March 1976

Evolution of Coastal State Jurisdiction: A Conflict between Developed and Developing Nations

Ernst K. Martens

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z3RZ3G

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcerazlaw.berkeley.edu.
Evolution Of Coastal State Jurisdiction: A Conflict Between Developed and Developing Nations

Ernst K. Martens*

INTRODUCTION

The law of the sea is an area of international law which has met harsh criticism from developing nations, especially with regard to customary international law of the sea. Like most customary international law, the rules governing the oceans were mainly formed by the practice of maritime European nations and a few other countries, long before the emergence of many nations of the Third World. Since a large number of the newer members of the international community gained independence only after struggles with the colonial powers—often the same nations which shaped the bulk of customary international law of the sea—the new states have understandably tended to regard such norms as the legacy of colonial rule. However, no country of the Third World has yet denied the validity of all traditional norms of international law. Since international law is a dynamic, constantly changing system, there is hope that certain modifications can be made to meet the needs of the new members of the international community.

I

HISTORICAL PERSPECTIVE

A. Grotius and Selden

Before the publication of Grotius' *Mare Liberum* in 1609, it had been almost universally accepted that the oceans or parts of them could

---

3. *Mare Liberum Sive de Jure, Quod Batavis Competitit ad Indicana Commercia* (1609).
be appropriated or reserved for the exclusive use of particular nations.\textsuperscript{4} Various schemes for the division of the oceans into national zones had been elaborated in order to avoid conflict over navigational routes for merchant and military vessels.\textsuperscript{5} Among Grotius’ reasons for recognizing the freedom of the seas were that their vast size made effective occupation and domination impossible, that no borderline could be established, and that the resources of the sea were inexhaustible.\textsuperscript{6}

Despite the persuasive refutations of Grotius’ arguments by John Selden in his treatise *Mare Clausum*,\textsuperscript{7} published in 1635, the notion of “freedom of the seas” became the norm. All nations came to regard the oceans as a *res omnium communis*. Since use of the oceans was trade-oriented, with fish reserves seemingly inexhaustible, the seafaring nations saw clear benefit from being able to fish and travel the oceans without restriction. At a time when resource-oriented motives seem to have replaced Grotius’ altruistic philosophical and theological considerations, it should be remembered that Grotius was not unsympathetic to the interests of the Dutch East India Company in its struggle over navigation routes claimed exclusively by Spain and Portugal.\textsuperscript{7a}

\textbf{B. Development of the Three Mile Zone}

Grotius recognized one major exception to his general doctrine of the inappropriability of the oceans. He justified coastal state control over immediate coastal waters on the principle of effective dominion: “[A] portion of the sea is . . . belonging to a territory, in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land.”\textsuperscript{8} On century later, Van Bynkershoek formulated the so-called cannonshot doctrine, which defined the limits of territorial waters to be one marine league or three nautical miles—at that time, the approximate range of land-based guns.\textsuperscript{9} Although the three mile limit was soon overreached by ballistics technology, the length of an 18th century cannonshot remained the generally accepted extent of territorial waters. There were exceptions, however, since some states claimed wider limits from four to 12 miles.\textsuperscript{10}

\textsuperscript{4} For an extensive outline of such claims, see T. Fulton, *The Sovereignty of the Sea* (1911); see also C. Colombos, *The International Law of the Sea* (6th ed. 1967).

\textsuperscript{5} For examples, see H. Kleb, *Hugo Grotius und Johannes Selden* 9-14 (1946).

\textsuperscript{6} *Mare Liberum*, supra note 3, at 21-26.

\textsuperscript{7} *Mare Clausum seu de Dominio Maris* lib. II (1635).


\textsuperscript{8} 1 De Jure Belli et Pacis 266-67 (W. Whewell transl. 1853).

\textsuperscript{9} De Dominio Maris ch. II (1703).

\textsuperscript{10} Scandinavian countries, especially Norway and Sweden, supported a four mile limit on historical grounds. Russia declared a 12 mile limit in 1912. For a summary
At the Hague Codification Conference in 1930, 42 nations attempted but failed to agree on a common limit. Many states argued for six miles, while others wanted to avoid a uniform limitation for all countries or insisted on the inclusion of a contiguous zone with special rights for the coastal state. Neither course was acceptable to Great Britain, the United States, Japan, and the other maritime nations who strongly advocated the three mile limit.\footnote{11}

\section*{II}
\section*{DEVELOPMENT AFTER THE SECOND WORLD WAR}

\subsection*{A. Continental Shelf and Fisheries Claims}

Ironically, it was the action of one of the staunchest supporters of the three mile doctrine that triggered the succession of more extensive coastal state claims. President Truman proclaimed a new United States policy with regard to fisheries and mineral resources of its continental shelf. The new policy established fishery conservation zones in waters contiguous to the coast of the United States but outside the three mile territorial limit. These zones were to be regulated and controlled by the United States alone where fishing was carried out solely by its nationals, and by joint state management where nationals of other countries were also engaged in fishing activities.\footnote{12} This proclamation stated that “the character as high seas of the area in which conservation zones are established and the right to their free and unimpeded navigation are in no way affected,” and explicitly recognized a corresponding right of other states to establish conservation zones off their coasts.\footnote{13} With respect to the continental shelf, Truman declared that “the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.”\footnote{14}

On October 29, 1945, Mexico, in a similar proclamation, claimed territorial control over its continental shelf and the right to take unilateral measures to protect and conserve fisheries in waters contiguous to the Mexican coast but outside the three mile territorial sea. In addition, Mexico claimed that its unilateral measures would be applicable to both Mexican nationals and foreigners.\footnote{15} Panama soon followed with a
similar claim in its constitution, and Argentina claimed not only the continental shelf but also the so-called "epicontinental sea" covering it.17

The grabbing continued with a presidential declaration by Chile and by Peru. Lacking almost any kind of continental shelf, due to the abrupt declination of the South American land masses to the bottom of the Pacific Ocean, both countries tried to secure fishing for their nationals, whose nutrition and income depended to a large extent on the fish caught off their coasts. Both claimed national sovereignty over the submarine waters of the adjacent sea up to a distance of 200 miles from their coast but gave assurance that this did not affect freedom of navigation on the high seas. Other Latin American nations have followed these examples.20

B. Declaration of Santiago

At the regional level, Chile, Ecuador, and Peru joined in the Declaration of Santiago on August 18, 1952, to "proclaim as a principle of their international maritime policy that each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast." As to navigation, the three countries agreed to respect "the innocent and inoffensive passage of vessels of all nations through the zone aforesaid."21

The terminology of this tripartite declaration seems to indicate that for the first time the claimed maritime zones constituted a true territorial sea of 200 miles, not merely jurisdiction over resource utilization. The express recognition of innocent passage, a technical term normally used only for navigation within territorial seas, supports this interpretation. However, it would be a mistake to give too much importance to the actual phrasing of these claims, for the terminology is often—sometimes deliberately—confusing. The Latin American states had to minimize protest and to avoid alienating potential supporters. Although primarily interested in exclusive resource utilization, the Latin American states may have felt that the use of the term "innocent passage" best expressed their desire to assert sovereignty. In addition, a broad ambiguous claim offers a useful bargaining reserve for international discussions. A compromise can thus be made without jeopardizing the state's

16. Id. at 15-16.
17. Id. at 4-5. Argentina has never explained the meaning of "epicontinental sea." See also text accompanying notes 45-47 infra.
18. Id. at 6-7.
19. Id. at 16-17.
essential interest. In spite of its formulation, the Declaration of Santiagogo must therefore be understood to claim special jurisdiction or an economic zone not encompassing a territorial sea.\textsuperscript{22}

After signing the Declaration, Chile, Ecuador, and Peru began enforcing the 200 mile maritime zone by seizing and fining foreign fishing vessels. A large number of fishing boats, among them many United States tuna boats, were captured.\textsuperscript{23} Peru, the most vigorous of the three, even seized Chilean boats found in its zone.\textsuperscript{24} The most notable incident was Peru's seizure of a whaling fleet in November 1954. The five captured vessels, owned by Aristotle Onassis, were released only after a fine of $3 million had been paid.\textsuperscript{25} Protests by several nations to these and other seizures were ineffective. Negotiations on fisheries between the United States and the three countries proved equally fruitless.\textsuperscript{26}

C. Implementation of the Icelandic Fisheries Policy

Another conflict over fisheries erupted in 1952 when Iceland adopted a policy of measuring its four mile territorial sea from baselines drawn across the outermost points of the Icelandic coast.\textsuperscript{27} In so doing, Iceland was apparently relying on a judgment of the International Court of Justice which recognized the right of Norway to measure its territorial waters from straight baselines connecting the "skaergaards" instead of from the so-called low water mark line.\textsuperscript{28} Again, protests were ignored. Furthermore, on June 30, 1958, Iceland extended its territorial sea to 12 miles measured from the disputed straight baselines.\textsuperscript{29} As a result, several clashes occurred when Icelandic gunboats tried to enforce the new fishing limits against British fishermen, who in turn were protected by British military vessels. In order to provide an atmosphere for negotiation at the 1960 Geneva Conference, the two countries arranged

\textsuperscript{22} F. Garcia Amador, \textit{The Exploitation and Conservation of the Resources of the Sea} 77-79 (2d ed. 1963); Garcia Amador, \textit{The Latin American Contribution to the Development of the Law of the Sea}, 68 AM. J. INT'L L. 33 (1974). Especially interesting is Garcia Amador's \textit{conclusio a contrario sensu} that the right of innocent passage as an element of the legal regime of the territorial sea need not have been expressly mentioned if a territorial sea regime were meant.

\textsuperscript{23} 114 CONG. REC. 8093-94 (1968).


\textsuperscript{25} Id. 27.

\textsuperscript{26} 28 DEP'T STATE BULL. 759 (1953); U.S. DEP'T OF STATE, SANTIAGO NEGOTIATIONS ON FISHERY CONSERVATION PROBLEMS (1955). See also 33 DEP'T STATE BULL. 1025 (1955).


\textsuperscript{28} [1951] I.C.J. 116.

\textsuperscript{29} COLOMBOS, \textit{supra} note 4, at 141.
a truce. However, the dispute was settled only later in a bilateral agreement. The United Kingdom agreed to drop objections to a 12 mile fishery zone and basically accepted Iceland's straight baselines. Iceland reserved the right to further extend its fisheries jurisdiction. In return, it agreed to a clause whereby "in case of a dispute in relation to such extension, the matter, at the request of either party, [would] be referred to the International Court of Justice."³¹

III

THE GENEVA CONFERENCES ON THE LAW OF THE SEA

A. Preparatory Work of the International Law Commission

Following the creation of the United Nations, the International Law Commission was asked to deal with controversial maritime issues for the world community. In 1956, the Commission submitted a report to the General Assembly, presenting a number of proposals for the codification of the law of the sea.³² This report contained 73 articles derived from the replies of 25 members of the United Nations and formed the basis of the Geneva Conference in 1958. Because the Commission could not agree on a generally acceptable limit for the territorial sea, its report suggested the adoption of a rule "that international law does not permit an extension of the territorial sea beyond twelve miles."³³

B. The Two Conferences

Like the Hague Conference in 1930, the 1958 Geneva Conference was unable to obtain the necessary two-thirds majority to reach a uniform limit for territorial waters. Although four conventions were agreed upon,³⁴ the most controversial issue remained unresolved. Approximately one third of the participating states, including most Western European states, the United States, Australia, Canada, and Japan, supported the old three mile doctrine. Another third, including the Soviet Union, Eastern European states, and several developing states in Africa and Asia opted for a 12 mile limit. The remaining participants supported six mile or greater limits. A renewed effort was made in 1960 at the Second Geneva Conference. The proposal which came closest to

³⁰. Id.
³³. Id.
adoption was a recommendation by Canada and the United States to establish a six mile territorial sea and a 12 mile fisheries limit, similar to their proposals in 1958. This proposal failed by one vote to gain the two-thirds majority of the 88 states attending the Conference.

The outcome of the Geneva Conferences was relatively favorable to the Latin American countries claiming a maritime zone of 200 miles, since no agreement was reached which directly prejudiced their position. However, the Convention on the Territorial Sea and the Contiguous Zone can be understood to limit indirectly the extent of the territorial sea to not more than 12 miles. Article 1(1) does not establish any limit when it says that “[t]he sovereignty of a state extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.” But article 24(1) states that the contiguous zone is “contiguous to its [the state’s] territorial sea” and article 24(2) says that “[t]he contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.” Thus, the Convention, in effect, seems to limit the territorial sea to a width of no more than twelve miles. This interpretation allows a state, for example, to claim either a three mile territorial sea and a nine mile contiguous zone, or a six mile territorial sea with a six mile contiguous zone, or as the extreme, 12 miles for the territorial sea and no contiguous zone. This interpretation of the Convention reflects the International Law Commission’s recommendation cited above and constitutes the common denominator of the states present at the Conference.

However, probably no one at the 1958 Geneva Conference imagined that, by adopting the less important limits of the contiguous zone, the basic question of maximum width of the territorial sea would thereby be decided by implication. On the contrary, the Conference passed a resolution for the convening of a second conference since it had “not been possible to reach agreement on the breadth of the territorial sea . . .” This decision leaves little room for the contention that the Conference, in adopting article 24, implied, even inadvertently, a maximum limit for the territorial sea. At any rate, the main struggle at the

Conferences was between the proponents of a three mile and a 12 mile territorial sea. States claiming more than 12 miles, whether as territorial waters or special jurisdiction, were outnumbered.\textsuperscript{41}

\section*{IV
DEVELOPMENT AFTER THE GENEVA CONFERENCES

\subsection*{A. New Wave of State Claims}

After a lengthy waiting period following the Geneva Conferences, the wave of national claims resumed in 1965. Nicaragua established a national fishing zone of 200 miles "for the better conservation and rational exploitation of our fish and other resources."\textsuperscript{42} Ecuador followed,\textsuperscript{43} also insisting on the 200 mile airspace.\textsuperscript{44} Argentina followed suit\textsuperscript{45} but expressly stated that freedom of navigation and overflight were not affected by the 200 mile zone.\textsuperscript{46} Nevertheless, Argentina referred to this zone as territorial sea, giving another example of the confusion in terminology.\textsuperscript{47}

Panama entered a true claim to 200 miles of territorial sea, comprising ocean floor, superjacent waters, and sovereignty over the airspace above.\textsuperscript{48} In accord with the widespread semantic confusion, Uruguay extended its "territorial sea" to 200 miles, while recognizing freedom of navigation and overflight beyond a twelve mile zone.\textsuperscript{49} Brazil used unequivocal terms to proclaim its territorial sea of 200 miles.\textsuperscript{50} Brazil claims complete control over the water column, seabed, subsoil, and airspace throughout the zone, allowing only innocent passage. The fact that two "fishing zones" in the "territorial sea" were established, each measuring 100 miles, does not change the character as territorial sea of the 200 mile zone. While the first 100 miles are reserved for nationals, foreigners are allowed to fish in the outer zone if licensed by Brazil.\textsuperscript{51} Costa Rica, like most Central and South American countries laying claim to a 200 mile zone for special purposes only, claimed a "patrimonial sea" of 200 miles but recognized freedom of navigation and overflight outside a 12 mile territorial sea zone.\textsuperscript{52}

\begin{thebibliography}{99}
\bibitem{41} See Dean, note 35 \textit{supra}.
\bibitem{43} \textit{Id.} at 78.
\bibitem{44} Political Const. art. 6.
\bibitem{46} \textit{Id.}
\bibitem{47} \textit{Id.} at 569.
\bibitem{48} \textit{Id.} at 105.
\bibitem{49} \textit{Hjerténsson, supra} note 24, at 58.
\bibitem{50} 10 I.L.M. 1224 (1971).
\bibitem{51} \textit{Id.} at 1226.
\bibitem{52} See \textit{Hjerténsson, supra} note 24, at 77-78.
\end{thebibliography}
The list of state claims after the Geneva Conferences shows that three countries, Ecuador, Panama, and Brazil, took advantage of the failure to agree on a specific limit for the territorial sea. After clearing the terminological confusion, these claims stand out as comprising a true 200 mile territorial sea, in which total state jurisdiction would be limited only by the right of innocent passage.

B. Latin American Agreement on a Unified Position

In spite of certain differences, the preceding summary of Latin American national claims shows a fairly homogeneous stand on the question of coastal state jurisdiction. The consensus is demonstrated in three declarations at regional meetings of Latin American countries.

1. Declaration of Montevideo

The first of these conferences was held in Montevideo, Uruguay, where the states claiming 200 miles of coastal jurisdiction met to coordinate and to defend their maritime policy. In a joint statement, Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru, and Uruguay declared “the right of littoral states to exercise control over the natural resources of the sea adjacent to their coasts and of the seabed and subsoil thereof in order to achieve the maximum development of their economy and to raise the living standard of their peoples.”

2. Declaration of Lima

A meeting which was designed to reach a consensus agreeable to all Latin American countries was held in Lima in August 1970. In the hope of securing broad recognition, observers were invited from Canada, India, Ireland, the United Arab Republic, Senegal, South Korea, and Yugoslavia, as well as representatives from the United Nations, the Organization of American States, and the Secretary General of the Standing Commission of the South Pacific. In the Declaration of Lima, the signatory states declared as a common principle “the right of the coastal state to establish the limits of its maritime sovereignty or jurisdiction in accordance with reasonable criteria, having regard to its geographical, geological and biological characteristics, and the need to make rational use of its resources.” For the first time, no particular limit was specified, implying that widely differing claims were justified if they could be found to be “reasonable.” Considering the number of positions at the meeting, this statement was probably the largest common denominator which would include all 200 mile claims.

54. 10 I.L.M. 208 (1971).
without distending more moderate claims.\textsuperscript{55} But complete consensus was not achieved. The landlocked countries, Bolivia and Paraguay, opposed the Declaration as unresponsive to the rights of non-littoral states. Also among the dissenters were several Caribbean countries,\textsuperscript{58} who opposed jurisdiction based on a criterion of reasonableness.

3. Declaration of Santo Domingo

In June 1972, the Caribbean countries met in the Dominican Republic and signed an extensive draft position on the international law of the sea, the Declaration of Santo Domingo.\textsuperscript{57} The limit of the territorial sea was set at 12 miles,\textsuperscript{58} and the territorial sea and the patrimonial sea together were not to exceed a maximum of 200 miles.\textsuperscript{59} The coastal states' rights in the patrimonial sea over the renewable and non-renewable natural resources in the waters, the seabed, and the subsoil were expressly recognized.\textsuperscript{60} The Declaration endorsed the coastal state's "duty to promote and the right to regulate the conduct of scientific research within the patrimonial sea, as well as the right to adopt the necessary measures to prevent marine pollution and to ensure its sovereignty over the resources of the area."\textsuperscript{61}

Having thus affirmed the rights of coastal states, the members of the meeting adopted a more conciliatory stand toward issues not involving resource utilization. Freedom of navigation and overflight was explicitly recognized, subject only to limitations "resulting from the exercise by the coastal state of its rights within the area." The right to lay submarine cables and pipelines in the patrimonial sea zone was guaranteed, subject to the same limitations.\textsuperscript{62} Like the Lima Declaration, the Santo Domingo Declaration recognized the right of the coastal state to the continental shelf even beyond 200 miles by adopting the exploitability clause of article 1 of the Continental Shelf Convention.\textsuperscript{63}

Of the participants in the meeting, 10 approved the Declaration and five abstained.\textsuperscript{64} As was the case at the preceding meeting, all

\textsuperscript{55} In addition to securing positive votes of the nine states that had earlier adopted the Montevideo Declaration, the Declaration of Lima was also signed by Colombia, the Dominican Republic, Guatemala, Honduras, and Mexico.
\textsuperscript{56} Barbados, Jamaica, Trinidad and Tobago, and Venezuela.
\textsuperscript{58} Id. at 71.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 72.
\textsuperscript{64} Participants who approved the declaration were: Colombia, Costa Rica, the Dominican Republic, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Trinidad and Tobago, and Venezuela. Barbados, El Salvador, Guyana, Jamaica, and Panama abstained. U.N. Doc. A/AC.138/SR. 78 at 12 (1972).
other Latin American states were invited as observers. Of the three documents, the Santo Domingo Declaration achieved the widest acceptance among the Latin American states. Even the most cautious, the Caribbean countries who had opposed the Declaration of Lima, supported the 200 mile resource jurisdiction for coastal states. Thus, essentially all Latin American states support a 200 mile economic zone.

C. Position of Developing States in Africa and Asia

1. African States

The developing coastal states in Africa and Asia find themselves in the same position as the Latin American countries. All of them seek to protect their offshore resources from the exploitation of technologically advanced nations so as to utilize the resources directly or indirectly for the benefit of their own peoples. The African states amply demonstrated their unified position on this issue at a Regional Seminar held in Yaoundé in June 1972. The 17 participants\(^6\) unanimously adopted an aggressive stance on coastal jurisdiction.\(^6\) The Yaoundé Report is very similar to the Santo Domingo Declaration; it recognizes a 12 mile limit to the territorial sea, and beyond that an economic zone without a specific limit. Navigation, overflight, and the laying of submarine cables and pipelines are free inside the economic zone.\(^6\)

Unlike the Santo Domingo and Lima Declarations, the Yaoundé Report explicitly concerns itself with the position of landlocked states. The need and pressure for special provisions with regard to landlocked states is much greater in Africa, as 18 African states are affected compared with only two in Latin America. The Yaoundé Report recognizes the right of landlocked and nearly landlocked states to share in the utilization of the living resources of the economic zone "provided that the enterprises of these states desiring to exploit these resources are effectively controlled by African capital and personnel." To implement this provision, the landlocked states are awarded the right of transit through coastal states to the economic zone.\(^6\) Another difference from the Latin American position is the rejection of the exploitability criterion as a "limit" for the continental shelf. Since all African coastal states have rather narrow shelves, they prefer a limitation based on distance

---

\(^6\) The meeting was attended by Algeria, Cameroon, the Central African Republic, Dahomey, Egypt, Ethiopia, Equatorial Guinea, the Ivory Coast, Kenya, Mauritius, Nigeria, Senegal, Sierra Leone, Togo, Tunisia, Tanzania, and Zaire. U.N. Doc. A/AC. 138/SR. 78 at 16 (1972).

\(^6\) Id.

\(^6\) Id.

and do not recognize claims to the continental shelf beyond the economic zone.\footnote{69. \textit{Id.} at 76. The position of the African states has been laid out in more detail in draft articles by Kenya, which place the maximum extent of the economic zone at 200 miles. \textit{Id.} at 181. Consensus among the African states is also demonstrated by declarations of the Organization of African Unity (OAU). \textit{E.g.,} U.N. Doc. A/Conf. 62/33 (1974).}

2. \textit{Asian States}


The archipelagic states, Fiji, Indonesia, Mauritius, and the Philippines, claim the right to enclose all waters lying within their outermost islands as archipelagic waters.\footnote{74. 12 I.L.M. 1263 (1973).} When measuring the territorial sea or an economic zone from straight baselines connecting these points, a vast area of exclusive jurisdiction is formed, many times the size of the archipelagic state itself.

One of the strongest proponents of the concept of a coastal jurisdiction is the Republic of China, which tries to become a spokesman of Third World countries in many areas of international law. China supports not only the 200 mile economic zone but even the claims to a 200 mile territorial sea: "We consider that it was in the exercise of the sovereignty of a State reasonably to define, in accordance with its specific conditions and its development needs, the scope of its jurisdiction over economic resources beyond its territorial sea, using such terms as exclusive economic zone, continental shelf, patrimonial sea or fishing zone."\footnote{75. U.N. Doc. A/AC. 138/SC. II/SR. 55 at 85 (1973).} The polarization on these issues between the developing and the industrialized nations affords China an opportunity to portray both the United States and the Soviet Union as collaborators against the interests of the Third World countries. China has announced it would firmly support "the just struggle initiated by Latin American countries in defense of the 200 nautical miles territorial sea rights and their own marine resources," and would "oppose the maritime hegemony and power politics of the super powers."\footnote{76. 11 I.L.M. 659 (1972).}
A. Pardo's Initiative

In a speech before the United Nations General Assembly in 1967, the Maltese delegate Arvid Pardo put the ocean problem on the agenda.\textsuperscript{77} Pardo was aware of the expanding technology for exploitation of nonliving resources of the seabed and subsoil beneath the high seas, and he feared that the majority of nations would be left out in the race to extract these resources. Of equal concern for him was the danger posed by large-scale industrial exploitation of the seabed, unrestricted by effective regulation of pollution. Pardo proposed that the area beyond the present limits of national jurisdiction be regarded as the "common heritage of mankind" and placed under the supervision of the world community. The General Assembly in direct response created the Ad Hoc Sea-Bed Committee to study the question of control over seabed resource extraction.\textsuperscript{78}

In a later initiative, Malta submitted a draft resolution proposing that the United Nations move expeditiously to hold a conference to delimit the international area where the common heritage principle would apply.\textsuperscript{79} This proposal implied that the international seabed area was to be defined before agreement upon its international regime was reached. The developed nations, especially the United States and the Soviet Union, favored this approach because they hoped that a 12 mile zone would be agreed upon; but the developing states, who were still in the process of determining their position on coastal jurisdiction, feared that their interests would be jeopardized in an early conference with too limited an agenda. Since the trend was going in the direction of expanded coastal state jurisdiction, the time factor was clearly on the side of the developing countries. They argued that the conference should deal with all issues of the law of the sea and not single out questions concerning the international seabed area.\textsuperscript{80} Subsequently, the Maltese draft resolution, thus amended, was passed in the General Assembly.\textsuperscript{81}

B. Moratorium Resolution and Declaration of Principles

The Ad Hoc Sea-Bed Committee was replaced in December 1968 by the permanent United Nations Committee on the Peaceful Uses of

the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (Seabed Committee).\textsuperscript{82} Under its guidance, the General Assembly adopted the "moratorium" resolution in December 1969.\textsuperscript{83} The resolution declared that, pending the establishment of the international seabed regime, states and persons were "bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction."

The moratorium resolution was sponsored by developing states in order to stop the exclusive exploitation of the seabed by the technologically advanced nations. It was also feared that such exploitation could prejudice the prospective regime for the international seabed area. Although the resolution was opposed by almost all industrialized countries, it nevertheless passed with the comfortable margin of 62 votes to 28, with 28 abstaining. This showed the strength of the developing countries and provided an added incentive for them to coordinate their positions. It soon became the policy of the developing states, especially those from Latin America, to avoid any limitation on the issues being discussed in the Seabed Committee or any decision on the limits of coastal state jurisdiction. The developing states thus postponed the new conference on the law of the sea until the preparatory work appeared favorable to their position, while they solidified their own stand at the Montevideo, Lima, and Santo Domingo Conferences.\textsuperscript{84}

In December 1970, the General Assembly passed the "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction."\textsuperscript{85} The Declaration of Principles was adopted by 108 votes to none and only 14 abstentions; it provided the basis for the convocation of the Third United Nations Conference on the Law of the Sea.\textsuperscript{86} A comparison of the extent of the international seabed area as envisaged by Arvid Pardo in 1967 with the resolutions of the General Assembly and discussions of the Seabed Committee shows that the concept of a freeze on the limits of national jurisdiction has been diluted.\textsuperscript{87} The work of the Seabed Committee, including the moratorium resolution, convinced coastal states to share in the grabbing of the oceans as long as possible. The notion of the sea as the common heritage of mankind has thus come to comprise only what is left after the coastal states have made their claims.

---

\textsuperscript{84} See Resolution No. 2 of the Lima Conference, 10 I.L.M. 207 (1971).
C. Preparatory Work of the Seabed Committee

As requested by the General Assembly, the 91 member Seabed Committee used the time until the start of the Conference to compile a comprehensive list of subjects and issues to be dealt with. This was necessary since the General Assembly had expressly widened the scope of the Conference's agenda to include "a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment (including, inter alia, the prevention of pollution) and scientific research . . .". The Seabed Committee allocated the topics to its three subcommittees of the whole. The first subcommittee concerned itself with the international regime and the international machinery for the seabed beyond the limits of national jurisdiction, and thus dealt with the issue which had first been brought to the attention of the General Assembly. The second subcommittee was responsible for the complex questions involving the traditional law of the sea issues: the territorial sea, the high seas, passage through straits, fisheries, and the area within national jurisdiction. The third subcommittee was concerned with the problem of pollution and scientific research; it also examined the possibility of transfer of technology from developed to developing nations.

D. Changing Policy of the United States

During the work of the Seabed Committee and its subcommittees, it soon became clear that an agreement on almost any issue was possible only as part of a comprehensive "package deal." It was further evident that any such agreement would have to recognize an exclusive resource jurisdiction in a 200 mile economic zone in order to have a chance of acceptance by the large number of developing states. Many developed states were prepared to concede this issue, especially since their own interests were not as decisively opposed to the concept of an economic zone as the developing nations were in favor of it. This can be amply demonstrated by the changing policy of the United States.

At first, the United States resisted the idea of an expanded law of the sea conference dealing comprehensively with all issues. Then, adopting the principle of the common heritage of mankind, the United States in August 1970 submitted a draft convention on the international
seabed area, cautiously labelled "Working Paper." The draft, inspired by the far-sighted Maltese ocean space concept, provided for the establishment of two zones: (1) an area of national jurisdiction to the 200 meter isobath and (2) an International Seabed Area seaward of this limit. The latter was further divided into two parts: an International Trusteeship Area, delimited by "a line beyond the base of the continental slope," in which the coastal state would act as a trustee for an International Seabed Resource Authority, and the area beyond that line, which would be directly administered by the Authority. In both areas, licenses would be issued and payments required for exploration and exploitation of the seabed and subsoil. These revenues would be used "for the benefit of all mankind, particularly to promote the economic advancement of developing States." However, the Trustee State would keep a portion of the payments it imposes.

International reaction was not favorable, as many of the developing nations shied away from a proposal that at first glance seemed to reincarnate the old trusteeship system, a reminder of colonial times. Criticism also mounted over the fact that the proposal contained a provision which would insure a veto power for any three of the six most industrially advanced member states, all of whom would be included in the main governing organ, the Council. Brown and Fabian summarize the international reaction:

The 1970 U.S. draft treaty was portrayed as at best a naive attempt to place a tidy international organizational structure on top of the chaotic and contentious arena of international ocean politics; and at worst a cynical attempt by the Department of Defense to buy off coastal developing states whose assertiveness might hamper naval mobility. More charitably, the 1970 American policy initiative can be viewed as a gesture that conceded few real interests while rhetorically aligning the national interests with universal order.

In addition to critics from outside, interests within the United States were also opposed to the proposal. The fisheries lobby of the East Coast opted for a 200 mile zone to protect them from the competition of large-scale fishing by Russian, Eastern European, and Japanese factory ships. More important, the lobby of the oil industry opposed

95. Diplomats at Sea, 52 FOREIGN AFFAIRS 317 (1974).
96. According to William T. Burke, "the largest gainer from a two-hundred-mile fishing zone would probably be the United States. The reasoning is that this country already suffers from some of the disadvantages of a two-hundred-mile zone without en-
any sharing in the profits derived from the resources in the continental shelf adjacent to the coast of the United States. The growing domestic pressure has caused the United States to modify its position and to focus more on resource exploitation. This policy shift in favor of the economic zone concept was aided by geographical factors. Long coastlines on two oceans and the Gulf of Mexico, as well as archipelagic conditions off Hawaii and parts of Alaska, assure the United States the largest economic zone of any country. Thus, a highly industrialized state with extensive merchant and military fleets has come significantly closer to the position of the developing coastal states.

VI
THIRD UNITED NATIONS LAW OF THE SEA CONFERENCE

A. Caracas Session

After an organizational session in New York in December 1973, the first substantive session was held in Caracas from June 20 to August 29, 1974. The Conference was organized in three committees along the model of the Seabed Committee, and the negotiators faced the vast array of issues and proposals from the latter, in addition to numerous new suggestions, especially from states which had not participated in the Seabed Committee. The three committees were unable to work out a draft convention, but they formulated a comprehensive set of informal working papers reflecting trends on every issue.

The Conference had been presented with early declarations of the United States and the Soviet Union indicating their willingness to accept a 200 mile economic zone if certain conditions were met. By quickly agreeing to the inevitable, both countries hoped to induce the 5000 representatives of 148 countries to act favorably on their main points of

joying any of its advantages; that is, the tuna industry as our main distant water fleet already is confronted with a two-hundred-mile zone.” *Fisheries and a New Conference on the Law of the Sea*, in *WORLD FISHERIES POLICY* (B. Rothschild ed. 1972) 52, 61. *See also* S. 961, 94th Cong., 1st Sess. (1975) (bill to establish 200 nautical mile fishery conservation zone off the coasts of the United States).


interest. These include freedom of navigation through international straits for both commercial and military vessels, the right of overflight, and submerged passage for submarines, even if the straits fall within a 12 mile territorial sea. Many developing countries, however, wanted to retain the innocent passage system of the 1958 Convention on the Territorial Sea and Contiguous Zone. Some insisted that innocent passage of warships should require advance permission from the littoral state.

Concessions on the part of developing states in these matters seemed to depend on favorable settlement of a number of issues. Among the latter was the institution of a strong international seabed agency that would itself conduct the exploitation of manganese nodules and other seabed mineral resources. According to some countries, this "enterprise" should price the seabed minerals so as to protect landbased producers among the developing nations from losses. The industrialized states, on the other hand, opted for a mere licensing body without pervasive authority. A similar conflict concerned the right of conducting oceanic research. Most developing countries insisted on prior consent of the coastal state to research in the economic zone, and some wanted to give the international seabed agency exclusive control over research beyond the economic zone. Another issue was the creation of minimum antipollution standards and their enforcement in the economic zone. These were considered necessary by the industrialized nations, but developing countries saw in environmental protection a potential threat to their economy. Thus, they advocated environmental standard setting according to a state's stage of economic development.

Unlike its predecessors, the Geneva Conferences in 1958 and 1960, the Third Law of the Sea Conference could not draw upon a draft convention prepared by the International Law Commission. For lack of mandate, the Seabed Committee's national delegates were unable to function as a preparatory group of independent experts. Thus, the delegates at the Caracas session did the preparatory work for a negotiating session.

101. Second Comm., supra note 99, art. 52.
103. First Comm., supra note 99, art. 9(B).
104. Id. art. 10(B).
105. Id. arts. 9(A), 10(A).
B. Geneva Session

There was no general debate at the second session (at Geneva), and negotiations were for the most part confined to informal groups. The most important were the "Group of 77," presently consisting of more than 100 developing countries, and the Evensen Group (named after its chairman, the Norwegian Minister Jens Evensen), made up of 40 nations with long coastlines. A group of landlocked or geographically disadvantaged nations comprised 49 countries.

The principal result of the Geneva session was the preparation of Informal Single Negotiating Texts (SNTs) covering all issues before the Conference. Upon recommendation of the President of the Conference and endorsement of the delegates, these texts were prepared by the chairmen of the three committees. The co-chairmen of the working group on dispute settlement also submitted a working paper on settlement of disputes. Later, the President of the Conference circulated an additional SNT on dispute settlement. Since the texts were presented at the end of the conference, they do not constitute agreed articles or consensus texts and are open to new amendments and change. However, in some aspects they reflect possible agreement that emerged in informal negotiations.

Part I, the SNT on the resources in the international seabed area, reflects mainly the view of the Group of 77. This is especially so with respect to the articles dealing with the International Authority and the system of exploitation. Article 22 provides that exploitation shall be conducted directly by the Authority. It "may" engage in joint ventures with states or natural or juridical persons, if its "direct and effective control over such activities" is ensured at all times. The United States and the Soviet Union proposed banking or parallel systems in which the Authority would directly exploit a portion of the seabed itself while another portion would be reserved exclusively for a state. However, these suggestions were rejected by the Group of 77 and are not found in the SNT. The system of exploitation and the voting procedure within the Authority will have to be changed considerably to give industrialized countries more influence in the decisionmaking.

114. Id. art 22(2).
115. Stevenson & Oxman, supra note 112, at 766.
process of the supervising organs. There is otherwise no basis for consensus.

Part II shows more agreement, along the lines of the Caracas main trends paper. This SNT contains a 12 mile territorial sea, an exclusive economic zone of 200 miles, and coastal state jurisdiction over the entire continental shelf. Coastal state rights to the shelf beyond the 200 mile zone up to the outer edge of the continental margin are coupled with a duty to contribute payments to the International Authority. Unimpeded passage through straits and archipelagic sealanes is provided to serve the interests of maritime nations.

Part III deals with environmental protection and preservation. States have the obligation to protect and preserve the entire marine environment. In an effort to balance these obligations against economic considerations, states shall exploit their natural resources "in accordance with their duty to protect and preserve the marine environment" and "their economic needs and their programmes for economic development." States are required to monitor pollution of the marine environment and keep under surveillance the effect of any activity which they permit or in which they engage. The results shall be reported to the United Nations Environment Programme or any other competent organization, "which should make them available to all states." Similar to the requirement of environmental impact statements in the United States, countries shall "as far as practicable," assess the potential effects of planned activities on the environment and report the results of such assessments. The difficult issue of environmental standard setting remained controversial. States shall establish international rules and standards with regard to pollution from vessels and from landbased and atmospheric sources.

The danger of double standards for developed and developing countries is still imminent. Lower pollution standards for developing

118. Id. art. 46.
119. Id. arts. 62, 63.
120. Id. art. 69.
121. Id. art. 34.
122. Id. art. 124(6).
123. Id. pt. III.
124. Id. art. 3.
125. Id. art. 13.
126. Id. art. 14.
129. Id. arts. 16-21.
130. Id. art. 20.
131. Id. arts. 16, 17, 21.
nations were recognized at the United Nations Conference on the Human Environment in 1972. It cannot be denied that strict environmental standards may represent a substantial burden for a developing economy, but coastal state standard setting would render any overall environmental policy impossible.

Part III also deals with marine scientific research. The SNT distinguishes between resource-related research and fundamental scientific research in the economic zone and the continental shelf. If the project is related to resources, it is subject to the explicit prior consent of the coastal state. Fundamental scientific research remains free, subject to certain basic conditions. Disagreement on the nature of the research project is to be decided by compulsory dispute settlement procedures. This compromise between developing and industrialized nations presents a good basis for a convention.

VII

OUTLOOK

It seems that Selden has finally won the debate with Grotius. States increasingly believe that they have the option of claiming extended portions of the subsoil, seabeds, or oceanic waters, as long as no international law rules directly oppose their claims. By relying solely on the exploitability clause of the Convention on the Continental Shelf, a state with extended continental margins might lay claim to a continental "shelf" of 300 to 600 miles. Such a claim must ignore the North Sea Continental Shelf Judgment, where the International Court of Justice defined the criterion of adjacency, also found in the Convention, so as to limit the exploitability clause: "[B]y no stretch of imagination can a point on the continental shelf situated, say, 100 miles, or even much less, from a given coast, be regarded as 'adjacent' to it, or to any coast at all, in the normal sense of adjacency . . . ."

The contention that what is not prohibited is allowed may find support in the decision of the Permanent Court of International Justice


\[134.\] Id. arts. 15, 16, 18, 22.

\[135.\] Id. art. 20.


\[137.\] As of early 1974, 19 states claimed territorial seas in excess of 12 miles; nine of these claimed a territorial sea of 200 miles. H. KNIGHT, LAW OF THE SEA 329 (1975). Even the 200 mile figure may be surpassed if a state with a wide continental shelf were to claim the full extent of the shelf and superjacent waters.


in the *Lotus Case*.\(^{139a}\) The court held that the rules of law binding upon states “emanate from their own free will” and that “[r]estrictions upon the independence of States cannot therefore be presumed.”\(^{139b}\) It should be remembered, however, that the International Court of Justice clearly refuted this notion with respect to the delimitation of coastal jurisdiction: “The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. . . . [T]he validity of the delimitation with regard to other States depends upon international law.”\(^{139c}\) Since any extension of coastal state jurisdiction deprives other states of the benefit of certain rights within the high seas, every such claim needs a basis in international law.

In its latest decision, however, the International Court of Justice refused to take a definite stand on the question of coastal state jurisdiction. When Iceland unilaterally extended its fisheries jurisdiction to 50 miles on September 1, 1972, Great Britain and the Federal Republic of Germany referred the matter to the International Court of Justice and requested it to pronounce the 50 mile fisheries claim illegal *de lege lata*. On June 25, 1974, the court rendered judgments.\(^{140}\) For fear of interfering with the Third Law of the Sea Conference, the court pronounced itself unable to “render judgment sub specie legis ferenda, or anticipate the law before the legislator has laid it down.”\(^{141}\) Instead, it held the 50 mile limit to be unopposable to Great Britain and Germany and asked the parties to solve their dispute by undertaking negotiations along certain guidelines (preferential fishing rights for Iceland, historical fishing rights for Great Britain and Germany) laid down by the court.\(^{142}\) It is unfortunate that the court rendered a judgment which by its indecision provided an added incentive to further extensive coastal state claims.\(^{143}\)

Surprisingly, most landlocked states tend to side with the developing coastal states, thus supporting expansion which diminishes the international area beyond national jurisdiction. But the promise of sharing in regional arrangements is perhaps more tempting than the uncertain principle of the “common heritage of mankind.” It remains to be seen...

---

139b. *Id.* 4, 18.
whether agreements on free transit and participation in resource utilization in the economic zone are actually implemented.  

After the Geneva session of the Law of the Sea Conference, prospects are unclear. If the SNTs are opened again to general debate by a large number of new proposals and amendments, the Conference might slip back to the situation in Caracas. But if negotiations lead to necessary compromises on the basis of the SNTs, success is possible. The next sessions of the Conference might well offer the last chance for the United Nations to arrive at a comprehensive agreement. If the renewed negotiations fail, many developed countries are expected to adopt a 200 mile economic zone for the protection of their fisheries and licensing procedures for protection of their nationals' deep sea mining ventures. This would certainly mean the end of the common heritage principle. None of the profits derived from the exploitation of manganese nodules would then be used for the betterment of developing nations. On the contrary, the growing gulf between developed and developing countries would widen even further.

145. See note 96 supra.