ACCESS BY AUSTRALIAN ABORIGINALS TO THE FRUITS OF DEEP SEABED MINING

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December 10, 1982 marked an important milestone in the International Law of the Sea, and indeed in international law generally. On that date, the *United Nations Convention on the Law of the Sea*[1] was opened for signature at a ceremony in Jamaica, and no fewer than 117 states (and two other entities) signed it then and there[2].

The ceremony at Jamaica was the culmination of an arduous and intensive process which spanned nearly a while decade[3], and resulted in a massive document comprising 320 articles and 9 annexes. The Convention deals with every aspect of the earth's oceans and their uses — and with justice has it been called "a constitution for the seas"[4].

For the present purpose, the most significant section of the Convention is Part XI[5], which deals with deep seabed mining, i.e. mining of the oceans' resources of mineral wealth at depths which, until fairly recently, have been beyond the capacity of human technology.

Reasons for Increase in Deep Seabed Mining

As has often been the case with the history of the development of Law of the Sea (particularly in modern times, since the end of the Second

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1. See (1982) XXI *International Legal Materials ("I.L.M")* 1245-1354 for the text of the Final Act of the Third United Nations Conference on the Law of the Sea and the text of the Convention itself (hereinafter called "Convention"). Unless otherwise indicated, references hereafter to article numbers refer to articles in the Convention. The official text of the Convention is contained in U.N. Document A/CONF. 62/122 of 7 October 1982.
2. For a full list of signatories to the Convention on the date of its opening for signature see *I.L.M.* supra n.1 at 1477.
3. The first session of the Third United Nations Conference on the Law of the Sea took place at United Nations Headquarters in New York in December 1973, and the last at the same location in September 1982. For a full list of all session venues and dates, see *I.L M.* supra n.1 at 1246-1247. However, the work of the Conference was preceded, *inter alia*, by the efforts of the *Ad Hoc* Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, which was established by United Nations General Assembly Resolution 2340 (XXII) of 18 December 1967. A concise chronology of the efforts under United Nations auspices culminating in the completion of the Convention is set out in the Final Act of the Conference, *I L.M.*, supra n.1 at 1245-1260.
4. J. Alan Beesley (Canada), who was Chairman of the Conference's Drafting Committee, quoted in *Time*, 8 September 1980, at 42. Ambassador Andres Aguilar (Venezuela) commented: "There is nothing comparable to it in diplomatic history" (Id.).
5. Articles 133-191, in *I.L.M.* supra n.1 at 1293-1308.

World War)[6] two factors have been critical in the area of deep seabed mining. The first is economic necessity[7]. Gradually, resources of minerals on land have been depleted, and this has necessitated a search for alternative sources offshore. The second factor is technological development[8]. It is only in the last decade or so that we have arrived at the stage where mining of deep seabed resources in commercial quantitites is a distinct possibility. At stake, in particular, are what are commonly called manganese nodules, i.e. oddly-shaped clusters of various minerals. What is remarkable about these nodules is not only that they exist in large quantities, but also that they are in fact self-generating. In other words, the supply of the minerals they contain is actually increasing. The implications of this are extremely important when one takes into account the ever-increasing scarcity of the same resources on land.

International Law Problems

But just as these factors have combined to create great possibilities, so they have also brought with them serious potential problems. These problems were articulated in 1967 by the then Maltese Ambassador to the United Nations, Mr Arvid Pardo. In that year in the General Assembly he made a marathon, 6-hour speech[9] which may be considered the real genesis of what has today emerged as Part IX of the 1982 Convention.

Ambassador Pardo saw the problem as lying in the fact that, when it comes to acquisition of rights in new areas, international law has traditionally operated by a process of laissez-faire — meaning that whoever arrived first at a particular place and staked out a claim could acquire sovereign rights. Applied to the context of deep seabed resources, what that approach meant, he foresaw, was that increasing economic pressures would drive states out to sea to supplement diminishing resources on land. But the only ones who would be able to acquire sovereign rights in the traditional way were those states which had both the economic and techonological capacities needed to undertake the huge capital investment necessary to achieve the desired goals. The end result, in Pardo's view,

6. The first major development of the post-War era which illustrated the point was the proclamation by President Truman of the doctrine of the Continental Shelf as an international legal concept ("The Truman Proclamation", as it became known): Presidential Proclamation No. 2667, 28 September 1945, (1945) 59 Stat. 884; 10 Fed. Reg. 12303; [1943-48] 3 C.F.R. 67; (1945) 13 D.S.B. 485.
7. The preamble to The Truman Proclamation itself stated that the Proclamation was expressly based on an "aware[ness] of the long range world-wide need for new sources of petroleum and other minerals".
8. The Truman Proclamation, in addressing itself to the resources underlying the Continental Shelf off the United States coast, cited (also in the preamble) technical experts who believed that "with modern technological progress their [i.e. the resources'] utilization is already practicable or will become so at an early date".
9. See the Statement by Ambassador Arvid Pardo of Malta, 1 November 1967, (1967) 22 G.A.O.R., A/C.1/PV. 1515 and 1516

would be a mad scramble to stake out claims which would rival the colonial battle to carve up Africa in the nineteenth century. Only the *already* wealthy would have any hope of obtaining access to this new source of wealth, while the less developed states (those without the money and technology) would be left behind – notwithstanding that in many respects they had the greatest need for access to the new-found wealth. It was, in short, a classic case of the rich getting richer and the poor getting poorer. And this, predicted Pardo, would be a serious source of international tensions in the coming decades.[10]

Convention on the Law of the Sea

The solution proposed by Pardo was that the deep seabed and its subsoil be declared to be "the common heritage of mankind".[11] And today, over 25 years later, this concept is at the very heart of Part XI of the 1982 Convention on the Law of the Sea.

Article 136 of the Convention proclaims that

> The Area [which, in broad terms, is defined as the deep seabed and its subsoil] and its resources are the common heritage of mankind.[12]

In practical terms that means three things, all of which are spelt out in the succeeding article in Part XI:

1. That no-one may acquire sovereign rights over "the Area" or its natural resources.[13]
2. That a sort of international trusteeship system is set up.[14] A new body – called the International Seabed Authority – is to be established to act as trustee of the Area and its resources.[15]
3. That all activities in the Area (meaning, in particular, mining) are to be carried out "for the benefit of mankind as a whole".[16]

Part XI of the Convention contemplates a *parallel* system of mining on the deep seabed. On the one hand, individual states (and private companies, for that matter) will themselves be able to mine, but only after first obtaining approval from the International Seabed Authority.[17] And on the other hand, the International Seabed Authority will have its own operating arm – to be called "the Enterprise" – which itself will conduct mining operations.[18]

10. Id., 1515th Meeting, especially at paras. 56-58 and 91-92
11. Id., 1516th Meeting, especially at paras. 3-16
12. *I L M.* supra n.1 at 1293
13. Article 137(1)
14. Article 137(2)
15 Article 156-157
16. Article 140(1)
17. Article 137(2) and 153
18. Article 170

Thus the International Seabed Authority will have two principal sources of revenue:

1. It will earn charges or royalties on the proceeds of mining operations conducted by states or companies.[19]
2. It will earn profits directly through its own mining operations conducted by its operating arm.[20]

The potential revenues to be earned by the International Seabed Authority in this fashion are huge.

The question then is: to whom are the proceeds of deep seabed mining to be disbursed? The answer is found principally in Article 140(1):

> Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing states and of *people who have not attained full independence or other self-governing status recognised by the United Nations in accordance with General Assembly resolution 1514(XV) and other relevant General Assembly resolutions*.[21]

What this paragraph establishes is that it is not only states which may receive the fruits of deep seabed mining, but also "peoples who have not attained full independence or other self-governing status".

By referring to United Nations General Assembly Resolution 1514 in this way, Article 140(1) of the Convention introduces the whole area of self- determination, which is undoubtedly one of the most vexed and controversial issues in international law.[22] At the very least, there is serious doubt as to whether self-determination is a norm of international law; indeed whether it is the sort of idea which is even *capable* of becoming a rule of law.[23] And even if it is, it is questionable whether Australian aboriginals would meet the requirements of self-determination in any event.

In a brief comment of this nature, it is unnecessary — and indeed impossible — to canvass these issues, and it is not suggested that there are any easy answers to them one way or the other. It is unnecessary to canvass the issues because, it is suggested, there is another, more pragmatic,

19. Article 171, para. (b) and see also Annex III, Article 13
20. Article 171, para. (c), and see also Annex IV, Article 10
21. *I.L.M.* supra n.1 at 1293 (emphasis supplied)
22. United Nations General Assembly Resolution 1514(XV), 14 December 1960, *Declaration on the Granting of Independence to Colonial Countries and Peoples*. Paragraph 2 of the Resolution stated: "All people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."
23. See e.g. J.H.W. Verzijl, *International Law in Historical Perspective* (1968), vol. 1 324-325, 558.

approach to the problem. In this respect, the real question is: who is going to be making the relevant decisions for the purposes of Part XI of the Convention?

The answer lies in Article 140(2):

> The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis . . .[24]

In other words, it is the International Seabed Authority *itself* which will be making the critical decisions. And these decisions will go through a two-step procedure, corresponding with the two levels of decision-making in the Authority. The Authority will consist of two principal organs:[25]

1. The Assembly:[26] This will be the supreme, policy-making body;[27] and every party to the Convention will *ipso facto* become a member of the International Seabed Authority, in general, and the Assembly in particular.[28]
2. A Council;[29] consisting of 36 members;[30] which will be the executive organ of the Authority.[31]

Decisions as to the sharing of profits earned from deep seabed mining will ultimately be made by the Assembly;[32] but on the recommendation of the Council.[33]

Implications of the Convention

The practical effect of this, as far as Australian aboriginals are concerned, is that decisions as to sharing the fruits of deep seabed mining will not necessarily be made on the basis of strictly "legal" considerations. The point is that self-determination has *two* dimensions: the legal on the one hand, and the political or moral on the other. One leading authority in the area recently put it this way:

> In certain respects, the entire debate on the legal status of the principle of self-determination is beside the point. The feeling that there *is* a right to self-determination persists and is probably held more

24. *I.L.M.* supra n.1 at 1293-1294.
25. Article 158
26. Article 159
27. Article 160
28. Article 159
29. Article 161
30. Article 161(1)
31. Article 162
32. Article 160(2)(g)
33. Article 162(2)(o)(i)

> widely today than ever before. Even if, as a *legal* right, "self- determination" cannot really swim, as a *moral* right or *political* desideratum, it will not, and in the opinion of most people should not, sink.[34]

Applied to the 1982 Law of the Sea Convention, and specifically to the topic of this comment, by appreciating *how* the system will operate, and *who* will be making the relevant decisions, it may be possible for Australian aboriginals to sidestep the legal complications of self-determination and address themselves directly to the political or moral dimension.

As far as the International Seabed Authority is concerned, it is early days yet. Recently, a preparatory commission, charged with the responsibility of establishing the Authority,[35] met for the first time. Unfortunately, it was bogged down on procedural and technical matters, and it appears therefore that it will be some considerable time before the International Seabed Authority is actually established, operating and earning revenues. In the meantime, once Australian aboriginals are aware of the interesting possibilities tucked away in Part XI of the *United Nations Convention on the Law of the Sea*, two things, it is suggested, seem to be important: firstly, that developments under the Convention should be carefully monitored, particularly insofar as they relate to the establishment of the International Seabed Authority; secondly, that once the International Seabed Authority is established, a submission ought to be prepared and submitted for recognition under Article 140(1) of the Convention.

34. M. Pomerance, *Self-Determination in Law and Practice* (1982) 73
35 See the Final Act of the Conference, Annex 1, Resolution I, *I L.M.* supra n.1 at 1253-1254