings of the Humbolt Current, which flows at a distance from

the coast of roughly 200 nautical miles — a distance which was destined to have a radical effect on the evolution of the law.

Equally seminal was the necessity felt by the United States to regulate and protect enterprises drilling for oil under water, outside the three mile limit of the United States territorial sea. On September 28, 1945, President Truman declared that the Government of the United States regarded, 'the natural resources of the sub-soil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, as appertaining to the United States, subject to its jurisdiction and control'.

By 1953, a large number of countries had asserted sovereign rights over the Continental Shelf or its resources. In the case of Australia this took the form of the *Pearl Fisheries Act* 1952, and proclamations under it, assertions which brought us into acute controversy with Japan. We were unaware at that time of the wealth of hydro-carbons in our Continental Shelf.

5. *United Nations Negotiations — The 1958 Conference*

The International Law Commission of the United Nations, established in 1946, took as one of its priority tasks the codification and progressive development of the Law of the Sea. Its drafting work, pursued in consultation with Governments, proceeded steadily and it was able to recommend four draft conventions to the First United Nations Conference which met in Geneva in 1958.

The proceedings of that Conference and its outcome are part of legal history, but they still provide the best evidence of the state of international law of twenty years ago, in many respects unchanged, or at least a starting point for subsequent evolution.

The 1958 Conference produced four conventions:

1. The Territorial Sea and the Contiguous Zone;
2. The High Seas;
3. Fishing and Conservation of the Living Resources of the High Seas;
4. The Continental Shelf.

The contents of the Conventions and the extent to which they met Australia's *desiderata* were most lucidly expounded at the time by the late Sir Kenneth Bailey,[3] who led the Australian delegation and was Chairman of the Committee on the Territorial Sea and Contiguous Zone. He was a great Australian jurist, who examined University of Tasmania students in Constitutional Law in the thirties. He advised our delegation negotiations with Indonesia on the seabed boundary in 1971, and in his very last days, took a keen interest in preparations for the Third Conference.

---

3 Sir Kenneth Bailey, 'Australia and the Geneva Convention on the Law of the Sea', *International Law in Australia* (Australian Institute of International Affairs, E. J. O'Connell, 1965.) See also Sir Kenneth's *Roy Milne Lecture*, 3 April 1959.

The following points about the 1958 Geneva Conference need to be borne in mind:

(i) The 1958 Conference concluded its work in nine weeks, but it built on over ten years of work by the International Law Commission. The present Conference inherited no comparable preparatory work.

(ii) Only eighty-six countries attended the 1958 Conference. That means that nearly seventy of the present members of the United Nations, most of them former colonial territories, developing countries, did not participate in the drafting of the Geneva Conventions. Many of the developing countries did not accede to them. The conviction of the newly independent states that the old international law was *res inter alios acta*, even a conspiracy of the wealthy great powers has been an important factor in the evolution of international law in the past decade.

(iii) The 1958 Convention on the Territorial Sea and the High Seas Convention, were largely codifications of pre-existing international law, and did not formulate many new rules, though they confirmed a few recent developments, e.g. rules on baselines applied by the International Court in the *Anglo-Norwegian Fisheries Case.*[4]

(iv) The Conference failed to reach agreement on the principal issue in relation to the territorial sea — its width! A two-thirds majority could not be secured for a three mile sea, or a twelve-mile sea, or even a six-mile territorial sea with a six-mile fishing zone. The 1960 Conference which met specially to resolve this issue again failed.

(v) The Convention on the Continental Shelf recognised that a coastal state exercises over the Continental Shelf 'sovereign rights for the purpose of exploring and exploiting its natural resources'. At the time the Australian negotiators took particular pride in having achieved a definition of 'natural resources' which made clear that pearl-shell oysters were included as sedentary species. This was in line with the position taken by Australia in its dispute with Japan. In the longer term, this was to prove much less important and less controversial that the definition of the Continent Shelf as referring

'(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

(b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.'[5]

---

4 (1951) International Court of Justice Reports 116.
5 UN Doc. A/CONF. 13/L. 52-L.55.

It was soon apparent that this mixed definition, including both geomorphological description and the depth element related to exploitability, required refinement.[6] It was to be one of the difficult issues for Australia in the Third Conference.

(vi) The Convention on Fishing and Conservation of the Living resources of the High Seas upheld the principle of freedom of fishing on the high seas but it recognised that a coastal state might, with a view to maintaining the productivity of the living resources of the sea, adopt unilateral conservation measures in relation to the high seas adjacent to the territorial sea if, after six months, negotiations with other states whose nationals fished in those waters had failed to bring about an agreement. There was also provision for reference of disputes to a commission for a binding decision unless parties agreed to seek a solution by another method.

(vii) The Convention of the High Seas, according to its preamble a codifying convention, contained two articles[7] dealing

(a) with prevention of pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil; and

(b) with measures to provent pollution of the seas from the dumping of radioactive waste.

The problem of environmental protection was to become even more acute in the ensuing years.

(viii) Apart from the special provisions on disputes settlement in the Fishing Convention, compulsory arbitral procedures were not included in the Geneva Conventions. An arbitral article on the Continental Shelf was carried in committee, but did not achieve a two-thirds majority in the Plenary of the Conference. Only an optional Protocol for acceptance of the compulsory jurisdiction of the International Court of Justice was opened for signature. The settlement of disputes was to be a key issue in the Third Conference.

6. *The Maltese Initiative of 1967*

In the decade following the First and Second Conferences many new members joined the United Nations with radical ideas on international law. They raised questions — to be developed in the Law of Treaties Conference in 1968 — about the validity of agreements made by or with colonial powers. New technology continued to increase the catch of the fishing fleets of the industrial powers, drilling for oil extended into deep waters and the first steps were taken toward exploitation of the metallic nodules on the bed of the abyssal plain. Nuclear submarines were further developed and oil tankers grew more and more gigantic. This

6 (1969) International Court of Justice: North Sea Continental Shelf Cases.
7 Articles 24 and 25.

was the decade when earth satellites were launched and the United Nations Committee on the Peaceful Uses of Outer Space was established in 1959 to ensure that outer space should be used only for peaceful purposes. In 1961, the General Assembly commended the principle that outer space and celestial bodies should be free for exploration and used by all States and should not be subject to national appropriation. Article I of the Treaty of 27 January 1967 provided that the exploration and use of outer space should be, 'carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development'.

This was the international climate in which Malta proposed that the General Assembly discuss, 'the preservation and use, exclusively for peaceful purposes, of the seabed and ocean floor beyond the present limits of national jurisdiction'. In November 1967, Ambassador Arvid Pardo, in a three hour speech, warned of the dangers which could arise from the placing of nuclear weapons on the ocean floor, and from pollution by radio-active and industrial wastes. He urged that the resources of the sea bed beyond national jurisdiction be declared 'the common patrimony of mankind'.

7. *General Assembly Declaration*

The Maltese initiative led to the establishment of a Seabed Committee (including Australia) and detailed discussion there and in the General Assembly finally resulted in adoption in 1970 of a Declaration[8] of Principles of which the first substantive paragraph provided: 'The seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area) as well as the resources of the area, are the common heritage of mankind.' The Assembly declared also (Paragraph 7): 'The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole.'

The Assembly also decided[9] to convene a Conference on the Law of the Sea in 1973 to deal with the establishment of a regime for the area and resources of the seabed, the ocean floor, and a broad range of related issues, including the breadth of the territorial sea and the question of international straits.

8. *U.S. Ocean Policy*

The great maritime powers, while not accepting all the implications seen by the developing countries and by other states hoping to revolutionize the law of the sea, went along with the UN Declaration and the proposed Conference. On 23 May 1970, President Nixon had announced a new Oceans Policy for the United States. He said: 'The stark fact is

8 Resolution 2749 (XXV) adopted on 17 December 1970, 108 in favour, non against, 14 abstentions.
9 Resolution 2750 (XXV).

that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. If it is not modernised multilaterally, unilateral action and international conflict are inevitable.'[10]

The Seabed Committee was expanded to act as preparatory committee for the Conference. In six sessions through 1971, 1972 and early 1973, it it sought to prepare a detailed agenda in the form of a list of subjects and issues to be covered by an ultimate Convention. By the end of 1972, the Australian Delegation was able to report (we thought amusingly) that the Committee had, 'developed a decided list'! There were also prolonged general debates in three sub-committees dealing with (i) the seabed beyond national jurisdiction; (ii) the limits of national jurisdiction (embracing the continental shelf, high seas, straits, and related matters); (iii) preservation of the marine environment, scientific research and transfer of technology. But no document acceptable as a draft convention to serve as a basis for negotiation had emerged by 1973. Nonetheless, in November 1973, the General Assembly decided to convene the Conference in Caracas, Venezuela, from 20 June to 29 August, 1974. A short organisational meeting was held in New York in November-December 1973, during the regular session of the General Assembly.

9. *Australian Objectives*

The Australian Delegation to Caracas was led initially by the Minister for Foreign Affairs, Senator Don Willessee. I acted as leader after the Minister's departure. Our instructions were to seek a package containing the essential elements of Australia's interests which included:

(i) A territorial sea of twelve miles maximum;
(ii) An economic zone of two hundred miles in which the coastal states would have exclusive rights to resources, fisheries and control over the preservation of the environment and scientific research;
(iii) Retaining our existing sovereign rights to explore and exploit to the edge of the continental margin where it exceeds two hundred miles;
(iv) An International Authority for the seabed beyond national jurisdiction with wide powers to explore and exploit on its own behalf and to enter into production-sharing agreements with and issue licenses to states, revenues earned by the Authority to be distributed with a preference for the developing countries;
(v) Workable machinery for the settlement of disputes;
(vi) Support for the archipelagic aspirations of our neighbours on the basis that criteria be formulated to confine recognition of archipelagic status to those states which are genuinely archipelagic in character and that there must be an assured and

10 See Kenneth Bailey, 'Law and the Oceans', in *Australia's Neighbours*, (1970).

unimpeded right to surface passage — at least along adequate traffic lanes through archipelagic waters;

(vii) A regime for islands which preserves the present international laws under which all islands generate a full territorial sea and sovereign rights over resources out to the edge of the continental margin.[11]

It will be essential for the practitioner in international maritime law to study in detail the history of the negotiation, but for present purposes it will suffice to understand the methods of negotiation, the evolution of the main issues, and the stage now reached as regards Australian interests.

10. *The Procedures of the Conference and Negotiating Methods*[12]

The opening session at Caracas endorsed what might be called a *gentleman's agreement* reached in New York, that 'the Conference should make every effort to reach agreement on substantive matters by way of consensus' and also agreed on a special majority system to ensure that, if and when voting did take place, important interests should not be overidden.[13] Up to the present time, the Conference has continued to operate on the basis of a search for consensus.

Negotiation began by the introduction of texts by national delegations. Joint texts were also produced by groups with common interests such as the coastal states (a group our delegation had initiated). Other groups included the land-locked states, the archipelagic states, the distant fishing states, the 'geographically disadvantaged' states, and the 'developing countries'.

These special alliances cut across the traditional geographical electoral groups of the United Nations, but the different regions like Africa and Asia sometimes met to consider law of the sea problems. The members of the Commonwealth of Nations, which includes countries from every interest group, also met periodically for exchanges of views.

As the Conference progressed, compromise texts were developed by informal negotiating groups, in particular one chaired by Minister Jens Evensen, of Norway, which met between sessions. There were also informal meetings of the three committees. Preparatory studies and a first draft, with alternative texts, for a chapter on settlement of disputes, were prepared in an informal group, of which the Ambassador of El Salvador and I were co-chairmen. The Caracas session identified the main trends but did not arrive at a basic text. On the last day of the Third session, which met in Geneva from 17 March to 9 May, 1975, the

11 'The Law of the Sea Conference', in *Australian Foreign Affairs Record,* July 1974, at p. 464.

12 For a concise history of the Conference, see the reports of the Australian delegation, Aust. Government Publishing Service, Canberra, 1971-1979.

13 *The Law of the Sea Conference in Caracas,* in Australian Foreign Affairs Record, October 1974, at p. 686.

Chairman of each committee circulated an 'Informal Single Negotiating Text' as a basis for future negotiation.[14]

The method of informal discussion and the circulation of texts issued on the responsibility of committee chairmen facilitated achievement of consensus or creation of a working majority[15] but the absence of official records of many discussions may make reference to the *travaux préparatoires* difficult in the event of disputes on interpretation.

On the last day of the Fourth Session the Committee Chairmen distributed revised 'SNT's' and the President produced after the Fifth Session a text on disputes settlement, later revised.

In subsequent sessions the President sought to focus debate on major outstanding issues and engaged in extensive intersessional consultation to promote agreement. While the main activity has been in negotiating groups, further readings were also made of the full negotiating texts to examine possible amendments which might increase acceptability.

11. *The Informal Composite Negotiating Text*

On 15 July 1977, at the Sixth Session, the President was able to issue an 'Informal Composite Negotiating Text'.[16]

This was in effect a draft Convention of 303 Articles complete with preamble, and the following substantive parts:

(i) Use of Terms
(ii) Territorial Sea and Contiguous Zone
(iii) Straits used for International Navigation
(iv) Archipelagic States
(v) Exclusive Economic Zone
(vi) Continental Shelf
(vii) High Seas
(viii) Regime of Islands
(ix) Enclosed or Semi-enclosed Seas
(x) Right of Access of Landlocked States to and from the Sea and Freedom of Transit
(xi) The Area (that is, the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction)
(xii) Protection and Preservation of the Marine Environment
(xiii) Marine Scientific Research
(xiv) Development and Transfer of Marine Technology
(xv) Settlement of Disputes
(xvi) Final Clauses

The Composite Text also had annexes on Highly migratory species, Basic conditions of exploration and exploitation, Statute of the Enter-

14 *The Law of the Sea,* Australian Foreign Affairs Record, August 1975, at p. 452.

15 *Fourth Session, Law of the Sea Conference,* Australian Foreign Affairs Record, June 1976, at p. 331.

16 UN, Third Conference of the Law of the Sea, Doct. A/CONF. 62/WP. 10.

prise, Conciliation, Statute of the Law of the Sea Tribunal, Arbitration and Special Arbitration Procedure.

At the Seventh Session differences on the composite text were narrowed, and the Eighth Session in Geneva from 9 March to 27 April 1979 resulted in a revised Informal Composite Negotiating Text.[17]

The Australian delegation has been led at recent sessions by the Australian Ambassador to Switzerland, Mr Keith Brennan, and includes representatives of the Australian States and of Federal Departments of Foreign Affairs, National Development and Defence, and the Attorney General's Department. At earlier stages representatives of the Treasury, and Department of Agriculture (Fisheries Division), Environment and Conservation, and Transport were also included.

12. *One or More Conventions?*

There has been some suggestion that, if agreement on the comprehensive Convention cannot be achieved soon, it may be unavoidable, and could be advantageous, to open for signature separate conventions based on parts of the complete text on which there is wide agreement and to defer other parts for a later Conference. Such suggestions are made by countries satisfied with existing international law as it would be modified and supplemented in a convention not including detailed provisions on 'The Area'. The proposers of this course, or of even more drastic reduction of the scope of the Convention, have sometimes argued that an adequate system could be achieved or best achieved on a regional basis. Some parts of the text have even before formal adoption, been so widely agreed as to be regarded as established rules of customary international law. This is true of the two hundred nautical mile Exclusive Economic Zone, at least as regards fisheries management.

Many countries, including Australia, have already given effect to its provisions or principles in their domestic legislation. Some countries including the United States are under pressure from their industries to enact legislation which would facilitate investment in deep seabed mining, e.g. by providing compensation to companies which invest in such enterprises, should an eventual Convention reduce their viability or profitability.

But there is still evident a political will, on the part of most if not all countries, to achieve a comprehensive convention. The prospects for success could only be assessed by a detailed analysis of all the articles, but there are a few issues which have been at the heart of the negotiation. Resolution of some of them has been achieved, but accommodations are still required on a few. We must briefly examine these key issues. It will be convenient to do this in the framework of the seven Australian objectives mentioned earlier.

17 UN, Third Conference on the Law of the Sea, Doct. A/CONF. 62/WP. 10/ Rev. 1.

13. *The Territorial Sea and Innocent Passage*

Provided other provisions on straits and archipelagos remain satisfactory, agreement is assured on Article 3 of the Composite Text. It provides that every State has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles. The baselines determined in accordance with the new Convention largely follow traditional law, starting from low water mark, with special rules for bays and coasts fringed by islands (Articles 4-16).

A state may of course, if it wishes, declare a narrower territorial sea, but if it wants to secure maximum rights it will opt for twelve miles. Section 3 of Part II deals with innocent passage in the territorial sea. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state (Article 19-1), but there is a long catalogue of activities which may be considered prejudicial.

Personally I hope that, if it is in the interest of Australia to declare a twelve mile territorial sea, this will not be prevented or delayed by the constitutional uncertainties dealt with in the High Court's judgment on the *Sea and Submerged Lands Act*, 1973.[18] The extension of the territorial sea created serious problems regarding passage through straits used for international navigation but those have been resolved by the definition of a right of transit passage (Article 38).

14. *Archipelagic States*

The Composite Text contains in Part IV provisions relating to 'Archipelagic States', an innovation in international law.

Australia supported the efforts of the archipelagic states to secure recognition of a special status for waters within the boundaries of their island-studded countries. This involved reaching consensus on a definition which would cover the case of our neighbours — Indonesia, the Philippines and Fiji, and of the Bahamas, a member of the Commonwealth, but which would avoid including minor archipelagos separated from metropolitan mainlands. It was essential at the same time to ensure that, since the new archipelagic waters have in the past been high seas or territorial sea, there should be provision for continuing rights of passage for ships and aircraft.

Article 47 allows baselines to be drawn joining the outermost points of reefs of an archipelago provided the ratio of water to land is between one to one and nine to one and provided at least 97 per cent of baselines do not exceed one hundred nautical miles. The other 3 per cent must not be longer than 135 miles.

Article 52 preserves the right of innocent passage but gives the archipelagic state the right of temporary and non-discriminatory suspension in specified areas. An archipelagic state may, by Article 53, designate sea lanes and air routes through which all ships and aircraft will enjoy the right of archipelagic sea lanes passage. Designation of

18 See Australian Foreign Affairs Record, January 1976.

such sea lanes is not, however, mandatory. If an archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

15. *The Regime of Islands*

In the 1958 Convention on the Territorial Sea and Contiguous Zone, an island was defined (Article 10) as a 'naturally-formed area of land, surrounded by water, which is above water at high tide'. But islands were treated, in some articles of the 1958 Conventions, as distinct from the 'mainland'. During the Third Conference it was urged by some countries that extensions of the territorial sea or at least the new two hundred miles economic zone need not necessarily be attached to miniscule islands, particularly those which are unpopulated.

Part VIII of the Composite Text repeats the 1958 definition and provides that not only the twelve nautical mile territorial sea, the contiguous zone of twenty-four miles, and the Exclusive Economic Zone of two hundred miles, but also the continental shelf of an island are determined in accordance with the provisions of the Convention applicable to other land territory.

Article 12 (3), however, provides that 'rocks which cannot sustain human habitation or economic life of their own, shall have no exclusive economic zone or continental shelf'. This presumably relates to the size of the rocks rather than the climate and is not drafted with Arctic or Antarctic islands in mind.

16. *The Exclusive Economic Zone*

The concept of an economic zone of two hundred miles has for several years been generally accepted. But the precise nature of the 'exclusive' rights of the coastal state in the zone proved difficult to define. It is now accepted by almost all that, under the new Law of the Sea, coastal states should have sovereign rights over the living and non-living resources of the zone. It is also accepted that the coastal state should have greater rights than heretofore in relation to the protection of the marine environment, the erection of installations in the E.E.Z. and the control of marine scientific research. On the other hand, maritime states had still to ensure that their naval and merchant vessels would enjoy freedem of navigation in the E.E.Z., and that other high seas freedoms, such as the right of overflight, the right to lay cables and pipelines, and the freedom to conduct scientific research, should not be unnecessarily impeded.

17. *The Legal Status of the Zone*

Part V of the Composite Text meets most of these concerns. Article 55 makes it clear that the E.E.Z. is a specific legal regime in which other States have rights and freedoms, further defined in Article 58, and further

protected by Articles 86 and 87 dealing with High Seas. The rights and jurisdiction of the coastal state are limited to those provided for in the relevant provisions of the Convention. The coastal states have also duties, particularly in relation to conservation of living resources and to preservation of the marine environment.

18. *Fisheries*

Important for fisheries is Article 61 which provides that, 'the coastal state shall determine the allowable catch of the living resources in its exclusive economic zone', and shall ensure, 'that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation'.

The coastal State is required (Article 62) to determine its capacity to harvest the living resources of its zone. Where it 'does not have the capacity to harvest the entire allowable catch' it is required 'through agreements or other arrangements' and pursuant to the terms, conditions and regulations set out in the text to 'give other States access to the surplus of the allowable catch'. The coastal State, in giving access to other states is required to take into account *inter alia* the requirements of developing countries in the sub-region or region in harvesting part of the surplus, and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks. This is a considerable modification of earlier demands by the land-locked and 'shelf-locked' countries.

19. *The Continental Margin*

The Composite Text reaffirms the 1958 principle that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources (Article 77).

Article 76 provides that the continental shelf 'comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea and throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance'. The continental margin is defined as consisting of the shelf, the slope and the rise, but not the deep ocean floor or the subsoil thereof. Paragraphs 4 to 6 of the Article seek to define and set a limit of 350 miles from the baseline to the 'outer edge of the continental margin'. This was necessary in situations where the margin consists of extensive but very thin sedimentary rocks.

20. *'Revenue Sharing'*

Article 82 provides that in respect of non-living resources beyond 200 miles from the baselines, after five years of production at the site, the

coastal state shall make a payment or contribution in kind to the International Authority at an initial rate of one per cent rising by the twelfth year to the maximum of 7 per cent of the value or volume of production at the site. A graduated contribution such as that now proposed is one which, in my view, could be agreed to by Australia without any abandonment of principle.

21. *The International Seabed Regime*

The definition of the continental shelf means that the hydro-carbons in the subsoil will all, or almost all be in the continental shelf of a coastal State.

One of the hard-core problems still not finally resolved is the question of the regime for the exploitation of the mineral resources of the deep seabed beyond the limits of national jurisdiction, i.e. the fields of nodules with their high concentrations of manganese, copper, nickel and cobalt. The basic issue has been whether exploitation should be exclusively by an international authority, or by national and private enterprises, or by a mixture of the two, and what should be the terms and conditions of exploitation.

There is now general agreement that an international authority must be set up including an international mining 'enterprise', but that in order to ensure early recovery of minerals the great private and state mining companies which have invested hundreds of millions of dollars in development of deep-sea mining technology should be able to obtain assured access to areas selected by them, subject to payment to the authority of appropriate fees, and a reasonable share of the profits or tax after production begins. It is also broadly agreed that the international authority should regulate operations in accordance with guidelines laid down by the Convention, including protection of the environment. The international Enterprise would have equivalent areas reserved for it which can before too long, mine, with its profits distributed to the membership with special emphasis on the developing countries.

It has been a feature of the negotiations that both the industrial states whose national enterprises expect to participate in deep-sea mining, and the advocates of international operations, have required detailed provisions setting out the constitution of the authority, including the composition and voting system of its Council, the method of application for and grant of concessions or contracts and their terms, and detailed financial arrangements for the authority and the financing of the international Enterprise.

One issue has been how to provide for a resources policy or marketing methods which will ensure that mining of millions of tons of copper, nickel, manganese and cobalt does not flood the market and drastically reduce the price of these metals on which a small group of land-based producers, many of them developing countries, depend for their export earnings.

Although there are international organisations which administer billion dollar development and welfare programmes, and large U.N. peacekeeping operations, the International Seabed Agency will be a revolutionary step in international co-operation. It will be, in effect, an immense trans-national corporation with one hundred and fifty governments as shareholders. It is no wonder that it is taking a little time to draft its constitution, financial regulations and operating policies!

There are, of course, some deposits of nodules which will be within the economic zones of states, and probably even within the territorial sea, for example of Macquarie Island. But most of the richest deposits at exploitable depths will be within the Area under the jurisdiction of the Authority. It is for this reason that the mining companies backed by their governments, are insisting on assured access under fixed and certain conditions which will give them a reasonable expectation of a good return on their investment. This is, for them a long-term requirement and they are clearly determined not to accept convention articles or annexes which could be altered by an Authority dominated by developing countries, with a controlling majority of states dedicated to a preeminently international operation. Countries like the United States, Japan and the Federal Republic of Germany and even the USSR, are, moreover, reluctant to agree to provisions subject to change by a majority at a Review Conference, after only a few years.

22. *Settlement of Disputes*

I have mentioned the action taken by Australia at Caracas to initiate study and drafting of a special system for settlement of disputes arising in connection with the Convention.

The objective of the conference is of course to reach agreement on clear and unambiguous rules, 'rules which would prevent disputes, not rules containing the seeds of conflict'.[19] We proposed that the Convention include a system of notification and consultation aimed at preventing, 'disputes generated by ignorance or secrecy, precipitancy or suspicion'.[20]

But it was clear that after a difficult negotiation with agreement depending on compromise wording in six languages, and given the complexity of the rules which the Convention on the Law of the Sea would contain, there were bound to be disputes about the meaning and application of the Convention. Appropriate methods and machinery to resolve them had to be laid down, so that no significant problem of interpretation could, 'long remain without a final and authoritative ruling, and no dispute on the application of the Convention continue to fester without a solution'.[21]

---

19 Statement by the Chairman of the Australian Delegation to the Fourth Session, New York, 5 April 1976, Australian Mission to the UN Press Release.
20 Ibid.
21 Ibid.

There are many states which have in the past been reluctant to accept any form of obligatory third-party settlement of disputes and many others which find serious constitutional and nationalistic difficulty in agreeing in advance to any third-party proceedings affecting the limits of territory over which they have claimed sovereignty. These sensitivities quickly appeared as soon as proposals were made which envisaged the conferring of jurisdiction on the International Court of Justice in The Hague, or on a Special Tribunal for the Seabed Area, or even the requirement that parties must elect some form of third party settlement, at the very least compulsory arbitration. At the same time, some countries such as the Soviet Union which had traditionally preferred to keep open their options even on the forms of arbitration, showed an interest in settlement machinery by which they could protect their rights under the new Convention, particularly in the Economic Zone and on the High Seas.

Discussion revealed a large measure of agreement that many disputes relating to particular parts of the Convention should be dealt with initially by special procedures in expert bodies for example in relation to fisheries, findings of fact by such procedures normally not to be subject to appeal. There was also support for the view that a special tribunal would be required to deal with disputes about the International Area, perhaps as an organ of the International Seabed Authority. It became clear that some alternative form of third-party settlement would be required in addition to arbitration for states which were not prepared to accept the jurisdiction of the International Court of Justice. Interest was shown in a scheme of compulsory conciliation elaborated by the Australian delegation.

The work of reconciling all these various elements has proceeded steadily under the aegis of the President of the Conference. Part XV of the Composite Text and Annexe V provide for a Law of the Sea Tribunal, with a Special Seabed Disputes Chamber. There is a comprehensive chapter for general questions including an obligation to accept conciliation if another party favours it. Article 286 requires that any dispute not settled by agreed means shall be submitted at the request of any party to the dispute 'to the court or tribunal having jurisdiction' under Section 2 of Part XV.

That section provides that a party shall be free to choose one or more of the following means for the settlement of disputes:

(a) The Law of the Sea Tribunal;
(b) The International Court of Justice;
(c) An arbitral tribunal; or
(d) A special arbitral tribunal.

Constitutions for (c) and (d) are also annexed.

A State Party, which is a party to a dispute not covered by a declaration in force is to be deemed to have accepted arbitration in accordance with the system annexed to the Convention.

This provision is qualified by the operation of Articles 296 on limits of applicability, and 297 allowing optional exceptions. For example, unless otherwise agreed, the coastal State shall not be obliged to accept submission to the settlement procedures of the Convention of any dispute relating to its sovereign rights with respect to the living (i.e. fish) resources in the exclusive economic zone. But there are on the other hand, provisions for compulsory conciliation and there is broad recognition of an obligation to agree on *some* procedure leading to binding settlement.

23. *The Current Situation*

The Conference has just resumed its Eighth Session in Geneva. The negotiations earlier this year were highly productive, but there are still differences to be resolved before the text of a Convention can be put to a vote with good prospect of that general support by all major States required to give the new Law of the Sea authority.

Negotiations this year have narrowed the gap on the system of exploitation of the seabed, timing and function of a review conference, transfer of technology, the system of limiting production, and the voting in organs of the Authority.

It is essential that accommodations be found which will finally bridge the gaps. Failure to do so at this session would not necessarily mean the end of the negotiations. But success now would give new heart and confidence to all those who (like Turner) believe that the affairs of men, whatever their nationality or political system, should be conducted in accordance with legal rules, and that disputes should be settled by impartial judicial processes.

A solid basis of law of the sea is essential for the decades ahead, not only to ensure freedom of navigation on the oceans, and not only to provide orderly management of the vast but finite resources of fish in the water, metals on the sea floor, and oil under the continental shelf. We must also preserve the marine environment from defective leviathan oil tankers, costly collisions and uncontrollable wells polluting water and coasts and living things.

And beyond these material and aesthetic necessities, is the need to strengthen the forces for co-operation on our troubled planet. Our objective must be, through the legal regulation of the watery two-thirds of the earth, to move towards a community of nations whose greatest common heritage will be a 'Universal Law', an international law which will in turn help to make such a community a permanent and peaceful reality.