

World Oceans Day 2010 - Our oceans: opportunities and challenges

Roundtable discussion on the United Nations Convention on the Law of the Sea  
fifteen years after its entry into force

ENHANCING THE IMPLEMENTATION OF UNCLOS AT THE NATIONAL LEVEL  
(WITH SOME COMMENTS ON THE REVIEW/AMENDMENT OF UNCLOS)

*By Ted L. McDorman\**

### **Enhancing Implementation**

Implementation of international treaties and their obligations within a State has three broad features.

**First**, there is the interface of international law and national law that exists respecting an international treaty. Learned writers of international law always start a conversation about the relationship between international treaties and domestic law in the following way:

It should not be assumed that once a treaty has entered into force for a state it is then in force in that state; in other words, that it has become part of its [national] law.<sup>1</sup>

International law and domestic law operate in different spheres. This is not surprising since international treaty law is about obligations, rights and responsibilities existing for a State in relationship to other States; whereas domestic law involves the law that applies to the people that live and work within a specific State. The manner in which the domestic law of a State relates to or engages with international treaties varies from State to State. Put differently, the manner in which international treaty law becomes part of national domestic law (or is

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\* Professor, Faculty of Law, University of Victoria.

transformed into domestic law) is different in each State. Learned writers divide the States of the world into two groups respecting the “reception” or “transformation” of international treaties into domestic law. First, there are those States that follow the monistic approach, which means that international treaties are, once they become binding on a State, directly part of the national law of the State. International treaties, in this approach, are referred to as being “self-executing.” Essentially, the international treaty text becomes like a statute or enactment with the same or higher standing as other national enactments. Usually, there is the procedural requirement that the principal legislative body (parliament, legislature or national assembly) must by vote agree that the State is to become bound by the treaty. Second, there are those States that follow the dualist approach, which means that international treaties, once they become binding on a State, are not self-executing and not directly part of that State’s domestic law. For an international treaty to become part of the domestic law of these States what is required is the enactment of statute/law essentially bringing the treaty into domestic law. The United Kingdom and commonwealth countries (such as Canada) follow this practice.

The **second** feature of treaty implementation is the usual requirement for legislation and/or detailed regulations to implement specific treaty obligations. This obviously arises in those States where a treaty is not self-executing but also almost always arises in those States where treaties are self-executing, since treaty wording is often too broad, non-specific and detail is necessary that is consistent with the legal and administrative traditions of the implementing State. It is rarely the case, and certainly even more rarely the case as regards implementation of the obligations, responsibilities and opportunities that exists in the 1982

Law of the Sea Convention (UNCLOS), that national laws are unnecessary to fully benefit and comply with a major international treaty.

For some States, enhancing national implementation of UNCLOS requires the enactment of new and/or modernization of national laws and regulations. Almost 30 years after the adoption of UNCLOS and over 15 years since its entry into force, some States have yet to comprehensively implement the Convention through national legislation and regulation. The reason for this is that there usually has to be a so-called “trigger” for a State to invest in legislative and regulatory change. The trigger can be internal or external and in the case of legislation and regulations implementing an international treaty one trigger is inevitably the ratification and/or entry into force of the treaty for that State. However, once this “window of opportunity” has closed, then the usual triggering action is a specific event or crisis of importance to the State that requires action. Without such a trigger, it is difficult to encourage States to legislatively implement international treaties. While difficult to show, it may also be the case that where the trigger for implementation of a treaty is a crisis of event of specific concern to a State, that State is apt to craft its legislative and regulatory response specific to national concerns raised, such that the legislative response may result in a practice diverse for what the treaty itself calls for.

The point to be made for the purposes here is that it may be very difficult to enhance the implementation of UNCLOS at the national level in those States which are parties to UNCLOS but have not yet embraced through legislation and regulation the obligations, responsibilities and opportunities provided by UNCLOS.

The **third** and often overlooked feature of implementation of international treaty obligations is what can be termed the “real” issue of implementation and that is the administrative and practical support that is necessary to bring to life the legislative and regulatory structure. For example, the creation of the 200 nautical mile EEZ is relatively easy, however, the implementation of the legal rights, obligations and responsibilities in UNCLOS on marine scientific research, marine environmental protection or fisheries within 200 nautical miles requires both legislation and regulation, as well as a bureaucracy, administration and other support to carry out, monitor and, where necessary, enforce such laws and regulations. In the case of marine scientific research, for example, a State has to identify competent people to deal with research requests in a timely manner. It is here that the real work of implementation of UNCLOS continues with the approach to enhancing such implementation identifiable as capacity-building and education.

It is not surprising that over time the national implementation of UNCLOS is creating a diversity of State practice on certain aspects of the Convention. National legislation and regulation inevitably reflects the specific interests, concerns and structures of the State, which can result in a diversity of understandings of the Convention wording and the most appropriate manner to accomplish compliance with an obligation. While treaties like UNCLOS have a “pull-factor” in terms of States acting in conformity with the Convention, over time the “pull-factor” can yield in some situations to the national interests of individual States, creating a diversity of practices. This provides a segue into a few comments on the review/amendment of UNCLOS.

## **Review/Amendment of UNCLOS**

UNCLOS is a 1970s document with 1970s sensibilities that, however, has undergone adjustment or elaboration (directly or indirectly) through other instruments, like the 1994 Agreement on the Implementation of Part XI and the 1995 Straddling and Highly Migratory Fish Stocks Convention. Note can also be made of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing as an important new instrument that elaborates upon the rights and obligations set out in UNCLOS. There are also many other such international accords. As noted by one of the other speakers, it is important to keep in mind that international ocean governance is more than just UNCLOS, even while acknowledging the “foundational” nature of UNCLOS.

The overwhelming “official” perspective is that at present no one wants to reopen the compromises and trade-offs that were and are central to UNCLOS. The perspective is, not unreasonably, that the stability provided by UNCLOS outweighs any benefit that may arise from a renegotiation of UNCLOS, particularly given the uncertain prospects of there being an agreement on amendments to UNCLOS. Better the devil we know, than what is not known. It is clear that there is no one, or even a cohesive group of topics or concerns, that can be identified as being so significant that the international community is galvanizing in such a manner that may lead to a reopening of UNCLOS.

Nevertheless, there are a number of “itches” which have led some to question whether scratching at UNCLOS may be worthwhile. One such “itch” is the evolution in international environmental law and practice that has taken place since the 1970s that, while reasonably foreshadowed in Part XII of UNCLOS, is, nevertheless, not fully reflected in the Convention. It is

not just concepts like ecosystem management and precaution, but also problems like ocean acidification and the effects of global climate change that are not well reflected in UNCLOS. The Arctic Ocean has been the geographic centre of an “itch,” largely from European sources. Some hold the view that its uniqueness and importance to the global climate require that it be treated differently than other ocean areas and that UNCLOS should be superseded by an Antarctic Treaty style regime. Even one of the widely understood sacrosanct aspects of UNCLOS, freedom of navigation, has seen “itches” caused by the concern over terrorism at sea, piracy and issues related to flag State regulation and effective authority. Freedom of navigation in national waters has raised “itches” about passage rights for vessels carrying ultra-hazardous cargoes. The regulation of marine genetic resources beyond 200 nautical miles is currently subject to discussions within the UN system, but the matter is also an “itch” vis-à-vis UNCLOS. For some, the marine genetic resources issue is reminiscent of the polymetallic nodules of the deep ocean floor from the 1960s and 70s that fuelled much of the political discussions around UNCLOS. The creeping of jurisdiction within 200 nautical miles and, for some, the more pronounced creeping of the continental shelf beyond 200 nautical miles, have led to commentary that the Common Heritage, again central to UNCLOS, is under siege and in danger of being significantly geographically constricted. Still another “itch” is the severely depleted state of the globe’s marine living resources and the condemnation often by non-lawyers of the international legal right of freedom of fishing that is associated with the world’s inability to reverse the situation. Needless to say the above listing is selective.

It is interesting that UNCLOS is one of the last of the major treaties not to have the device of a “review” conference to assess the implementation and progress of the attainment of the

goals of the Convention. Moreover, UNCLOS is one of the last major treaties not to create a regular Meeting of State Parties for the purposes of substantive discussion and assessment of the Convention. [The mandate of the Meeting of States Parties to UNCLOS is narrow and many States, again quite reasonably, are not predisposed to open up its mandate.] The lack of a review conference device or broad-ranging State Parties mechanism arguably may result either in the festering of the various itches and the creation of greater unilateral action and the destabilizing of UNCLOS, or, conversely, the maintenance of stability, since States have no avenue to air complaints and concerns that could undermine UNCLOS.

The intention here was not to advocate for or against the review and/or amendment of UNCLOS, rather it was to raise the question and provoke some commentary. Most, if not all, of the resulting commentary was dead-set against a reopening of UNCLOS in anyway, noting as done above that selected aspects of UNCLOS are being elaborated upon in many different fora (for example, in the International Maritime Organization respecting vessel-source marine pollution) and that unravelling the careful compromises in UNCLOS is not in anyone's interest. Without disagreeing with this perspective, one is inclined to speculate whether UNCLOS, like the U.S. Constitution, is being elevated to what a colleague once described as "sacred text," such that the contemplation of any alteration is itself a sinful act.

See generally on the review/amendment of UNCLOS:

1. Douglas M. Johnston, "RUNCLOS: The Case for and against Revision of the Law of the Sea Convention" (2003), CIX Hogaku Shimpo: The Chuo Law Review (Honouring

Professor Kazuomi Ouchi) 135-159. The “sacred text” concept is discussed at pp. 144-147.

2. Edward L. Miles, “Preparations for UNCLOS IV” (1988), 19 *Ocean Development and International Law* 421-430.
3. The various papers in Alex G. Oude Elferink, ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Leiden: Martinus Nijhoff, 2005).
4. Alan Boyle, “Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change” in David Freestone, Richard Barnes and David M. Ong, eds., *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), at pp. 40-62.

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<sup>1</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007, 2nd ed.) at p. 178.