Satya N. Nandan
Keynote Address

ABLOS CONFERENCE
15-17 October 2008

THE SUCCESSES OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND SOME FUTURE CHALLENGES

The United Nations Convention on the Law of the Sea is the most successful international instrument since the Charter of the United Nations. Apart from the binding nature of the Convention on the 156 parties to it, its efficacy also depends on the widespread application of its provisions by states. An examination of state practice reveals the high level of uniformity and consistency in the application of its provisions. The widespread acceptability of the Convention is further evidenced by the use of its provisions by competent international organisations and technical bodies concerned with oceans-related matters. Furthermore it is the paramount source for current international law of the sea and it is recognised as such by judicial bodies. Even for those states which are not yet parties to the Convention it provides an important point of reference.

The institutions established by the Convention

The three new institutions established by the Convention are all functioning and are widely supported by states. The International Seabed Authority completed its organisational phase several years ago and has also adopted rules and regulations covering exploration for polymetallic nodules on the deep seabed. It has issued exploration licences under these regulations to eight entities. It is currently working on rules and regulations for exploration for polymetallic sulphides and cobalt-rich crusts. Eventually these will form part of a comprehensive mining code covering all aspects of prospecting, exploration for and exploitation of seabed minerals. Recently, there are signs of renewed commercial interest in seabed mining; two new applications for exploration licenses were made in 2008 by private sector interests sponsored by developing states. The eight licenses already issued were to State-backed entities. The renewed interest in seabed mining is due to the growth in demand for metal and the consequent high prices.
Commercial sea bed mining in national areas of Papua New Guinea is likely to begin by 2012. Its success is of great interest to the International Seabed Authority.

The International Tribunal for the Law of the Sea has also been established and has completed its organisational phase. It has adopted its rules of procedure and its docket of cases has expanded slowly but steadily. As a result, we have the benefit of a growing jurisprudence on matters related to the Convention, particularly in fisheries cases.

The third institution established by the Convention, the Commission for the Limits of the Continental Shelf, is slightly different to the others in that it is not a full-time body and is not intended that it should have a permanent institutional existence. In fact, as things have turned out, it seems likely that the Commission will have an existence much longer than initially anticipated. The Commission's purpose is to review the data and information submitted by coastal states and make recommendations to them in accordance with article 76 of the Convention on the delineation of the outer limits of the continental shelf in areas where the shelf extends beyond 200 nautical miles from the baseline from which the territorial sea is drawn.

Each of the bodies established has its own functions and they cannot assume responsibilities which belong to others. One of the functions of ITLOS, for example, is that it has jurisdiction to provide interpretations of the Convention, including through advisory opinions. In the case of the Authority, its functions are to administer the mineral resources of the deep seabed. The Commission, on the other hand, is a technical body. Its function is to review the technical data and information provided by states to ensure that they conform to the technical formula for establishing the outer limits provided for in the Convention. It cannot assume a role whereby it begins to give legal interpretations to the provisions of the Convention, which is a role that properly belongs to a judicial body. In this regard, one of the unique aspects of the Convention is that it provides for compulsory dispute settlement, as well as for the possibility of advisory opinions.

The Commission was established in effect to be an arbiter between coastal states and the rules set out in the Convention to ensure that the technical aspects of the rules are properly applied. Whilst the Convention provides a role for the Commission to make recommendations to coastal states on the delineation of their outer limits, which will eventually become binding on all states, the Commission cannot act in a manner that is inconsistent with the provisions of the Convention. One of the difficulties for the Commission, however, is that most of those who advise on developments on the continental shelf are also members of the Commission. One has to be careful in this situation in ensuring that the Convention is not interpreted in a manner which is not consistent with the Convention merely in order to maximise claims by coastal states. For example, there has been discussion recently as to whether the Statement of Understanding in Annex II of the Final Act of UNCLOS III may be of wider application than the Bay of Bengal. However, under the terms of the Statement of Understanding, the Commission is only requested to apply the Statement in making its recommendations in respect of "States in the southern part of the Bay of Bengal".If the Conference had indeed felt that the alternative methodology outlined in the Statement was of wider application then it would have included the methodology in the body of the Convention rather than as a separate Statement included at the initiative of one state to recognise the special circumstances prevailing in the Bay of Bengal. This is explained in the University of Virginia Commentary on the Law of the Sea (Volume II).

A major problem for many states in the functioning of the Commission is a lack of transparency in the work of the Commission and a lack of accountability. While the meeting of states parties receives a report on the general work of the Commission, states have no access to the records of the internal proceedings of the Commission, which would indicate how decisions have been arrived at, what precedents are being created in the interpretation and application of the formula in the Convention and whether the Commission, which is a technical body, has taken it upon itself to interpret the provisions of the Convention. These matters are very important to a full understanding of the working of the Commission and of interest to all states parties to the Convention, whether they have a claim to an outer continental shelf or not. This is an issue not only one of perception but of practical interest that ought to be addressed. I hope as you deliberate here on matters related to the continental shelf and on the work of the Commission you will give thought to some of these issues.

Yesterday's presentation by Mr. Mark Alcock of Geoscience Australia on the Australian's submission to the Commission was excellent. It provided an insight into some of the processes within the Commission as it reviewed the Australian submission. It demonstrated how meticulously and professionally the Commission members conducted the review and how they came to their recommendation. It highlighted the variety of geological and morphological features the Commission had to consider. Clearly, the Commission uses certain principles and

policies in dealing with different types of features, for instance, the test of "geological continuity" and the criteria for establishing the foot of the slope. These principles, policies and evolving practices are very important for the full appreciation of the Commission's work as well as in ensuring uniformity and consistency in the application of the technical formula for present and future members of the Commission as well as for States. They should be recorded and published in official documents. There is nothing in the Convention that requires that the proceedings of the Commission should be kept confidential. This is a self-imposed restriction by the Commission. The only data and information that is required to be kept confidential are those relating to resources in the continental shelf. The present reports to the Meeting of States Parties and those submitted to the Secretary-General and reproduced on the Commission's website are inadequate and do not do justice to the good work the Commission is doing nor do they inform the States of certain important details which will assist in understanding the end result.

New challenges

A remarkable feature of the Convention is its capacity to adapt to new and changing circumstances. One important reason for this is that the Convention allows for flexibility in the implementation of many of its provisions through competent international organisations, such as the International Maritime Organisation and FAO.

In the few situations that have arisen where the provisions of the Convention were found to be inadequate – as happened for example in the late 1980s in relation to the problem of the management of straddling and highly migratory fish stocks – states have chosen nevertheless to address the problem within the framework of the Convention by adopting implementing agreements to clarify and elaborate the relevant provisions of the Convention. The case of the 1994 agreement for the implementation of Part XI was slightly different, in that it was intended to address specific political problems of some states in order to enable them to accede to the Convention, but nevertheless it indicates the strong desire of all states to remain within the framework of the Convention.

There are three current challenges for the law of the sea. The first two of these mainly concern fisheries and are closely interrelated. They are how to apply the ecosystem approach to fisheries management and what action should be taken to protect biodiversity in the world's oceans. The third challenge is how to deal with the so-called genetic resources of the oceans.

Ecosystem-based management

Ecosystem-based management acknowledges that fishing and other activities take place within complex communities of organisms and habitats and that fishing is only one of many human activities which impact on these marine environments. The main goal of ecosystem-based management with respect to fisheries management is to ensure the sustainability of catches without compromising the inherent structure and functioning of the marine ecosystem. This poses significant challenges in practice. Managing complex marine ecosystems requires considerably more data and information about ecological relationships and the impact of human activities than single-species management regimes. External factors such as poverty alleviation, food security, profit motives and lack of political will are likely to hinder progress in achieving effective management of marine resources under these new schemes just as they did under the old single-species regimes.

In order to deal with these challenges it is likely that the regional organisations and arrangements that, under the provisions of the UNFSA, have become the paradigm for the management of

international fisheries will need to significantly change their approaches and mandates. They will also need to be given the resources necessary to enable them to address the broader ecological impacts of fishing activities on the world's oceans. This may well involve greater regional integration and a more co-ordinated approach at global level, for example data collection and scientific analysis at the level of large marine ecosystems.

Protection of biodiversity

The need for global action to reduce the current rate of biodiversity loss for the benefit of all life on earth has captured the public imagination in recent years. It was endorsed by world leaders at the WSSD in 2002 and has been incorporated as one of the Millennium Development Goals. The case for conserving marine biodiversity is particularly compelling, especially given the vast range of marine species and ecosystems, many of which are poorly understood, and the rapid increase in the level of anthropogenic impacts on the oceans, both as a result of population growth in coastal areas and other man-made impacts such as climate change.

One effect of this increased attention on the protection of biodiversity has been the application of concepts from international environmental law to the traditional law of the sea. Whilst the Convention contains extensive provisions on the need to prevent, reduce and control pollution, it speaks only indirectly to the protection of biodiversity. Such references may be found, for example, in article 61, which requires states to take into consideration the effects of fishing on species "associated with or dependent upon harvested species", and in article 145, which requires the International Seabed Authority to adopt rules, regulations and procedures for the "protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment".

Increasing concern for the conservation of biodiversity as an end in itself has led to calls for the application of concepts and principles from international environmental law to the law of the sea. For example, the WSSD has called for the establishment of marine protected areas consistent with international law and based on scientific information, including representative networks by 2012. Considerable progress has been made at the national level to establish such protected areas, mainly in coastal areas, although the most recent reports from the Convention on Biological Diversity suggest that only about 0.65% of the world's ocean surface has been covered by MPAs, compared to about 12% of terrestrial areas.

Particular attention has focused on the need to establish protected areas in the high seas and various proposals have been put forward for the design of a representative network of such areas and for the development of criteria to identify ecologically representative sites. The scientific and ecological arguments may be compelling, but it is important also that in proposing such measures the jurisdictional framework established by the Convention is respected. There are many competing uses of the ocean, especially in areas beyond national jurisdiction, and the Convention regulates each of these competing uses in a very specific and balanced manner.

For example, seabed mining is regulated exclusively through the International Seabed Authority. The rules and regulations adopted by the Authority contain detailed and elaborate procedures for the protection of the marine environment, including its biodiversity, from the harmful effects of mining. Where necessary, the Authority can act to designate areas as off-limits to mining. However that would not protect the same area from fisheries activity. Similarly, action by a regional fisheries organisation to protect an area from destructive fishing activities cannot compel the International Seabed Authority to act in the same manner. Indeed, if the problem in a particular area is essentially a fisheries problem, there may be no need to prevent other legitimate

uses of the area, for example cable laying, marine scientific research or even mineral exploration. A coordinated and cooperative approach is required that fully respects the jurisdictional competences set out in the Convention.

Marine genetic resources

Over the past few years the question of the management of so-called marine genetic resources has become one of the most prominent issues in the law of the sea. The issues involved are complex and multi-faceted. Although the initial concerns related to the impact on the marine environment of the recovery of genetic resources from the ocean, many other concerns have emerged as discussions on the issue have continued under the auspices of the General Assembly. Some states, especially the developing states and less technologically advanced states, are concerned about fair access to genetic resources. Others are preoccupied with the problem of sharing of the financial and other benefits derived from genetic resources, whilst some are concerned about the lack of environmental regulation of unrestrained scientific activity. It is interesting to see that some of the same ideological positions that preoccupied the Seabed Committee and the First Committee of UNCLOS III during discussion of the regime for deep seabed mining have come to the fore in recent discussions over marine genetic resources. It is to be hoped that the sort of estimates that are being placed on the potential financial rewards from the exploitation of marine genetic resources do not turn out to be as wildly optimistic as the estimates made in the 1960s and early 70s for polymetallic nodules.

Mr. Chairman,

I wish to conclude with the observation that you have a very interesting and extensive agenda. I am sure that the next few days will be illuminating and will generate interesting discussions of those issues. I wish the Conference every success.
