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THE DEVELOPMENT OF THE 1982 UN CONVENTION ON THE LAW OF THE SEA: AN AUSTRALIAN PERSPECTIVE

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Abstract

Attempts to achieve a comprehensive codification of the law of the sea were eventually successful with the entry into force of the 1982 UN Convention on the Law of the Sea. Australia played a key role in the negotiations that led to the finalization of the 1982 Convention and this involvement has shaped the manner in which Australia has subsequently dealt with law of the sea issues. This paper reviews aspects of Australian practice as the 1982 Convention was being negotiated and then considers Australian state practice by examining three case studies that have particular significance for Australia and Indonesia: the Indonesian archipelagic sea lanes designation; the MV Tampa incident and the maritime boundary conciliation between Australia and Timor Leste. The paper concludes with some observations regarding how Australia's approach to the law of the sea has evolved.

Keywords : *archipelagic sea lanes, codification, conciliation, law of the sea, maritime boundaries, MV Tampa, passage rights, rescue at sea.*

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I. INTRODUCTION

The United Nations Convention on the Law of the Sea¹ was opened for signature on 10 December 1982 at Montego Bay, Jamaica.² This occasion marked the completion of nearly ten years of treaty negotiations

“... involving participation by more than 150 countries representing all regions of the world, all legal and political systems [and] all degrees of socio-economic development.”³

The LOSC provided that it would “... enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession”⁴ and this occurred on 16 November 1993 when Guyana submitted its instrument, with

¹ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) [hereafter LOSC].

² See LOSC Articles 305 – 307.

³ Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea*, United Nations Publication Sales No. E.97.V.10, 1997, 1.

⁴ LOSC Article 308.

the result that the Convention would enter into force twelve months later on 16 November 1994.⁵

While it is readily apparent that Australia and Indonesia are both large maritime States, in terms of the LOSC each State has fundamentally different characteristics. Australia deposited its instrument of ratification on 5 October 1994, just before the LOSC entered into force, and can best be described as a ‘coastal State’. The land area of the Australian continent extends to approximately 7.7 million square kilometers, while Australia’s maritime Exclusive Economic Zone covers approximately 10 million square kilometers.⁶ On the other hand, Indonesia ratified the Convention on 3 February 1986, perhaps reflecting its early satisfaction with the inclusion of the new Part IV in the final text of the LOSC,⁷ and its now recognized status as an ‘archipelagic State’. Other types of States that are contemplated under the LOSC include ‘geographically and disadvantaged States’, ‘island States’ and ‘land-locked States’. Each type of State has particular recognition provided in various Articles of the LOSC.

The paper will look at how Australia has approached the development of the law of the sea by adopting the following format. First, a brief look at some aspects of Australia’s participation in the three United Nations Conferences on the Law of the Sea that have been held since the formation of the United Nations in 1945,⁸ followed by some general comments regarding the current approach that Australia seeks to adopt in dealing with its international legal obligations and rights. Next, the paper will assess three case studies that have

⁵ *The Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements*, which is available on the Division for Ocean Affairs and the Law of the Sea website, now lists Guyana as the 59th party to deposit its instrument due to the removal of Yugoslavia (date of deposit 5 May 1986) from the Chronological list: Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, “The Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements”, available at: https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea, accessed on 28 January 2020. Further details regarding the former Yugoslavia’s absence from United Nations Multilateral Treaties can be found in Christian Tams “Article 308”, margin note 11 and footnote 33, in Alexander Proelss, ed, *United Nations Convention on the Law of the Sea: A Commentary*, C.H. Beck/Hart Publishing, 2017. See also Edward Duncan Brown, *The International Law of the Sea*, Dartmouth, 1994, Table 13.1, pp. 382-386.

⁶ “The Law of the Sea,” Geoscience Australia, accessed on 3 February 2020, <https://www.ga.gov.au/scientific-topics/marine/jurisdiction/law-of-the-sea>,

⁷ LOSC Part IV is titled ‘Archipelagic States’ and contains Articles 46 – 54 which describe the special consideration that is provided for archipelagic States, including passage and overflight through, above and under archipelagic waters by foreign ships and aircraft.

⁸ The First United Nations Conference on the Law of the Sea was held in Geneva in 1958; the Second United Nations Conference on the Law of the Sea was also held in Geneva in 1960; the Third United Nations Conference on the Law of the Sea was held between 1973 and 1982. For a detailed history of the three UN Law of the Sea Conferences, see Donald Rothwell and Tim Stephens, *The International Law of the Sea*, Hart Publishing, 2016, 6 – 14.

attracted significant attention, or have particular significance, for the law of the sea as well as having special resonance for both Australia and Indonesia due to their association with both countries. These case studies will highlight the legal issues that arose when:

- 1) Indonesia lodged its archipelagic sea lanes designation in 1996;
- 2) the Norwegian flagged vessel *Tampa* rescued people trying to reach Australia from Indonesia in 2001; and
- 3) Australia and Timor Leste concluded their maritime boundary conciliation under Annex V of the LOSC.

There are important lessons that can be gleaned regarding Australia's approach to the development of the law of the sea in general, and the approach that Australia is willing to take in relation to the LOSC in particular, from analyzing each of these case studies.

The paper will conclude with some thoughts about why Australia's approach to the law of the sea has evolved in the way it has and suggest a number of key themes that can be deduced from the topics that have been addressed in the paper.

II. AUSTRALIA AND THE LAW OF THE SEA CODIFICATION

There have been a number of attempts to codify the law of the sea and Australia has been involved in all of them. Australia was represented at the 1930 Hague Codification Conference that was held under the auspices of the League of Nations, as well as being actively involved in all three of the United Nations Conferences on the Law of the Sea.⁹ The late Professor Ivan Shearer,¹⁰ writing in 1986, notes that a 'distinctive Australian contribution towards the codification and progressive development of the international law of the sea did not emerge, however, until the United Nations First Conference on the Law of the Sea in 1958.'¹¹ The two 'notable' contributions that were made by Australia in 1958 were to:

- (i) successfully take the lead in providing an acceptable definition for the

⁹ Ivan A. Shearer "Australia and the International Law of the Sea", *Archiv Des Völkerrechts*, Vol 24, No 1, 1986, pp. 22-40; see also Geoscience Australia, "The Law of the Sea", above n 7

¹⁰ Over the course of his long academic career, Professor Ivan Shearer (who died in 2019) also made an enormous personal contribution to Australia's understanding and involvement with law of the sea issues as a scholar, practitioner, judge and member of the Royal Australian Navy Reserve. Recognition of this contribution can be found in the *Australian Yearbook of International Law*, Volume 24 (2005) which was dedicated to honor Professor Shearer's achievements

¹¹ Shearer, note 10 above, "Australia and the International Law of the Sea", 23.

term ‘natural resources’ in the Convention on the Continental Shelf;¹² and

- (ii) unsuccessfully chair the committee that was tasked with resolving the long-standing issue of the maximum breadth of the territorial sea – this issue was also the main subject of the Second United Nations Conference on the Law of the Sea in 1960 but it could not be satisfactorily resolved on that occasion either.

Turning to the Third United Nations Conference on the Law of the Sea, Shearer notes that in the period leading up to the first meeting of States for that Conference there had been two ‘significant steps’ taken by Australia. The first was the declaration of a twelve nautical mile fishery zone in 1967 and the second was the proclamation of an extended continental shelf through legislation that passed the Commonwealth Parliament in that same year.¹³ Additionally, Australia lodged protests when Indonesia and the Philippines proclaimed archipelagic baselines in 1958 and 1961 respectively as Australia did not consider such claims, with their potential impact on navigation rights through each archipelago, were consistent with customary international law that existed at that time.¹⁴

In terms of the major themes that were pursued by Australia during the period from 1973 – 1982 when the Third Conference was held, paramount among them was the successful conclusion of a ‘widely accepted and comprehensive convention on the law of the sea.’¹⁵ Clearly this theme has been achieved, with the LOSC currently having 168 States party to the Convention,¹⁶ although perhaps not to the extent that Australia would have hoped during the long period of negotiations due to the significant absence of the United States of America as a State party. Other elements of Australia’s focus during the UNCLOS III conferences included the establishment of a 12nm territorial sea, clarifying the sovereign rights of a coastal state over the continental shelf, creation of a 200nm exclusive economic zone, marine environmental protections, setting out the regime of islands that is now found in LOSC Article 121, setting acceptable parameters for marine scientific research, setting up a transit passage regime that covered straits used for international navigation and archipelagic waters, preserving the seabed beyond national jurisdiction as the common heritage of mankind¹⁷ and finally, but importantly, ensuring that the Convention

¹² United Nations Convention on the Continental Shelf, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964), Article 2(4) which is now reflected in LOSC Article 77(4).

¹³ Shearer, note 10 above, “Australia and the International Law of the Sea”, 24.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 25.

¹⁶ See the Chronological list, note 5 above.

¹⁷ Instructions to the Australian delegation to the UNCLOS Conference that was held in Caracas from

contained a strong dispute settlement scheme.

Australia, as evidenced by a statement made by Ambassador Ralph Harry, who at that time was the Leader of Australia's Delegation to Sub-Committee II of the Seabed Committee¹⁸ and subsequently became the Leader of Australia's Delegation to a number of the early UNCLOS III Conferences, also supported the establishment of a regime under the law of the sea that recognized the unique position of those States '... which are genuinely archipelagic in character.'¹⁹ Ambassador Harry stated that Australia recognized that

*"... a State spread over a large area of ocean with its population scattered throughout a large number of islands – over 13,000 in the case of Indonesia – cannot be expected to exercise political control effectively over its component islands if those islands are separated by water accorded the status of high seas."*²⁰

This approach was reiterated by Ambassador Keith Brennan, who was the leader of the Australian delegation to UNCLOS III from 1977 until its conclusion in 1982, in a statement to the Tenth Session of the Conference on 17 March 1981 when he stated that Australia:

"... wish[ed] to see a clear and agreed formulation of the concept of

20 June to 29 August 1973 included supporting the establishment of 'An International Authority for the seabed beyond national jurisdiction with wide powers to explore and exploit on its own behalf and to enter into production-sharing agreements with and issue licenses to states, revenues earned by the Authority to be distributed with a preference for the developing countries' Ralph Harry "Law of the Sea", *University of Tasmania Law Review* 6, no. 3 (1980): 216; ongoing recognition of Australia's interest in this topic can be deduced from the active participation of Australia in both the Preparatory Committee that was established in 2015, and the subsequent Intergovernmental Conference that was established in 2017, by the United Nations General Assembly to determine the text of '... an international legally binding instrument under the United Nations Convention on the Law of Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction': United Nations, "Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction", available at: <https://www.un.org/bbnj/>, accessed on 31 January 2020.

¹⁸ Following consideration of the Report of an Ad-Hoc Committee established by the United Nations General Assembly in 1967 pursuant to UNGA Resolution 2340 (XXII), a decision was made by the General Assembly on 21 December 1968, pursuant to UNGA Resolution 2467 A (XXIII), that a standing Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (the 'Seabed Committee') should be established. After some initial work by the Seabed Committee, it was subsequently tasked to act as a preparatory committee for the future UNCLOS III and three sub-committees were established to assist with that task. Sub-Committee II dealt with '... the limits of national jurisdiction (embracing the continental shelf, high seas, straits, and related matters)': Ralph Harry, see note 17 above, 216.

¹⁹ Harry, "Law of the Sea" note 17 above, 216-217; see also quoted extracts from the Report of the Australian Delegation to the Sixth Session of the United Nations Committee on the Peaceful Uses of the Sea-bed at the United Nations European Headquarters Geneva, Annex 17, p. 2 ff in Robert Miller, "Australian Practice in International Law", *Australian Year Book of International Law* 5, (1975): 147-148.

²⁰ Miller, *ibid.*, 147.

archipelagic waters, so that a long held aspiration of the archipelagic States, many of whom are Australia's close neighbors, can be realized."²¹

However, Australia's position in relation to the archipelagic concept was not overwhelmingly and unreservedly supportive of the view put forward by those States that sought archipelagic recognition. Australia also wanted the position of coastal States' rights in relation to any potential archipelagic waters to be properly considered, with particular emphasis on the preservation of '... an assured and unimpeded right of passage ... through the waters enclosed within an archipelagic state'²² as this issue was critical for Australia's trade and security interests in terms of maintaining the ability to exercise freedom of navigation (and overflight) through the waters of the large number of archipelagic States that would eventually exist among Australia's regional neighbors.

As an aside, it is noteworthy that until independence was achieved in 1975, Australia had administrative responsibility for Papua New Guinea pursuant to authority provided by the United Nations International Trusteeship System.²³ During the early years of the UNCLOS III series of Conferences, Papua New Guinea was transitioning towards full independence, which was finally achieved in September 1975, but until then Australia had responsibility for Papua New Guinea's foreign affairs.²⁴ A balance was needed on the part of the Australian negotiating officials at UNCLOS III to ensure that the interests of Papua New Guinea, as a future archipelagic State, were adequately represented. Again, this issue was highlighted by Ambassador Harry when he stated in 1973 that by

*"... advocating that special consideration should be accorded to archipelagic states, my delegation, of course, has in mind also its special responsibility to the people of Papua New Guinea."*²⁵

Throughout the remainder of the UNCLOS III series of Conferences, Australia remained a fully engaged participant. Australia unsuccessfully sought to

²¹ "Australian Practice in International Law", *Australian Yearbook of International Law* 10, (1983): 398-399.

²² Miller, "Australian Practice in International Law", note 19 above, 148; see also Stuart Kaye, "Australia and the negotiation of the law of the sea," *Australian Journal of Maritime and Ocean Affairs* 7, no. 4 (2015): 260.

²³ For information regarding the United Nations International Trusteeship System see: United Nations, "International Trusteeship System and Trust Territories", available at: <https://www.un.org/dppa/decolonization/en/history/international-trusteeship-system-and-trust-territories>, accessed on 29 January 2020

²⁴ An abridged view of Papua New Guinea's history can be obtained from the website of The Commonwealth Secretariat, "Papua New Guinea: History", available at <https://thecommonwealth.org/our-member-countries/papua-new-guinea/history>, accessed on 3 February 2020

²⁵ Miller, "Australian Practice in International Law", note 19 above, 148.

become chair of the Drafting Committee but when the vote was taken the Australian candidate (Ambassador Harry) was easily defeated by the Canadian nominee. Australia's representative (Mr. H. C. Mott) did however become the rapporteur of the First Committee after the Canadian candidate withdrew his nomination.²⁶ Kaye notes that Australia was also involved with the activities of a number of the 'groups' that emerged during UNCLOS III where such participation aligned with Australia's '... aims in relation to the Conference, and its international affiliations.'²⁷ Membership of, or involvement with, the 'Western Europe and Others' group, the Coastal States group, the 'margineers group' and the 'Oceania group' were all beneficial to Australia at varying stages of the UNCLOS III negotiations.²⁸ Finally, Shearer notes the 'significant part' that Australia played in the formation of what became Part XI of the LOSC dealing with the 'Area', as well as the attempts that were made by Australia to reach a solution to the objections of the United States that eventually led to that country not accepting the final draft of the Convention.²⁹

Overall, Australia played a very prominent part in the UNCLOS III negotiations, adopting a somewhat progressive approach that balanced its long-standing interests and security alliances with the reality of being geographically positioned in an area where the legitimate interests of regional states, especially those that could make archipelagic claims, were unavoidably progressing. Of course, Australia did all of this with a very clear appreciation that it too would obtain significant benefit from many of the new approaches to the law of the sea that were eventually adopted in the 1982 LOSC.

III. AUSTRALIA'S APPROACH TOWARDS INTERNATIONAL LAW

Skipping forward a few decades, both the 2016 Defence White Paper³⁰ and the 2017 Australian Foreign Policy White Paper have made it clear that Australia has a strong interest in 'acting with others to support a rules-based international order' and this includes 'tangibly support[ing] the leadership of the United States to this end.'³¹ The 2017 White Paper also has many refer-

²⁶ See Summary Records of Plenary meetings, United Nations document A/CONF.62/SR.7 available at https://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_1/a_conf62_sr7.pdf&lang=E accessed on 3 February 2020

²⁷ Kaye, "Australia and the Negotiation of the Law of the Sea, note 22 above, 261.

²⁸ *Ibid.*

²⁹ Shearer, note 10 above, "Australia and the International Law of the Sea", 27-28.

³⁰ "2016 Defense White Paper", Australian Government Department of Defense, accessed on 29 January 2020, 70, <https://www.defence.gov.au/WhitePaper/>.

³¹ "2017 Foreign Policy White Paper," Australian Government Department of Foreign Affairs and Trade, accessed on 29 January 2020, 79, <https://www.dfat.gov.au/about-us/publications/Pages/2017-foreign-pol->

ences to the role that Australia has played in the past in supporting the establishment and operation of various international bodies, including the United Nations in 1945,³² as well as contributing to ‘setting new rules and norms’ through, for example, ‘regional approaches to irregular migration and human trafficking.’³³ The brief summary of Australia’s approach to the law of the sea negotiations outlined above is further evidence of the manner in which Australia has sought to engage and influence the outcome of those international treaty negotiations that it has been involved with.

While acknowledging that Australia has played a prominent part in supporting the establishment and functions of a wide range of international bodies for many decades, it is however worth considering what lies behind Australia’s relatively recent overt emphasis on the importance of a ‘rules-based global order’ as a key element of Australia’s Defense and Foreign Affairs policy. It seems that making such clear statements regarding the value of ‘the rules’ sets out Australia’s view that there is an ongoing need for continued adherence to the normative principles that emerged in the voluminous treaty-making that has occurred since the conclusion of the Second World War, regardless of any accompanying uncertainty that might arise through the actions of those States that use those same rules to interpret international law in widely varying ways. If viewed in this way, Australia’s ready acceptance and enthusiasm for a ‘rules-based global order’ makes perfect sense from a security perspective where certainty and clarity provide undoubted benefits for Australia’s continued prosperity, using the global international legal frameworks that are already in place for the peaceful resolution of a wide variety of disputes including those that affect the region’s maritime areas.³⁴

IV. CASE STUDIES

The next part of this paper will illustrate how Australia’s approach to the law of the sea has played out in practice by briefly reviewing three case studies.

A. INDONESIAN ARCHIPELAGIC SEA LANES DESIGNATION

As an archipelagic State, Indonesia is permitted to take full advantage of

icy-white-paper.

³² *Ibid.*, 82 – 83.

³³ *Ibid.*, 83.

³⁴ See discussion in Donald Rothwell and David Letts “Is there still a role for international law in the South China Sea”, *Asian Jurist* (October 2018): 53-57.

the provisions contained in Part IV of the LOSC, including drawing archipelagic baselines³⁵ and designating archipelagic sea lanes.³⁶ In fact, it is well known that Indonesia is the only State that has sought to designate archipelagic sea lanes so far, with its submission being lodged with the ‘competent international organization’ during the 67th session of the International Maritime Organization’s (IMO) Maritime Safety Committee (MSC) in 1996.³⁷ Having been forewarned of this submission at the previous session of the MSC, Australia was among a group of institutions and States that also lodged submissions in relation to the proposed designation of archipelagic sea lanes, and highlighted the major concern of these States that the Indonesian designation only proposed three north-south sea lanes without any sea lanes being designated in the east-west direction.³⁸

Balkin notes that Australia and Indonesia took a different approach to the role of the IMO’s MSC in their written submissions.³⁹ While Indonesia was content with the MSC alone dealing with the topic of sea lanes designation, Australia submitted that the issues at stake were much wider than only those associated with ‘safety’ and therefore the views of other relevant IMO committees such as the Legal Committee and its Sub-Committee on Navigation should also be sought. This view was not, however, supported by other delegations that were involved in the process, including the United States, so the matter was left with the MSC.

In contrast, Australia’s position in relation to the absence of any proposed east-west archipelagic sea lanes was widely supported, and Australia, the United States and Indonesia undertook a series of consultations to try and resolve the issue.⁴⁰ The view expressed by Australia and the United States, on behalf of other ‘user States’, was that navigation and overflight along east-west sea lanes was one of the ‘normal passage routes used as routes for international navigation and overflight through or over archipelagic waters’.⁴¹ Accordingly, Australia took the view that the mandatory language used in LOSC

³⁵ LOSC Article 47

³⁶ LOSC Article 53

³⁷ Rothwell and Stephens, *International Law of the Sea*, note 8 above, 275.

³⁸ See Sebastian Leonard, Ristian Atriandi Suprivanto and I Made Andi Arsana, “Beyond the Archipelagic Outlook” in *Power, Leadership and the Regional Order*, Christopher Roberts, Ahmad Habir and Leonard Sebastian, eds. (Palgrave Macmillan, 2015), 315; see also Rothwell and Stephens, *International Law of the Sea*, note 8 above, 275-276.

³⁹ Rosalie Balkin, “The Role of the International Maritime Organisation in the Settlement of International Disputes” in *Navigational Rights and Freedoms and the New Law of the Sea*, Donald Rothwell and Sam Bateman, eds. (Martinus Nijhoff, 2000), 311-313.

⁴⁰ Rothwell and Stephens, “*International Law of the Sea*”, note 8 above, 275; see also Hasjim Djalal, “Indonesia’s Archipelagic Sea Lanes” in *Indonesia Beyond the Water’s Edge: Managing and Archipelagic State*, Robert Cribb and Michele Ford, eds. (ISEAS Publishing, 2009), 62-63.

⁴¹ LOSC Article 54(4)

Article 54 (4) through the use of the words ‘shall include’ required Indonesia to have east-west sea lane(s) in its designation.⁴² Although it has been reported that Indonesia did consider this proposal,⁴³ there was no change to Indonesia’s submission to the 69th session of the MSC which maintained the position that designation of the three north-south sea lanes was sought by Indonesia.⁴⁴ The consultations between Australia, the United States and Indonesia did produce what has been described as ‘a general agreement or understanding on 19 rules that would be applicable in the sea lanes’⁴⁵ but the precise status of these rules, and the inconsistency that exists with the subsequent Indonesian Government Regulation 37/2002, makes their current relevance uncertain.⁴⁶

Two significant outcomes arose from the Indonesian archipelagic sea lanes designation process, and Australia was heavily involved in both of these. First, as the sea lanes designation process had never been undertaken before, there had to be some recognition that the IMO was indeed the ‘competent international organization’ to which such submissions should be made. The submission process itself, supported by the practice of all States involved, confirmed that this was indeed the case.⁴⁷ Significantly, the IMO at Australia’s suggestion adopted General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes (GPASL) which is designed to both reflect the lessons learned from the Indonesian submission and provide a guide for any future sea lanes designation submissions.⁴⁸

The second significant outcome was the compromise reached by the IMO as a way of dealing with the Indonesian submission in a manner that would be acceptable to Indonesia and other States. This compromise followed a suggestion from the United States that the Indonesian designation should be viewed as a ‘partial proposal’ with an accompanying ‘partial designation’ by the IMO.⁴⁹ From the perspective of Australia, this compromise could be supported on the basis that the more generous right of archipelagic sea lanes passage (as opposed to innocent passage) would remain available in other archipelagic waters⁵⁰ and this outcome was ultimately adopted at the 69th session of the

⁴² Balkin, “The Role of the International Maritime Organisation in the Settlement of International Disputes,” note 39 above, 312.

⁴³ Leonard, Supriyanto and Arsana, “Beyond the Archipelagic Outlook”, note 38 above, 315.

⁴⁴ *Ibid.*

⁴⁵ Djalal, “Indonesia’s Archipelagic Sea Lanes”, note 40 above, 63-65 (the 19 rules are listed on pages 64 and 65).

⁴⁶ Leonard, Supriyanto and Arsana, “Beyond the Archipelagic Outlook”, note 38 above, 315-316.

⁴⁷ Rothwell and Stephens, *International Law of the Sea*, note 8 above, 275-276.

⁴⁸ Tara Davenport, “The Archipelagic Regime” in *The Oxford Handbook of the Law of the Sea*, Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens, eds. (Oxford, 2015), 151, fn 129.

⁴⁹ *Ibid.*

⁵⁰ Balkin, “The Role of the International Maritime Organisation in the Settlement of International Disputes,” note 39 above, 312; see also Rothwell and Stephens, “*International Law of the Sea*”, note 8 above,

MSC on 19 May 1998.⁵¹

B. *MV TAMPA* RESCUE AT SEA

The second case study involves events that took place in August 2001 when the Norwegian flagged bulk carrier *MV Tampa* rescued 433 people from a boat that had departed Indonesia with people onboard who were trying to reach Australia.⁵² *MV Tampa* was on a voyage from Fremantle in Western Australia to Singapore as part of its scheduled program when the captain of *MV Tampa* responded to a call for assistance from the Australian Maritime Safety Authority's Rescue Coordination Centre that a vessel (subsequently identified as a wooden boat, the *Palapa 1*) was in distress. On 26 August 2001 the *Palapa 1* was approximately 75 nautical miles⁵³ from the Australian territory of Christmas Island, and when the *MV Tampa* reached the vessel the *Tampa's* captain assessed the condition of the vessel as being unseaworthy. Accordingly, over a period of a number of hours on 26 August 2001 the 433 people in *Palapa 1* were taken onboard *MV Tampa* and course was subsequently set for the Indonesian port of Merak. However, shortly after all the people had been rescued from *Palapa 1*, a small delegation went to the bridge of *Tampa* to meet the captain and they demanded to be taken to Christmas Island. For a number of reasons, primarily those dealing with the safety of all the people now embarked in *MV Tampa*, the captain decided to sail towards Christmas Island. Once the Australian government became aware of the captain's decision to sail towards Christmas Island, steps were taken by the Australian government to prevent *MV Tampa* from entering Australia's territorial sea and disembarking those who had been rescued at Christmas Island.

Reaction by the Australian government to this incident displays a 'hardened' approach to the various legal obligations that arose but this paper will only address those legal obligations that specifically relate to the law of the sea. The first issue of note is the obligation placed on States by Article 98 of the LOSC.

Article 98 Duty to render assistance

276.

⁵¹ International Maritime Organisation, "Maritime Safety Commission – 69th Session", available at: <http://www.imo.org/en/MediaCentre/MeetingSummaries/MSC/Archives/Pages/default.aspx,c> accessed on 4 February 2020.

⁵² The brief summary of facts provided in this paper are obtained from the judgement of North J. in *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs* [2001] FCA 1297 (11 September 2001) paras 14-43 (hereafter '*VCCL v MIMA*') and Frank Brennan, *Tampering with Asylum: a universal humanitarian problem*, University of Queensland Press, 2003, p. 207.

⁵³ Seventy-five nautical miles is approximately 140 kilometers.

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose

Clearly in this instance both Australia and Indonesia had fulfilled their initial obligations under Article 98 by coordinating the rescue effort between them, and Norway had similarly met its obligations as the flag state of the ship as MV *Tampa* had responded to the call for assistance and taken the rescued persons onboard. However, tension soon emerged between Australia and Indonesia, as well Australia and Norway, following the Australian government's decision to deny MV *Tampa* access to Australian territorial waters around Christmas Island. Statements in the Parliament from Australian Prime Minister Howard and Foreign Minister Downer made it very clear that Australia was seeking the assistance of both Indonesia and Norway to resolve the question of where the 'rescuees'⁵⁴ should be taken,⁵⁵ and in relation to international legal obligations Mr Downer stated:

"It is important that people understand that Australia has no obligation under international law to accept the rescued persons into Australian territory. I note that the fishing boat from which the 434 persons were rescued in international waters set off from Indonesia and was crewed by

⁵⁴ 'Rescuees' was the 'neutral' term adopted 'clumsily' by North J. in *VCCL v MIMA*, pp 17

⁵⁵ "House Hansard Questions Without Notice: Illegal Immigration MV *Tampa*," Parliament of Australia, accessed on 30 January 2020, <https://parlinfo.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F2001-08-28%2F0004;query=Id%3A%22chamber%2Fhansardr%2F2001-08-28%2F0000%22>,

Indonesians."⁵⁶

It is certainly true that the LOSC does not deal with this topic at all, merely providing the 'Duty to render assistance' under Article 98 that has been noted above. The operationalization of search and rescue obligations has been set out under the 1979 SAR Convention⁵⁷ which is designed to ensure that no area of the world's ocean spaces is without a responsible authority for search and rescue of those that need assistance at sea. However, as noted earlier, Christmas Island and the waters in which MV *Tampa* picked up the 'rescuees' is located in the Indonesian Search and Rescue zone, and in the Australian government's view at the time, this created an obligation for Indonesia in relation to the people that had been rescued – regardless of the fact that the call for assistance was relayed through Australia's Rescue Coordination Centre.

Other law of the sea issues that arose during the *Tampa* incident include Australia's purported closure of the territorial sea to the *Tampa* which was communicated through public statements from Australian officials to the captain of MV *Tampa*⁵⁸ and eventually not complied with when the *Tampa*'s captain decided that the situation onboard his vessel could no longer be tolerated.⁵⁹ The issues that arise here relate to LOSC Article 25 which permits temporary suspension of innocent passage in the territorial sea to foreign ships provided there is no 'discrimination in form or in fact' and that such temporary suspension 'is essential for the protection of its security.' The right of innocent passage is set out in Article 17 of the LOSC and the meaning of passage is stipulated in Article 18 and relevantly it includes 'rendering assistance to persons, ships or aircraft in danger or distress.'⁶⁰ So, the question that arises is whether MV *Tampa*, having performed its obligations under LOSC Article 98, could now seek to exercise a right of innocent passage in the territorial sea around Christmas Island relying on the exception provided by LOSC Article 18(2) to vessels in distress. It is readily apparent that MV *Tampa* could not claim that its passage was innocent *per se*, as the presence of the vessel in Australia's territorial sea would have clearly been inconsistent with a number of the activities listed in LOSC Article 19(2), and therefore by definition the passage of the vessel would not be innocent.

Tensions between Australia and Indonesia had been heightened following Australia's prominent role in the events of August/September 1999 when In-

⁵⁶ *Ibid.*

⁵⁷ International Convention on Maritime Search and Rescue (with annex), opened for signature 27 April 1979, 1405 UNTS 97 (entered into force 22 June 1985)

⁵⁸ *VCCL v MIMA*, para. 21-22.

⁵⁹ *Ibid.*, 35.

⁶⁰ LOSC Article 18(2)

onesian rule in East Timor ended. The *Tampa* incident, which followed reasonably soon afterwards, put further strain on the relationship, with one critic suggesting that the situation was eased with ‘an upstream disruption regime being negotiated on a wink and a nod with a cheque book and the assurance of silence.’⁶¹ In one sense, the LOSC had shown a certain degree of inadequacy in dealing with all of the issues that arose when the *Tampa* responded to the distress call and in the subsequent days before the ‘rescuees’ were removed from the vessel, and other solutions to the ‘problem’ were required. On the other hand, the LOSC was never designed or expected to single-handedly address every conceivable situation that might arise on, over or under the world’s oceans, and the movement of people seeking asylum needed a response from States that exceeded the remit of the LOSC.

The ‘*Tampa* incident’ highlighted that clarification of some aspects of how people who are rescued at sea are dealt with was needed. The competing interests of flag State, coastal/archipelagic State, and ‘rescuees’ all needed to be considered in more detail, as well as taking steps to address the response that States could take to deal with those involved in maritime people smuggling activities. In an effort to provide solutions for these issues, one of the more immediate outcomes of the *Tampa* incident was the initiation of The Bali Process which is an informal ‘forum for policy dialogue, information sharing and practical cooperation to help the region address’ the ‘consequences of people smuggling, trafficking in persons and related transnational crime.’⁶² The Bali Process emerged from a regional Ministerial Conference that was jointly hosted by Australia and Indonesia in Bali from 26-28 February 2002 and has now grown into a mature organization with nearly 50 States participating.⁶³ So, although the *Tampa* incident saw a further increase in tension between Indonesia and Australia in the short term, there were longer term outcomes successfully initiated to deal with some of the problems and uncertainties that arose at the time.

C. AUSTRALIA AND TIMOR LESTE MARITIME BOUNDARY CONCILIATION AND TREATY

The third case study that will be briefly assessed is the historic conciliation that has resulted in the settling of the maritime boundary between Australia and Timor Leste.⁶⁴ It is noted that the history of the maritime boundary dis-

⁶¹ Brennan, *Tampering with Asylum*, note 52 above, 207.

⁶² “The Bali Process,” The Bali Process, Available at: <https://www.baliprocess.net/> accessed on 2 February 2020.

⁶³ *Ibid.*

⁶⁴ The Australian Yearbook of International Law recently published a ‘Timor Sea Treaty Agora’ which provides four separate perspectives regarding the treaty negotiations and conciliation process: see *Australian*

pute between Australia and Timor Leste is inextricably linked to the maritime boundary negotiations that have taken place between Australia and Indonesia, which have been written about by others on numerous occasions.⁶⁵ However, the focus of this paper is not to look at all of the technical issues regarding the maritime boundary delimitations in any great detail, but rather to assess (or perhaps speculate) how and why the position adopted by Australia changed over the course of nearly twenty years, with the ultimate outcome being the 2018 Treaty between Australia and Timor Leste.⁶⁶

The starting point⁶⁷ selected for this section of the paper is the 2002 Timor Sea Treaty, establishing a Joint Petroleum Development Area (JPDA) between East Timor and Australia which was signed on 20 May 2002.⁶⁸ The significance of this date should not be overlooked, as 20 May 2002 was the date upon which East Timor, now known as Timor-Leste, ceased being administered by the United Nations Transitional Administration that had been established for that purpose and became the world's newest independent State. Membership of the United Nations followed soon afterwards, with Timor-Leste becoming the 191st member of the United Nations on 27 September 2002.⁶⁹ A further treaty that 'unitised' part of the resources that were shared between Australia and Timor-Leste was signed in 2003⁷⁰ and in 2006 the two States signed the *Treaty on Certain Maritime Arrangements in the Timor Sea* (CMATS)⁷¹ which, *inter alia*, sought to exclude any proceedings being commenced by either party in relation to maritime boundaries for 50 years.⁷²

Yearbook of International Law 36 (2019): 31-82.

⁶⁵ For example, Clive H. Schofield, "An incomplete maritime map" in *Law of the Sea in South East Asia: Environmental, Navigational and Security Challenges*, Donald Rothwell and David Letts, eds. (Routledge, 2020), 56-59; see also the opening statement of HE Minister Kay Rala Xanana Gusmao to the Conciliation Proceedings between Timor Leste and Australia on 29 August 2016: Permanent Court of Arbitration, "Conciliation Proceedings Between The Government Of The Democratic Republic Of Timor-Leste And The Government Of The Commonwealth Of Australia," accessed 3 February 2020, <https://pcacases.com/web/sendAttach/1889> (hereafter Gusmao opening statement)

⁶⁶ Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea, [2019] ATS 16.

⁶⁷ As noted above, Australia and Indonesia have negotiated a number of treaties dealing with maritime boundaries between the two States, but these treaties are not the focus of this case study. For brief details of these treaties see Schofield, above note 66 and Elizabeth Exposto, "The Timor Sea Conciliation and Treaty: Timor-Leste's Perspective", *Australian Yearbook of International Law* 36, 2019, 45-47.

⁶⁸ Timor Sea Treaty between the Government of East Timor and the Government of Australia (with annexes), 20 May 2002, 2252 UNTS 3.

⁶⁹ "Timor-Leste," United Nations, accessed on 1 February 2020, <http://data.un.org/en/iso/tl.html>.

⁷⁰ *Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor relating to the Unitization of the Sunrise and Troubadour Fields* (the International Unitization Agreement or IUA) 2483 UNTS 317.

⁷¹ Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, (hereafter 'CMATS'), 12 January 2006, 2438 UNTS 359.

⁷² CMATS article 4(1)

Timor-Leste's initial dissatisfaction with the treaties concluded with Australia began soon after Independence Day in May 2002. During the Conciliation proceedings with Australia Xanana Gusmao stated that at the time Timor-Leste entered into the treaties the country was '... in no position to take informed decisions of our own.'⁷³ He further stated that notwithstanding the restrictions contained in the treaties regarding the establishment of permanent maritime boundaries, Timor-Leste wanted to negotiate '... a permanent maritime boundary with Australia based on international law.'⁷⁴

The years between May 2002, when the Timor Sea Treaty was signed, and April 2016, when Timor-Leste commenced conciliation proceedings against Australia, were punctuated with a number of related legal proceedings. Timor-Leste brought a case against Australia in the International Court of Justice,⁷⁵ as well as commencing two separate arbitrations in relation to the Timor Sea Treaty.⁷⁶ All of these cases have now been concluded, with the successful conciliation process⁷⁷ being pivotal in achieving this resolution.⁷⁸ One of the keys to achieving this outcome was the involvement of an '... authoritative, highly distinguished and fair-minded Commission with a balance of legal expertise and diplomatic experience.'⁷⁹ The Conciliation Commissioners were: HE Mr Peter Taksøe-Jensen (Chairman), Dr Rosalie Balkin, Judge Abdul G Koroma, Professor Donald McRae and Judge Rüdiger Wolfrum.

One of the features of all of the legal proceedings that took place between Australia and Timor-Leste was the use, primarily by Australia, of a range of different 'objection mechanisms'. In a sense, Australia played 'hard-ball' and sought to resist each of the proceedings taking place at all, primarily through raising questions regarding jurisdiction and competence. This resulted in an environment of distrust between the parties, and the prospect of achieving a successful conciliation was not good.⁸⁰ Notwithstanding this approach, the conciliation process did proceed after the question of competence was de-

⁷³ Gusmao opening statement, 18.

⁷⁴ *Ibid.*

⁷⁵ International Court of Justice, "Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)", available at <https://www.icj-cij.org/en/case/156>, accessed on 29 January 2020, records the discontinuance of these proceedings.

⁷⁶ *Arbitration under the Timor Sea Treaty of 20 May 2002 (Timor-Leste v. Australia)*, Permanent Court of Arbitration Case No. 2013-16 and *Arbitration under the Timor Sea Treaty of 20 May 2002 (Timor-Leste v. Australia)*, Permanent Court of Arbitration Case No. 2015-42

⁷⁷ *Timor Sea Conciliation (Timor-Leste v. Australia)*, Permanent Court of Arbitration Case No. 2016-10

⁷⁸ Timor Sea Treaty Agora, see note 66 above.

⁷⁹ Exposto, "Timor Sea Conciliation", note 65 above, p. 54.

⁸⁰ Ben Huntley, Amelia Telec and Justin Whyatt, "The Timor Sea Treaty: An Australian Perspective", *Australian Yearbook of International Law* 36: 31-33, 35-38; see also Exposto, "Timor Sea Conciliation", note 65 above, 51-55.

cided, and has resulted in an historic agreement on maritime boundaries between the two States and may prove to be a useful model for other future maritime boundary negotiations – perhaps between Australia, Indonesia and Timor-Leste.

V. CONCLUSION

The review of Australia's approach towards the development of the law of the sea that has been conducted in this paper suggests an approach to the law of the sea that can be identified through a number of key themes. First, Australia is a strong advocate of the advantages and need for a normative international legal structure that is built upon a solid treaty foundation, even if this structure contains inconsistencies and flaws in interpretation – which is clearly the case with the 1982 LOSC. Australia's recent championing of the so-called 'rules-based international order' in the influential Defense and Foreign Policy White Papers is testament to the emphasis that has been placed on the strengths of a normative framework by Australia.

Second, Australia has had a mixed record of 'success' and 'failure' in terms of achieving the outcomes it has sought in a number of law of the sea arenas. The issues raised by Australia when Indonesia lodged its archipelagic sea lanes proposal allowed a compromise to be reached that has proved to be enduring and acceptable to both Australia and Indonesia.

Third, Australia has been prepared to invoke some of the protections that are available to a coastal state under the LOSC to protect its maritime borders from unauthorized incursions. In doing so, Australia has been mindful of the impact on other affected states, but has also used the authority provided by the LOSC to achieve its stated objectives.

Fourth, it might be considered that Australia has taken a pragmatic approach to maintaining its place as a 'solid international citizen', especially in relation to its settlement of the boundary dispute with Timor-Leste. Australia did not easily succumb to the range of proceedings that Timor-Leste initiated, using available mechanisms to challenge each once. However, once the decision was made that the proceedings were validly underway, Australia's approach altered to one of active involvement to ensure that the proceedings could be concluded in a mutually beneficial manner.

In terms of how Australia's approach to the development of the law of the sea is likely to unfold in the future, it is contended that Australia will continue to be an active participant in appropriate processes and will look to Indonesia

for support and partnership for the foreseeable future. The Joint Statement between The Government of the Republic of Indonesia and The Government of Australia⁸¹ following President Widodo's visit to Australia in February 2020 contains nine paragraphs that highlight future maritime cooperation between the two States, and these initiatives are testament to a continuing shared interest in maritime affairs.

⁸¹ Prime Minister of Australia, "Statement between The Government of the Republic of Indonesia and The Government of Australia", available at <https://www.pm.gov.au/media/joint-statement-0> accessed on 10 February 2020.

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