The Law of the Sea

Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea

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NOTE

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country or territory or of its authorities, or concerning the delimitation of its frontiers.

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FOREWORD

More than 10 years have elapsed since the adoption in 1982 of the United Nations Convention on the Law of the Sea. It is widely recognized that even before its entry into force, on 16 November 1994, the principles and rules embodied in the Convention have exerted considerable impact on the practice of States, regardless of their position with respect to signature, ratification or accession.

At its forty-sixth session, in 1991, the General Assembly requested the Secretary-General to submit a special report on the "progress made in the implementation of the comprehensive legal regime" embodied in the Convention in the light of the tenth anniversary of its adoption. The Assembly further asked the Secretary-General to "take such action ... as may be appropriate to mark the occasion" (resolution 46/78).

At its forty-seventh session, in 1992, the Secretary-General submitted the special report to the General Assembly (document A/47/512). At the same time, the Secretariat started preparing a more comprehensive study on the practice of States to commemorate the tenth anniversary of the adoption of the Convention. The present publication is the outcome of such study. Its publication coincides with the entry into force of the Convention, though it covers the materials available as at November 1993.

In order to seek advice and assistance in the preparation of the special report and the study, the Secretariat convened a meeting of 17 experts representing all geographical regions in January 1992. The Secretariat wishes to express its appreciation to the following experts in particular, who made substantive written contributions: Mr. David H. Anderson (United Kingdom of Great Britain and Northern Ireland), Mr. Yuri Barsegov (Russian Federation), Mr. Michel Cyr-Djiena Wembou (Cameroon), Mr. Hiran Jayewardene (Sri Lanka), Mr. Mohamed Mouldi Marsit (Tunisia), Mr. Donald M. McRae (Canada), Mr. Mochtar Kusuma-Atmadja (Indonesia), Mr. Francisco Orrego Vicuña (Chile), Mr. Jean-Pierre Quéneudec (France), Mr. M.J.C. Templeton (New Zealand) and Mr. Tullio Treves (Italy).

In addition, the Secretariat is also grateful for the contributions of the following experts, who made oral presentations and comments at the meeting: Mr. Anselm Francis (Trinidad and Tobago), Mr. James Kateka (United Republic of Tanzania), Mr. Jioji Kotobalavu (Fiji), Mr. Choon-Ho Park (Republic of Korea), Mr. Robert Smith (United States of America) and Mr. Soji Yamamoto (Japan).

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I. STATUS OF THE CONVENTION

The United Nations Convention on the Law of the Sea was open for signature from 10 December 1982 to 9 December 1984. During that time, 159 States and other entities referred to in article 305 signed the Convention. This is the highest number of signatories of any multilateral treaty. As of 16 November 1993, 60 States had established their consent to be bound by the Convention, 58 instruments of ratification and two instruments of accession having been deposited with the Secretary-General of the United Nations. Having received the required number (60) of ratifications or accessions, the Convention will enter into force on 16 November 1994. Of these 60 States, 27 belong to the group of African States, 11 to the Asian group and 19 to the group of Latin American and Caribbean States. The three remaining States are European.

Practically all of the 60 States which have established their consent to be bound by the Convention are developing States. The industrialized States have expressed dissatisfaction with some of the terms of Part XI of the Convention and this has led them to refrain from ratifying or acceding to the Convention, particularly in view of the world economic situation that has changed fundamentally since the early 1980s. In 1990, in an effort to achieve universal participation in the Convention, the Secretary-General took the initiative to convene informal consultations aimed at addressing issues of concern for those States. Several rounds of consultations have made it possible for States to identify issues and several areas of general agreement.

Although the Convention has not yet entered into force, many Governments have taken measures to implement the rules embodied therein. A great number of coastal States adopted new legislation particularly on the territorial sea and the exclusive economic zone, setting their limits at 12 and 200 miles respectively, even before 1982 as the consensus on these and other issues began to emerge at the Third United Nations Conference on the Law of the Sea. Competent international organizations have also taken a series of actions pursuant to its provisions. That process is generating patterns of consistent State practice which, in turn, is forming rules of customary international law, as well as influencing the work of international organizations and the decisions of international tribunals.

One factor that has undoubtedly contributed to those positive developments was the unique working method adopted by the Third United Nations Conference on the Law of the Sea. The method of working by way of consensus meant that debates, especially on key issues, were spread over several sessions and held in both committees and working groups, both official and unofficial. As a result, the discussions were inevitably prolonged, but the

texts which finally resulted had the valuable quality of being negotiated texts, which took due account of the legitimate concerns and interests of different States. [1/] Under such circumstances, Governments were more willing to incorporate in their national legislation the rules set forth in the Convention, accepting the burden as well as the benefit of the balanced provisions of the Convention.

II. IMPACT OF THE CONVENTION ON STATE PRACTICE

A. Territorial sea

1. Breadth of the territorial sea

The Convention gives every State the right to establish the breadth of its territorial sea up to a limit not exceeding 12 miles ("miles" throughout this study refers to nautical miles), measured from baselines (article 3). Before the Third United Nations Conference on the Law of the Sea, the practice of States regarding the maximum permissible breadth of the territorial sea displayed significant divergencies, which the First and Second United Nations Conferences on the Law of the Sea held, respectively, in 1958 and 1960 had failed to resolve. Thus the Convention provided a solution to a long-standing controversy. The agreement on a maximum of 12 miles was a key element in the overall agreement on the limits of national jurisdiction of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf, as well as in the acceptance as a whole of the regimes contained in Parts II and III of the Convention, dealing with the territorial sea, the contiguous zone and straits used for international navigation.

By 16 November 1993, no less than 129 coastal States had established a territorial sea of 12 miles or less, of which 121 had a 12-mile limit, with the remainder having limits of either three, four or six miles. [2/] Several States included in the total of 129 have withdrawn claims to more than 12 miles of territorial sea, clearly under the influence of the work of the Conference and the adoption of article 3 of the Convention. Several States, including Japan, the United Kingdom and the United States, which used to object to claims of 12 miles, have ceased to do so and indeed have extended their own territorial seas to 12 miles. Despite this emerging convergence of State practice, there are some countries which still claim a territorial sea of 200 miles, [3/] while others claim breadths less than 200 miles, but greater than 12 miles. [4/]

2. Drawing of baselines

The breadth of the territorial sea is measured from its baselines, which are also used to determine the breadths of other zones of national jurisdiction, such as the contiguous zone, the exclusive economic zone and the continental shelf. The methods of drawing baselines follow closely the terms of the 1958 Convention on the Territorial Sea and the Contiguous Zone. Thus, the relevant rules embodied in that Convention have been generally reflected in the practice of States.

Article 7 of the 1982 Convention, following article 4 of the 1958 Convention, clearly sets out the conditions under which a coastal State may adopt straight baselines: they may be employed in "localities where the coastline is deeply indented and cut into" or "if there is a fringe of islands along the coast in its immediate vicinity" (paragraph 1). Such baselines "must not depart to any appreciable extent from the general direction of the coast", and the sea area lying within such lines "must be sufficiently closely linked to the land domain to be subject to the regime of internal waters" (paragraph 3). More than 70 States have employed straight baselines before or after the 1982 Convention. Although their practice is mostly in conformity with the provisions of article 7, there are a number of cases where not all these specific conditions are met. Many of such claims were protested by other States. [5/]

3. Right of innocent passage

The 1982 Convention has reconfirmed the right of innocent passage as provided for in the 1958 Convention on the Territorial Sea and the Contiguous Zone. It has, however, further clarified that right as well as the concomitant rights and duties of States.

Article 18 (1) of the 1982 Convention provides that "passage" in that context means navigation through the territorial sea for the purpose of (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such a roadstead or port facility. The legal status of the latter element was considered by the International Court of Justice in the 1986 case concerning the Military and Paramilitary Activities in and against Nicaragua. The Court found that article 18, paragraph 1 (b), "does no more than codify customary international law" as part of the freedom of communication. [6/]

As a whole, the provisions of Section 3 of Part II of the 1982 Convention concerning innocent passage in the territorial sea can be said to have had a greater impact on the practice of States than those of the 1958 Convention, upon which the former are based to a considerable extent. The new provisions in Section 3 include article 19, which contains a detailed list of activities that render passage non-innocent. The legislation of many countries now includes a list of such activities. In general, States have followed the list closely, but there are instances where they have departed from the exact wording of article 19.

According to article 22, the coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such "sea lanes" and "traffic separation schemes" as it may adopt for the regulation of the passage of ships. In doing so, the coastal State must take into account, inter alia, the recommendation of the competent international organization. As such competent

organization, the International Maritime Organization (IMO) through its Maritime Safety Committee has regularly been considering and recommending the adoption of new sea lanes and traffic separation schemes and amending existing ones as needed. There are now more than 100 such traffic separation schemes in effect around the world.

Although there is now general international consensus concerning the right of innocent passage and on the scope of activities which render passage non-innocent, there remain some differences in State practice with regard to warships. At the Third United Nations Conference on the Law of the Sea, the question of the right of innocent passage of warships was the subject of lengthy discussions. Proposals to the effect that warships must give prior notification or seek prior authorization before entering the territorial sea in exercise of the right of innocent passage were not included in the Convention. None the less, the legislation of a number of States contains provisions requiring such notification or authorization.

With respect to vessels carrying hazardous wastes, article 23 of the Convention provides that foreign ships carrying nuclear or other inherently dangerous or noxious substances shall carry documents and observe special precautionary measures established for such ships by international agreements. Some States, however, have enacted regulations preventing ships carrying such wastes from entering their territorial sea in order to protect the marine environment.

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal [7/] provides that the Convention shall not affect, inter alia, the sovereignty of States over the territorial sea and the exercise by ships of all States of navigational rights "as provided for in international law and as reflected in relevant international instruments" (article 4 (12)). This compromise formula prompted Portugal to declare that it required the notification of all transboundary movements of such wastes across its waters, and several Latin American States, including Mexico, Uruguay and Venezuela, to declare that, under the Basel Convention, their rights as coastal States were adequately protected. Germany, Italy, Japan and the United Kingdom, on the other hand, declared that nothing in the Convention requires any notice to or consent of the coastal State for vessels exercising the right of innocent passage. [8/]

B. Contiguous zone

Although the 1958 Convention on the Territorial Sea and the Contiguous Zone made provisions for a contiguous zone extending up to 12 miles from the baseline from which the breadth of the territorial sea is measured, relatively few States enacted legislation establishing