TEXTUAL INTERPRETATION OF ARTICLE 121 IN THE UN CONVENTION ON THE LAW OF THE SEA

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Abstract

This paper provides a textual interpretation of Article 121 in the 1982 UN Convention on the Law of the Sea (UNCLOS or Convention). The study is divided into three principal substantive parts. The first outlines the background and context in which the text was drafted at the Third United Nations Conference on the Law of the Sea (Third Conference or Conference). The second main part analyzes the ordinary meaning of the specific words used in the text of Article 121. The third part of this study is a review of supplementary treaty interpretation sources helpful in ascertaining the meaning of ambiguous language found in paragraph 3 of Article 121.

A. Introduction

The Third Conference was formally held from 1973 to 1982. Many observers have noted that the negotiations for this Conference were not only lengthy but also highly complex with many unique negotiating processes. The goal set and achieved in the 1982 Convention was to reach agreement on a comprehensive legal regime governing over 70% of the earth's surface. The resulting Convention contains 320 articles plus 9 Annexes of treaty text. The Convention's original provisions on the deep seabed mining regime proved not to be generally acceptable to the international community, especially to industrialized States, and the objectionable text was modified through an innovative procedural process in 1994 just prior to the Convention's entry into force. By 2011, there were 161 Parties to the Convention, including the European Union. With near universal acceptance, the provisions in the Convention are generally regarded either as customary international law or as persuasive evidence of customary international law. The importance of this point is that conventional law is legally binding only with the express agreement of sovereign States while customary
international law is enforceable against all States, whether or not Parties to the particular agreement.

The Convention has 17 Parts, many of which contain extensive text, but Part VIII consists of only a single article under the heading “Regime of Islands”. Part VIII does not deal with artificial islands or installations (for this, see Convention Arts. 60, 80 and 147), groups of islands (see Part IV concerning the archipelagic regime), or territories under foreign occupation or colonial dependence (see Final Act, Annex I, Resolution III). Moreover, Part VIII, or indeed UNCLOS as a whole, does not deal with disputes over territorial sovereignty or delve into any specific maritime delimitation cases. UNCLOS does provide that to qualify as an island under Article 121, the territory must be naturally formed and be surrounded by water at high tide. With these qualifications, islands are entitled under UNCLOS to the same maritime zones as other land territory. The principles pertaining to islands proper embodied in UNCLOS are widely recognized in customary international law and in State Practice. Article 121 (3) of UNCLOS, however, contains a novel exception not rooted in customary international law. The third paragraph of Article 121 reads: “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” An effort to clarify the elusive meaning of this paragraph is given detailed attention in the third main part of this study.

The first noteworthy source of international law dealing with the regime of islands topic was in a draft text prepared for the 1930 Conference for the Codification of International Law. The 1930 draft

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1 See M. Nordquist/S. Nandan/S. Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. III, at 321, fn. 2 (1995). This seven volume series (Virginia Commentary) provides the official sources for text and traces the negotiating history of each article in the 1982 Convention. The Virginia Commentary was a project conceived and executed at the Center for Oceans Law and Policy, University of Virginia School of Law starting in 1982 and is almost complete in that an Index for the entire series is set for publication in the final Volume VII during 2011. More than 100 scholars/diplomats from throughout the world contributed to the volumes. Many contributors represented their governments in the negotiations at the Third United Nations Conference on the Law of the Sea. Part of the authoritative value of the project is that records were not kept of the numerous informal working group meetings at the Third Conference. While the contributors to the Virginia Commentary concentrated on making objective comments drawn from primary sources, they did occasionally offer conjecture or general observations not in the record when the editors and reviewers were confident, based on their personal participation in the negotiations, that the thoughts were justified by actual events.