'THE FISHERIES OF THE COMMONS: RESOLVING INTERNATIONAL AND NATIONAL INTERESTS'

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ABSTRACT:

The Southern Ocean from Bass Strait to the Antarctic has been and is the location of many difficult and unresolved conflicts regarding the nature and extent of fisheries and rights of access to and protection of those fisheries. Those disputes raise significant issues of national and international law, and highlight the need for a more studied and focussed view of fisheries laws. There remains an urgent need for reconciliation of competing interests in fisheries of the commons. There also remains significant ongoing roles for arbitration and mediation in the resolution of these complex disputes both as between states and in private disputes, not only with respect to fisheries disputes but also in the fields of offshore minerals exploration and exploitation, shipping, offshore energy and international trade.

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THE FISHERIES OF THE COMMONS AND THEIR EXPLOITATON

There is bad news and good news today about the conservation of the world's natural heritage through the United Nations and more particularly UNESCO. On day three following his successful election as next President of the United States Donald Trump threatened to leave not only COP 29 occurring as I speak in Baku Azerbaijan but also all other UN financial commitments of his national. I recall when I was President of the World Heritage Committee based in Paris that another conservative US President carried into effect a similar threat because the World Heritage Committee had listed the Everglades and Yellowstone National Park on the World Heritage endangered list because of drainage of the former and poisoning of the river through the other. Yet after representations which I and others made and with a looming election all those funds were reinstated.

This paper concerns a field of international commerce with a turnover in excess of $150 billions per annum, but which received surprisingly little support from either the UN itself or the great maritime powers of the world. A startling example of that is the failure of the proposed 1977 Torremolinos Convention and the 1993 Protocol re-drafted in 2012 under the Cape Town Agreement, which is designed to given the same protections to the safety of fishers at sea as commercial ship's personnel, has failed to receive the required number of signatories to come into effect. The UN oversight body involved the *International Maritime Organisation* [the IMO] has been unable to achieve what the sinking of the x in 1912 did in just two years the *Safety of Life at Sea Convention* [SOLAS] in 1914.

A particular focus of this paper is the high seas. Those parts of our terrestrial world that fall outside the sovereign jurisdiction of any country include the high seas, outer space, and

Antarctica, and are sometimes referred to as the 'global commons' being part of the common heritage of mankind. Apart from brute force, management of these resources can only occur by way of international treaty. In the teeming turbulent seas of the Southern Ocean between Bass Strait on the Australian coastline to Antarctica both regimes have held sway, not necessarily to the benefit of commercial fishers nor the conservation of the fisheries in those waters. This dissertation is concerned with the intersection of rights both in the national sphere and beyond into the global commons.

The sovereignty of nations on the high seas is important in this consideration because it involves the recognition by other nations of the right of a state to exercise exclusive control over the land mass of, airspace above, and waters adjacent to its territory but also of its ships at sea as if an extension of the land[1]. The issue was brought into stark relief recently in the decision of the International Tribunal for the Law of the Sea in *The MV Norstar; Panama v Italy* [10 4 2019]. Panama filed an application with the Tribunal in a dispute with Italy regarding the arrest and detention of the MV Norstar, a Panamanian-flagged vessel. According to the application, from 1994 until 1998 the MV Norstar was involved in supplying gasoil to mega yachts in international waters beyond the territorial seas of Italy, France and Spain. The application further stated that the MV Norstar was arrested in the bay of Palma de Mallorca on 24 September 1998 by Spanish officials, at the request of Italy, allegedly for having supplied oil to mega yachts in contravention of Italian legislation. In its application, Panama claimed compensation from Italy for damage caused by the illegal arrest of the MV Norstar in 1998. In support of its request, Panama contends that Italy violated several provisions of the United Nations Convention on the Law of the Sea [UNCLOS], in particular the right of freedom of navigation[2]. The dispute was submitted to the Tribunal under article 287 of the Convention.

In its determination on the merits the Tribunal applied article 87 of UNCLOS regarding Panama's freedom of navigation on the high seas. In order to assess what that freedom entails under UNCLOS, the Tribunal had regard to article 92 which provides for the exclusive jurisdiction of the flag State over its vessels on the high seas.
The Tribunal found that article 87.1 of UNCLOS was applicable in the present case and that Italy, by extending its criminal and customs laws to the high seas, by issuing the decree of

[1] See *Montevideo Convention on the Rights and Duties of States* 1933 Article 1
[2] As embedded in particular in UNCLOS articles 33, 73 (3) and (4), 87, 111, 226 and 300.

seizure, and by requesting the Spanish authorities to execute it - which they subsequently did - breached the freedom of navigation which Panama, as the flag State of the *Norstar*, enjoyed under that provision. Panama was awarded compensation for the loss of the vessel in the amount of USD 285,000 with interest at the rate of 2.7182 per cent, compounded annually and payable from 25 September 1998 until the date of the judgment.

But not beyond its recognised territory. Sovereignty also involves access to and exclusive management of all natural resources of a state. On this issue UNCLOS Article 193 provides:

> '*States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment'.*

That sovereign right extends to such coastal waters around the state's landmass as form the 'territorial sea' measured from a baseline which is generally speaking measured by a series of rules establishing a baseline founded upon the mean low water mark of the state concerned, whilst also making allowances for inland waters, and permitting that limit to extend seawards up to 12 nautical miles[3]. A coastal nation may also protect against a potential invasion of its territory through an additional contiguous zone extending the limits of the state another 12 nautical miles or in total 24 nautical miles seawards from the baseline, within which it may protect certain limited interests such as prevention of pollution and breach of the criminal law of the State, including fisheries laws by the exercise of extra-territorial legislative power of the State.

In addition the Convention also recognises the right of a coastal nation to claim an exclusive economic zone [or EEZ] stretching to 200 nautical miles from the baseline, within which it can exercise exclusive economic rights to exploitation and conservation of natural resources such as fisheries, deposits of minerals on the ocean floor, and energy activities such as gas production, and wind and tidal power[4]. Under Article 77 a coastal state may also claim rights over the continental shelf if it extends beyond the EEZ for the purpose of exploiting natural resources including sedentary fisheries such as trepang or abalone. Australia has declared under the Convention an EEZ around its coastline and the continental shelf in those areas where it

[3] See UNCLOS Articles 5 and 6 to 16.
[4] UNCLOS Articles 55 to 57.

extends beyond the 200 nautical mile limit[5]. Where the EEZ of different nations overlap access is determined by bilaterial agreement. An example familiar to Australian fishers is the *Australian – Indonesian Zone of Cooperation Treaty 1982* between Indonesia and Australia, and the *Torres Strait Treaty 1978* between Papua New Guinea and Australia. Where an arrangement cannot be reached the dispute resolution process outlined in UNCLOS Part XV may be actioned.

Significantly, beyond the EEZ and the extended continental shelf, rules of international law underpinned by the Convention allow hot pursuit and capture of vessels on the high seas that have been involved in illegal fishing operations in Australian waters. Australia has used such powers to apprehend and forfeit to the Commonwealth foreign vessels all equipment and the catch on board taking the scarce Patagonian toothfish.

However, in federations such as Australia, Canada and the United States of America, there is constitutionally an initial complication in offshore waters which does not arise in unitary states such as New Zealand or Indonesia. Australia comprises six States and several territories, including Macquarie Island close to Antarctica. Each State of the Commonwealth of Australia at various times before federation in 1901 and since has claimed sovereignty out to three nautical miles based on the Imperial claim, notwithstanding the Australian Constitution declares all Australian waters to be the domain of the Commonwealth. In *New South Wales v Commonwealth* [1975] 135 CLR 337 the High Court of Australia however declared that the limits of each State ended at the mean low water mark, and that the only jurisdiction of their legislatures beyond that limit is that of extra-territorial power not founded on sovereignty. These are 'Australian waters' not State waters, as declared by section 51(x) of the Constitution.

With respect to fisheries laws the residual power of the States has proved extensive as demonstrated by the decision of *Pearce v Florenca* [1976] 135 CLR 507 where the High Court recognised the validity of State criminal provisions in respect of fishing vessels linked to the State more than 200 nautical miles to sea. As UNCLOS had not come into force at the time it was not appropriate to consider its impact on the State claim to extra-territorial power. Further, following these decisions the States and the Commonwealth agreed to terms sharing power in Australian waters called the Offshore Constitutional Settlement. The result is a confusing mix

[5] See the map at *http://www.ga.gov.au/metadata-gateway/metadata/record/gcat_69822*

of regimes in Australia's offshore waters based on 'joint arrangements' between the Commonwealth and the States with respect to separate fisheries. For example some but not all fin fish are split into two types of arrangements. For example tuna fisheries are administered by the Commonwealth. Others such as flounder are administered by the States. Others again such as pike do not fall under any arrangement and are innominate and usually claimed by the States although legally they are residual Commonwealth fisheries. There is also now the issue of overlap with UNCLOS which came into effect in 1982 after the OCS.

Accordingly within the 200 nautical mile limit recognised by UNCLOS which surrounds Australian's coasts and island territories there is currently recognised a complex overlap of State and Federal laws with respect to different fisheries. Beyond that limit the position is one under international law, and depends on the operation of treaties and the preparedness of state parties involved to subscribe to international treaty.

One problem with treaties solving the problems of sharing and protection of resources in the commons and the high seas in particular is the essentially consensual nature of international law. This is reflected in the negotiation process for multilateral treaties which necessarily entails identifying standards both maximum and minimum that are acceptable to all potential State parties. This explains why international law is as one author has said '*typically insufficiently ambitious*'[6]. In short the development of such treaties for the most part is limited to setting obligations which are the maximum achievable in a politically and diplomatically complex regional or global setting. This means that a new treaty may not be as far-reaching as some State parties intended because compromises were needed in order to ensure the support of more States and thereby extend the application of the treaty to more issues or a larger geographical area. An example is the 1995 United Nations *Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks* which provides a regime for the conservation and management of these stocks, with a view to ensuring their long-term conservation and sustainable use, a laudable object not always achieved.

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[6] Gullett *Legislative Implementation of the Law of the Sea Convention in Australia* [2013] UTasLawRw 12; (2013) 32(2) University of Tasmania Law Review 183

One method of compromise is to craft treaty articles in vague language. This enables States to reach agreement on general principles and thereby proceed to the conclusion of a treaty while leaving to a later date more difficult interpretation questions about the substance of obligations. While this may be inelegant or indeed unhelpful as a matter of legal development, it is a feature of international law that reveals it as much a political and diplomatic process as it is a legal process. The multilateral negotiation process that led to the UNCLOS is a classic illustration of this phenomenon. It involved a series of negotiating conferences, which commenced in 1930 and concluded in 1982, and produced a text that is noteworthy for its coverage of a large array of issues but with a lack of specificity in most areas. Nevertheless, it is a treaty that can boast 169 parties.

This leaves the domestic laws of the State including its common law with work to do in a dispute over resources on the high seas. One mode of enforcing sovereignty in the commons is by dramatic laws amounting in effect to brute force. In *Olbers Co Ltd v Commonwealth of Australia* [2004] FCAFC 262; (2005) 143 FCR 449, consideration was given to the scheme under the *Fisheries Management Act 1991* (Cth), s106A. It was held that it operated to automatically forfeit foreign boats to the Commonwealth upon the commission of the relevant offences after exercising rights of hot pursuit into the high seas beyond the EEZ. It was argued by the owners of the vessel in that case that forfeiture should be understood as not transferring title to the Commonwealth unless and until the thing is "condemned as forfeited". This would mean that property did not pass as at the date of the offence, and in the event of a failure to comply with provisions regarding seizure, it was argued there had not been a lawful forfeiture. This argument was rejected as contrary to the meaning and effect of the relevant provisions.

Consideration was given by the Court to the word "condemned" and what it means in various legislative contexts where property is forfeited upon the occurrence of a specified event, and then a procedure is afforded by which the occurrence of that event can be adjudged and the consequences of it officially recognised and recorded. It was said that such an adjudication is properly described as a "condemnation" and that "it adjudicates and records that a forfeiture has already occurred". The Court quoted from a passage in *Whim Creek Consolidated NL v Colgan* [1991] FCA 467; (1991) 31 FCR 469 at 477 – 479 explaining the use of the word "condemned" in this way, at 455:

> *' ... the term 'condemnation' refers not to a proceeding which has the effect of vesting title in the Crown, but to a proceeding which determines that upon some cause previously arising title had vested in the Crown.'*

The Full Court of the Federal Court in that case went so far as to hold that the forfeiture might extend to fishing gear, all equipment, the vessel itself and the catch on board, and that this occurred instantaneously upon the breach of Australian fisheries laws although the actual loss of possession and control did not occur until an order of the Court once the vessel was arrested on the high seas and brought to an Australian port.

All State parties to a convention have the responsibility to ensure that their domestic laws allow them to fulfil their obligations under the convention. Regarding the LOSC, this includes ensuring that the actions of the executive to implement LOSC obligations are authorised within the domestic legal framework, typically under legislation, but also potentially under executive authority contained in constitutions.[3] A complication regarding the LOSC is that many of its provisions have the status of law outside the convention itself. This is because much of the LOSC codifies rules of customary international law that had emerged prior to the conclusion of the treaty in 1982. There are differences in the way domestic law embraces convention law and customary international law. A further complication is that the body of customary international law of the sea has relevance to the interpretation and development of the LOSC.

The process by which domestic law is revised to incorporate new international laws differs among States. In some States there is automatic incorporation of international law into domestic law. In others States, such as Australia, there needs to be legislative action. Practical and legal problems can arise where there are disjunctions between a State's domestic laws and its international obligations. Problems can arise such as where coastal State enforcement officers undertake a boarding of a foreign ship pursuant to authority provided in domestic law which goes beyond what is permitted under international law. In such a case a protracted international legal dispute could arise between the coastal State and the flag State about the correct interpretation of the international law while enforcement officers remain in doubt about the parameters of their authority.

More complex still are the whaling provisions which have led to serious differences between Japan and Australia over whaling research activity of Japan in the Southern Ocean.

Australia ambitiously declared the *Australian Whale Sanctuary* under Commonwealth legislation made in 1999[7]. The Sanctuary includes the EEZ and other UNCLOC recognised waters but in some areas in the Southern Ocean extends further and in which the killing, injuring or taking of cetaceans either within the Sanctuary or outside it is prohibited. Under the EPBC Act foreign vessels need permission to enter an Australian port[8]. Under the *International Convention for the Regulation of Whaling 1946* the right of whaling nations to issue permits to take specified species and quantities of whales for '*scientific research*' is recognised and protected[9]. However whilst other nations do not recognise Australia's internal constitutional arrangements as a federation, nor does international treaty does not override domestic laws made by the Commonwealth purporting to override international law and treaties.

These issues came to a head in the action brought in the Australian federal courts by the Humane Society International Inc against a Japanese whaler for breaches of the EPBC Act whaling prohibitions in the Sanctuary in the matter of *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116. The Japanese company having refused to accept service of court process the Court at first instance refused leave to serve the process outside the jurisdiction on the ground it may cause a diplomatic incident. However on appeal the Full Court allowed the appeal, and held that the Court's process may be served overseas using usual diplomatic channels. However the Government of Japan refused to serve the company. The Full Court then granted leave to serve it by registered post, and when it did not appear the Court proceeded with the case in the absence of the owners. The Court then ruled that the company had engaged in unlawful whaling in Australian Antarctic waters under Australian domestic law and granted an injunction against further whaling. When this was disregarded a fine of $1million for contempt of court was imposed, whether enforceable or not[10].

Meanwhile the International Court of Justice in a separate action ruled in favour of Australia that Japan's whaling programme was not in fact designed and carried out for scientific purposes and order japan to revoke current whaling permits and refrain from issuing any more[11]. Since

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[7] *Environment Protection and Biodiversity Conservation Act 1999* [Cth] ['EPBC Act'] s 225.
[8] EPBC Act s 236.
[9] See Article VIII; refer also as to current permits *https://iwc.int/permits*
[10] See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2015] FCA 1275
[11] *Australia v Japan* – refer *https://www.icj.org/docket/files/148/18136.pdf.*

then the *International Whaling Commission* has given greater discretion to the IWC Scientific Committee to determine if research programmes meet the IWC criteria.

The Future

Although bolstering treaties and calling on governments to follow existing rules for fisheries are vital first steps, enforcing the rules is just as important. There is a critical need to improve enforcement, especially in developing coastal nations contending with illegal fishing and other illicit maritime activity. Related issues concern actual breaches of sovereignty represented by the territorial seas of another national such as at Scarborough Shoals in the South China Sea. Authorities in these nations often lack adequate ways to collect information on illegal practices, as well as the capability to take action when such practices are detected. To address this problem, the IMO together with effective international bodies protecting fishers and fishing such as the Institute of Marine Engineering Science and Technology [IMarEST] working with maritime authorities from around the world to integrate fisheries enforcement into their military curricula and training exercises. Because illegal fishing is often associated with other crimes and has broader national security implications, it is imperative that authorities stop looking at fish solely as an environmental or management issue. One important step in a global solution is for the IMO and member nations to bring into effect the Torremolinos Convention.

Internationally there is a well-established precedent of navies sharing information about vessel location and movements across large swaths of the ocean. By integrating fishing vessel surveillance and IUU fishing inspections into their work, navies and coast guards can take a more holistic approach to maritime security and help nations, including those with less surveillance capacity, establish governance of their waters. For example, FISH-i Africa, an alliance among eight east African coastal nations, has helped bring actions and charges against more than 40 suspected illegal operators. As successful as that African experience has been, more collaboration is needed around the globe—from Central and South America to the Pacific—to ensure that stakeholders from government, industry, and civil society develop effective multistate solutions.

Such international issues have relevance not only in international law and on the high seas but in Australia's domestic laws as well. An issue of continuing current relevance in that respect is the lawfulness of the OCS in light of UNCLOS and the plain indication of the High

Court of Australian in the *Seas and Submerged Lands Act Case* that the sovereignty of States with respect to '*Australian waters*' referred to in the Constitution ends at the mean low water mark. Another is climate change and its impacts on the world's ocean laws including with respect to maritime security. This impacts through overfishing by foreign nations of straddling and migratory fishstock, and in the Australian Whale Sanctuary, and the tensions arising from declining fish stacks on account of pollution, ocean warming and acidification[12].

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[12] See inter alia Rothwell '*Maritime Safety in the Twenty-First Century*' in Klein ed '*Maritime Security: International Law and Policy Perspectives from Australian and New Zealand*' [2010] Routledge, at 243.