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Recent Developments in the International Law of the Sea

HOUSTON PUTNAM LOWRY*

I. Introduction

This report covers significant developments in the international law of the sea in the year 2000. To a great extent, developments with respect to the United Nations Convention on the Law of the Sea (UNCLOS)¹ are a continuation of activities reported in past years. Meetings of the Outer Continental Shelf Commission, the International Seabed Authority, States Parties to the Convention, and cases before the International Tribunal on the Law of the Sea, as well as ocean related issues pursuant to the United Nations Environmental Program (UNEP) are timely and extensively reported on the United Nations Oceans and Law of the Sea website² and linked sites, and are also annually covered in the United Nations' Secretary General's report.³ Only items of significant interest during the year will be covered here.

Also as previously noted, UNCLOS and the related Agreement adopted in 1994 amending the controversial seabed mining provisions of UNCLOS were sent to the Senate for its advice and consent to ratification in 1994. No action has been taken because of the opposition of Senator Helms, chairman of the Senate Foreign Relations Committee. As a consequence of non-ratification, the United States lost its guaranteed seats and de facto veto in governing bodies of the International Seabed Authority until future ratification. The United States does not have a nominee for the International Law of the Sea Tribunal

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1. *Third United Nations Conference on the Law of the Sea: Final Act*, U.N. Doc. A/Conf.62/121, 21 I.L.M. 1245 (1982), available at <http://www.un.org/depts/los/> (last updated Mar. 2, 2001) [hereinafter UNCLOS].

2. See *Oceans and Law of the Sea*, at <http://www.un.org/Depts/los/index.htm> (last updated Mar. 2, 2001).

3. *Oceans and the Law of the Sea: Report of the Secretary-General*, 55th Sess., Item 34, U.N. Doc. A/55/61 (2000), available at <http://www.un.org/ga/55/lista55.htm#2>.

and participates in other continuing bodies created by UNCLOS on an observer basis. One hundred thirty-five states have now ratified UNCLOS.

In view of the continuing failure of the Senate to act on this and other treaties long pending before it, the American Bar Association at its annual meeting in New York in July 2000 adopted a resolution that, *inter alia*, urged the U.S. Senate to expedite consideration and approval of four U.N.-related international agreements, including UNCLOS, which had been previously endorsed by the ABA. An item of interest in 2001 will be what effect, if any, the Senate's agreement that a tie vote in a committee can send an issue to the Floor will have on the treaties on "hold" by Senator Helms.

II. The United States

A. OCEANS ACT OF 2000

The Oceans Act of 2000⁴ was signed into law by President Clinton in August. The Act finally passed through Congress after failing to pass before two prior Congresses adjourned. Following the model of the Stratton Commission of the 1960s, the Commission on Ocean Policy, a sixteen-member commission established by the Act, will have a broad mandate to make recommendations for a comprehensive U.S. oceans policy with respect to ocean and coastal resources, development of ocean technology, and environmental protection. The report is due eighteen months after the Commission is appointed in early 2001. The sixteen members are to be chosen by the President: twelve from an agreed number of prospective nominees by the House and Senate majority and minority leaders, and four by the President alone. The authorizing legislation makes only tangential reference to existing treaty arrangements affecting the United States' offshore waters under UNCLOS and other agreements to which the United States is a party. The new Commission on Ocean Policy is intended to set the course of U.S. ocean policy for decades to come, hopefully in a manner consistent with preserving the careful balance between high seas freedom of navigation and management of coastal resources set forth in UNCLOS.

B. GULF OF MEXICO TREATY⁵

The United States signed and the Senate gave its advice and consent to ratification of a treaty with Mexico establishing the boundaries of the continental shelf in the Gulf of Mexico where it extends beyond 200 miles. There will be a ten-year moratorium on commercial exploitation in a buffer zone beyond the boundary, but the agreement will permit the U.S. Department of the Interior to proceed with leasing where the shelf has the greatest potential for oil and gas.

C. PACIFIC REGIONAL FISHERIES AGREEMENT⁶

The United States and ten other fishing nations of the Pacific region signed an international convention for the conservation of highly migratory fish stocks, principally tuna,

4. Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644 (2000).

5. Treaty on Delimitation of Continental Shelf, June 9, 2000, U.S.-Mex., S. TREATY DOC. NO. 106-39.

6. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sept. 5, 2000, 40 I.L.M. 278.

in the western and central Pacific. This was the last major ocean area not covered by a regional fisheries agreement.

D. *UNITED STATES V. LOCKE*⁷

In March 2000, the U.S. Supreme Court unanimously ruled, on federal preemption grounds, that several Washington state laws and regulations relating to oil tanker equipment, design, and operating and reporting rules were unconstitutional. The Court found that Titles I and II of the Federal Ports and Waterways Safety Act of 1972 (PWSA)⁸ preempted state law. According to the Court, a clause of the Oil Pollution Act of 1990 recognizing state authority to impose “additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil”⁹ did not limit the preemptive effect of the PWSA. The decision is significant because the PWSA imposes uniform standards that conform to international requirements; in particular, Title II of the PWSA as amended, implements many requirements of the MARPOL 73/78 Convention¹⁰ to which the United States is a party.

III. International Dispute Settlement

UNCLOS Article 292, which governs the release of vessels where there is an allegation that the detaining state has not complied with the provisions of UNCLOS for prompt release, was expected to be, and has proved to be, a major source of business for the International Tribunal for the Law of the Sea (Tribunal).¹¹ Other cases, chiefly on maritime delimitation, are now pending before the International Court of Justice. Arbitration, however, remains the default mechanism for dispute settlement under UNCLOS if states do not agree on another forum. States may opt out of compulsory arbitration in several categories of disputes.

A. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

1. *Camouco (Panama v. France)*

The Tribunal received *Camouco (Panama v. France)* on January 17, 2000.¹² The Panamanian vessel *Camouco* was arrested by a French frigate for allegedly fishing unlawfully in France’s exclusive economic zone of the Crozet islands (French Southern and Antarctic Territories). Panama applied to the Tribunal for the prompt release of the *Camouco* under UNCLOS Article 292.

7. *United States v. Locke*, 529 U.S. 89 (2000).

8. Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1221 (1994).

9. Oil Pollution Act of 1990, 33 U.S.C. § 2718(c) (1994).

10. Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319; Protocol of 1978 Relating to the Convention for the Prevention of Pollution from Ships, 1973, Feb. 17, 1978, 17 I.L.M. 546. Together these documents are referred to as MARPOL 73/78.

11. The International Tribunal for the Law of the Sea is a forum established by UNCLOS for the peaceful settlement of disputes. Its seat is at the Free and Hanseatic City of Hamburg, Germany. The Tribunal may sit and exercise its functions elsewhere whenever it considers this desirable. See *Oceans and Law of the Sea, Settlement of Disputes*, available at http://www.un.org/Depts/los/los_disp.htm (last updated Feb. 17, 1999).

12. See International Tribunal for the Law of the Sea, *Application Filed Against France for Release of Arrested Panamanian Fishing Vessel Camouco and its Master* (Jan. 17, 2000), available at <http://www.pict-pecti.org/news/archive/January/ITLOS.01.17.Camouco.html>.

Moving with great speed for an international tribunal, the Tribunal issued its judgment on February 7, 2000.¹³ The Tribunal voted 19–2 that it had jurisdiction to hear the application to release the vessel. Neither party contested that jurisdiction.

There was some dispute on whether or not the Master of the vessel had been seized. His passport was taken from him by French authorities and he was under court “supervision.” The Tribunal felt this prevented him from traveling, and thus he was effectively seized.

The release of a vessel and crew could be conditioned on the posting of a bond. In fact, the local French court set a bond at Fr 20,000,000.¹⁴ This amount was not reasonable according to Panama, who requested a bond of Fr 1,300,000. As the Tribunal ultimately determined by a vote of 15–6, the amount of the bond should be a bank guarantee of Fr 8,000,000.¹⁵ Once this was posted, the vessel and its crew would be free to leave.

The court fulfilled its obligations under UNCLOS Article 292(3) to resolve these types of questions “without delay.”¹⁶ If only domestic courts could respond as quickly!

2. *Monte Confurco (Seychelles v. France)*

Monte Confurco (Seychelles v. France) was brought to the Tribunal on December 6, 2000.¹⁷ The Seychelles’ vessel *Monte Confurco* was seized by France in the exclusive economic zone of the Kerguelen Islands (French Southern and Antarctic territories). The vessel was taken to Reunion where it and its Master were detained. The Master was placed under judicial supervision. The local court required the posting of a Fr 56,400,000 bond¹⁸ before the vessel and its Master would be released.

The Seychelles brought this matter to the Tribunal pursuant to UNCLOS Article 292. Once again, the Tribunal demonstrated its commitment to proceed without delay. The Tribunal issued its decision on December 18, 2000,¹⁹ taking only twelve days from the date the case was filed to issue a decision.

Once again, there was no serious contest to the Tribunal’s jurisdiction. Provisions to release the *Monte Confurco* had not been made within ten days of its seizure, allowing the Tribunal to hear the case. The Tribunal found it had jurisdiction.

The Seychelles requested the Tribunal set a bond for Fr 2,200,000. France continued to claim a Fr 56,400,000 bond was reasonable. The Tribunal noted there were two competing interests. First, France could expect its rules and regulations concerning fishing had to be complied with. Second, the Seychelles had a right to secure the release of its vessel after posting a bond of such a magnitude as to protect France’s interests. This means the amount

13. *Panama v. France (The “Camouco” Case)* (Feb. 7, 2000), available at <http://www.pictpcti.org/news/archive/february/ITLOS.02.07.Camouco.html>.

14. Under local rules, the French court did not have to explain how it determined the amount of the bond.

15. The Tribunal interestingly noted the maximum fine was Fr 5,000,000. If so, why was such a large bond required?

16. UNCLOS, *supra* note 1, art. 292(3).

17. International Tribunal for the Law of the Sea, *Application for Release of Fishing Vessel “Monte Confurco” and its Master* (Dec. 6, 2000), available at <http://www.pictpcti.org/news/archive/months2000/december/ITLOS.12.06.monteconfurco.html>.

18. This time the French court carefully explained how it determined the amount of the bond—Fr 1,000,000 to secure the appearance of the vessel’s Master, Fr 400,000 to secure payment for damages, and Fr 55,000,000 to secure payment of fines and confiscation of the vessel.

19. *Seychelles v. France (The Monte Confurco Case)* (Dec. 18, 2000), available at <http://www.pictpcti.org/news/archive/months2000/december/ITLOS.12.18.judg.pdf>.

of security must be proportionate to the offense (and the penalties for the offense). In light of all the circumstances of the case, the Tribunal set the bond amount at Fr 18,000,000.

Once again, there was a question of whether or not the Master of the vessel had been detained. The Seychelles said he was. France said he was not. While the conclusion was debated, the underlying facts were not really in dispute. The Master's passport was taken from him by the French authorities and he was under "court supervision." While the Master could apparently come and go on Reunion Island, he was not free to leave the island. The Tribunal held this was detention within the meaning of UNCLOS. Therefore, the Master must be allowed to leave once the bond was posted.

3. *Swordfish Stocks (Chile v. European Community)*

On December 20, 2000, the Tribunal established its first special chamber²⁰ at the request of Chile and the European Community.²¹ It is too early to tell how the chamber will function, but it may provide a model for such disputes in the future. It should be noted the President of the Tribunal used his good offices to assist the parties in deciding to use a special chamber.

4. *The Permanent Headquarters of the Tribunal*

On July 3, 2000, the Tribunal moved into its permanent building in Hamburg.²² U.N. Secretary-General Kofi Annan spoke on the occasion, praising the Tribunal as a modern court that can respond quickly.²³

5. *Trust Fund to Assist in Litigation*

On May 25, 2000, the parties to UNCLOS established a trust fund to assist states in proceedings before the Tribunal. The U.N. Secretary-General will administer the fund. Contributions are voluntary and can be received from states, intergovernmental institutions, non-governmental organizations, and any other person.

The fund will be used as a device to overcome financial impediments to the judicial settlement of disputes. In this sense, it is similar to a trust fund established to assist states in proceedings before the International Court of Justice. Interestingly, the fund is not intended to be used where the jurisdiction of the Tribunal is being disputed.

B. AN ARBITRAL TRIBUNAL

1. *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*

The Tribunal originally issued an interim order of protection in *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*.²⁴ The case was ultimately referred to an arbitral

20. The special chamber consists of Rao (India), Caminos (Argentina), Yankov (Bulgaria), Wolfrum (Germany), and Vicuna (ad hoc for Chile).

21. See International Tribunal for the Law of the Sea, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Dec. 20, 2000), available at http://www.un.org/Depts/los/ITLOS/Order3_2000Eng.pdf.

22. See Oceans and Law of the Sea, *Secretary-General Opens Law of the Sea Tribunal in Germany* (July 28, 2000), available at <http://www.un.org/Depts/los/ITLOS/Hdqrts/Hdqrpx.htm>.

23. See International Tribunal for the Law of the Sea, *Official Opening of the Headquarters Building of the Tribunal* (July 17, 2000), available at http://www.un.org/Depts/los/Press/ITLOS/ITLOS_36.htm.

24. *Australia and New Zealand v. Japan (Southern Bluefin Tuna Case)* (Aug. 27, 1999), available at <http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>.

tribunal²⁵ that issued its jurisdiction decision on August 4, 2000, revoking the Tribunal's provisional measures in the August 1999 case and ruling that the arbitral tribunal lacked jurisdiction to decide the case.

Japan was accused of violating its obligations under UNCLOS Articles 64 and 116–19 concerning the Southern Bluefin Tuna (a highly migratory species used in sashimi). Australia and New Zealand requested an award of interim measures, which was granted by the Tribunal. As part of its award of interim measures, the Tribunal found the arbitral tribunal (specially formed to determine the merits of the decision under UNCLOS 3, Annex VII) would have jurisdiction to determine the case.

This finding did not prevent Japan from raising the jurisdiction issue before the arbitral tribunal itself. The arbitral tribunal found the dispute between the parties really arose out of the 1993 Convention for the Conservation of Southern Bluefin Tuna²⁶ rather than UNCLOS. Since the parties had not exhausted their dispute resolution remedies under the Bluefin Convention, they were not able to use the UNCLOS 3 dispute resolution procedures. Therefore, the case was dismissed and the interim order of protection was dissolved.

There were some interesting issues the arbitral tribunal did not explicitly consider: What is the level of proof necessary to sustain an interim order of protection? Is it probable cause? Is it a preponderance of the evidence? Is it clear, cogent, and convincing evidence? Should the parties be free to re-litigate the question of jurisdiction after an interim order of protection has been entered?

IV. The International Seabed Authority

A. DEEP SEABED MINING REGULATIONS

On July 13, 2000, the International Seabed Authority (ISA) approved regulations to govern prospecting and exploration for polymetallic nodules (manganese, nickel, cobalt, and copper nodules) in the "area."²⁷ The regulations address protection of the marine environment, reporting requirements, and protection of confidentiality of data. The regulations do not presently cover polymetallic sulfides and cobalt crusts.

One measure of waning expectations of a seabed mineral bonanza was the complaint by the ISA Secretary-General at the annual meeting of States Parties to the Convention that a large number of ISA members were in arrears in their assessed contributions, and it was difficult to secure a quorum at ISA meetings.

25. The tribunal consisting of Judge Stephen Schwebel, Judge Florentino Feliciano, Justice Sir Kenneth Keith KBE, Judge Per Tresselt, and Professor Chusei Yamada.

26. Convention for the Conservation of Southern Bluefin Tuna, done at Canberra, May 10, 1994, *available at* <http://www.oceanlaw.net/texts/ccsbt.htm> (last visited May 16, 2001).

27. The "area" is the part of the Ocean beyond national jurisdiction subject to the Convention, as modified by the 1994 Agreement.